

## **I. Introduction**

This Department of Labor (DOL or Department) report is submitted in response to the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2022 (Pub. L. 117-103) and the following language contained at pages 24-25 of House Report No. 117-96:

*H-2A Program.*—Given the rapid growth of the H-2A program, the role of farm labor contractors, and the troubling rate of violations within the program, the Committee directs the Secretary to submit a report to the Committee on Appropriations on the Department’s enforcement of farm labor contractors (FLCs) within 180 days of enactment of this Act. The report shall contain, at a minimum, the following information for each of the last 5 years: an analysis of H-2A certifications for fixed-site employers and FLCs; an analysis of the inspections, audits, investigations, administrative complaints, and judicial litigation regarding findings of violations by farm labor contractors in the H-2A program, including remedies; and recommendations to deter violations and improve compliance by farm labor contractors in the H-2A program and how to ensure that farmworkers obtain adequate relief for any violations. The content of the final report shall be made publicly available on the agency’s website.

In line with this request, DOL’s Employment and Training Administration, through its Office of Foreign Labor Certification (OFLC), and DOL’s Wage and Hour Division (WHD) have provided information below regarding audit and investigative outcomes of H-2A and specifically, FLC (or H-2ALC) certifications.

## II. Background

The H-2A temporary agricultural worker visa program is provided for under sections 101(a)(15)(H)(ii)(a) and 218 of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188. The INA authorizes the Department of Homeland Security (DHS) to permit employers to employ nonimmigrant workers to perform agricultural labor or services of a temporary or seasonal nature if DOL certifies that:

- A. There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition; and
- B. The employment of the nonimmigrant worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Thus, the program seeks to balance the labor needs of agricultural employers facing a shortage of domestic workers, with the need to protect against potential adverse effects that the employment of nonimmigrant workers might have on the wages and working conditions of similarly employed workers in the United States.

Within DOL, two agencies share responsibilities for administering and enforcing H-2A program requirements. OFLC is responsible for administering the labor certification process, which includes examining the employer's representations and assurances about the terms and conditions of the job, the employer's need for foreign workers, and overseeing the employer's recruitment of U.S. workers. In addition to administering the labor certification process, OFLC conducts post-certification audits of applications to enhance program integrity. These audits require employers to submit documentation and evidence demonstrating compliance with the terms and conditions of the H-2A labor certification. When an employer is found to have committed substantial violations, including fraud involving the H-2A labor certification application, OFLC may debar an employer and/or its agent or attorney from participating in the program; revoke existing certifications; or refer matters for further investigation or enforcement action. *See* 8 U.S.C. § 1188(b) and 20 CFR § 655.180-184. If OFLC determines an employer has committed less than substantial violations, it may require the employer to conduct enhanced recruitment of U.S. workers in future applications.

WHD is responsible for enforcing the statutory and regulatory requirements of the H-2A program, including the terms and conditions of the work contract that the employer enters into with workers with H-2A visas and workers engaged in corresponding employment. As part of its on-site investigations of workplaces to determine whether an employer is complying with the applicable requirements, the WHD reviews records, interviews employees, and inspects worker housing and transportation. Upon finding violations, the WHD is authorized to recover unpaid wages for workers; impose civil money penalties; seek injunctive relief; require specific performance of contractual obligations; and seek reinstatement of improperly laid off or displaced U.S. workers. Additionally, the WHD may debar employers from participation in the program if the employer commits substantial violations; debar an employer's agents or attorneys

if they participate in the employer's substantial violations; and recommend to OFLC that existing certifications be revoked. *See* 8 U.S.C. § 1188(g)(2) and 29 CFR §§ 501.1(a)(2); 501.16; 501.20.

The Department's regulations governing the H-2A program also apply to the employment of workers without H-2A visas by a participating employer, if such other workers are engaged in corresponding employment, *i.e.*, any work included in the job order approved by the OFLC, or any agricultural work also performed by the workers with H-2A visas during the validity period of the job order.

Another critical component of ensuring agricultural worker rights and safety is the registration of farm labor contractors that is required under the Migrant and Seasonal Agricultural Worker Protection Act and applicable to most H-2A labor contractors (H-2ALC). To legally operate as a farm labor contractor, an individual or company must register with the Department and receive specific authorization to house, transport, or drive a migrant or seasonal agricultural worker. Housing must comply with applicable federal, state, and local safety and health standards, and a written statement of the terms and conditions of occupancy must be posted at the housing site where it can be seen or be given to the workers. Similarly, vehicles used to transport workers must be properly insured, operated by licensed drivers, and meet federal and state safety standards with functional safety equipment. These authorizations set minimum standards that must be met and are vitally important to protecting the health, safety, and wellbeing of agricultural workers.

An H-2ALC is any person who meets the definition of employer under 29 CFR part 501, subpart A, and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association (as those terms are defined in the same subpart) who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. § 1188, 20 CFR part 655, subpart B, or 29 CFR part 501.

### III. WHD Enforcement

The WHD conducts investigations for a number of reasons, all having to do with enforcement of the laws and assuring an employer's compliance. Regardless of the particular reason that prompts an investigation, all investigations are conducted in accordance with established policies and procedures.

Any person may report a violation of the employer's contractual or regulatory obligations, including the prohibition against retaliation. WHD is charged with conducting investigations in a manner that protects the confidentiality of any complainant or person who provides information to the agency. WHD also conducts nationwide strategic initiatives to strengthen compliance with labor provisions in agriculture. These initiatives include providing compliance assistance tools, information, training, and critical outreach to employers and stakeholders, as well as conducting investigations.

WHD conducts investigations in order to determine compliance with program requirements. Such investigations may ensue pursuant to a complaint, strategic enforcement initiative, referral, or otherwise, and may involve entering and inspecting any premises, land, property, housing, and vehicles; reviewing records and making transcriptions thereof; questioning individuals; and gathering any information as may be appropriate. *See* 29 CFR §§ 501.4, 501.6. WHD refers allegations of discrimination related to immigration status or citizenship to the U.S. Department of Justice's Civil Rights Division, Immigrant and Employee Rights Section. In some cases, referrals to other federal, state, and local agencies may also be necessary. For example, if WHD investigators detect indicators of human trafficking, referrals are made immediately to criminal law enforcement agencies with the authority to investigate and prosecute trafficking crimes.

At the conclusion of an investigation, WHD may seek a broad array of remedies. This includes the ability to recover unpaid wages for workers; impose civil money penalties; debar employers from participation in the program if the employer commits substantial violations as well as an employer's agents or attorneys, if they participate in the employer's substantial violations; recommend to OFLC that existing certifications be revoked; seek injunctive relief; require specific performance of contractual obligations; and seek reinstatement of improperly laid off or displaced U.S. workers. For H-2ALCs specifically, WHD may also seek to collect back wages owed to workers through liquidation of the H-2ALC's surety bond(s) in instances in which the H-2ALC is undercapitalized. H-2A program debarments by fiscal year and surety bond collection information are available in Section V of this report. *See* 8 U.S.C. § 1188(g)(2) and 29 CFR §§ 501.1(a)(2); 501.16; 501.20.

WHD considers the assessment of penalties in every H-2A investigation in which it finds violations. The amount of the penalties depends, in part, on the type of violation disclosed, the gravity of the violation and its impact on the worker(s), and the circumstances surrounding the violation. The H-2A regulations explain that a penalty will not exceed \$1,500 per violation for most violations, and \$5,000 for willful violations. Certain repeat or willful violations, including

those that result in injury or death, carry penalties as high as \$100,000 per violation.<sup>1</sup> Penalties may be assessed for each violation. WHD considers a non-exhaustive list of seven regulatory factors when determining the amount of the penalty to assess. *See* 29 CFR § 501.19.

In addition to penalties for each violation of the H-2A requirements, WHD may pursue “make whole relief” for any person who has been subjected to retaliation, and reinstatement and “make whole relief” for any U.S. worker who has been improperly rejected for employment, laid off, or displaced.

Section 218(b) of the INA (8 U.S.C. § 1188(b)) authorizes the debarment of employers from the H-2A program. WHD and OFLC possess concurrent authority to debar employers, agents, and attorneys for substantial violations of the program requirements. *See* 20 CFR § 655.182 and 29 CFR § 501.20. Violations subject to debarment include but are not limited to one or more acts of commission or omission which involve:

1. Failure to pay or provide the required wages, benefits or working conditions to the employer’s H-2A workers and/or workers in corresponding employment;
2. Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
3. Failure to comply with the employer’s obligations to recruit U.S. workers;
4. Improper layoff or displacement of U.S. workers or workers in corresponding employment;
5. Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. § 1188, 29 CFR part 501;
6. Impeding an investigation of an employer under 8 U.S.C. § 1188, 29 CFR part 501, or an audit under 20 CFR § 655.180;
7. Employing an H-2A worker outside the area of intended employment, in an activity not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;
8. A violation of the requirements of 20 CFR § 655.135(j) or (k);
9. A violation of any of the provisions listed in 29 CFR § 501.4(a); or
10. A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

20 CFR § 655.182(d)(1); 29 CFR § 501.20(d)(1). An employer’s failure to pay a necessary certification fee in a timely manner, fraud involving the Application for Temporary Employment Certification, or a material misrepresentation of fact during the application process would also constitute a debarable violation. 20 CFR § 655.182(d)(2)-(4).

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<sup>1</sup> The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74 (Inflation Adjustment Act), sec. 701, requires annual adjustment for inflation of civil money penalties (CMPs). Accordingly, the base level of CMPs described above has been increased, and are currently \$1,898, \$6,386, and \$126,463, respectively.

Pursuant to the statute, a notice of debarment must be issued to the employer, agent, and/or attorney within two years of the occurrence of the violation, and the debarment period may be up to three years. 8 U.S.C. § 1188(b)(2).

## IV. OFLC Audits and Findings

OFLC is responsible for administering the H-2A temporary labor certification process, which includes examining the employer’s representations and assurances about the terms and conditions of the job, the employer’s temporary or seasonal need for workers to perform agricultural labor or services, and overseeing the employer’s recruitment of U.S. workers. In addition to administering the temporary labor certification process, OFLC conducts post-certification audits of selected applications to enhance program integrity. *See* 20 CFR § 655.180. Audits require employers to submit documentation and evidence demonstrating compliance with the terms and conditions of the H-2A program certification. If the OFLC Administrator determines an employer has committed substantial violations, OFLC may debar an employer and/or its agent or attorney from participating in the program, revoke existing certifications, or refer matters for further investigation or enforcement action, including fraud involving the H-2A labor certification application. If the OFLC Administrator determines the employer has committed less than substantial violations, it may impose special procedures and require the employer to take enhanced recruitment steps to recruit U.S. workers for future applications. *See* 8 U.S.C. § 1188(b) and 20 CFR § 655.180-184.

From fiscal years 2017 to 2021, OFLC certified 62,913 H-2A applications. Of the total 62,913 certifications, 9,386 of those—or 14.9 percent—were H-2ALC certifications. As illustrated in Chart 1 below, during that timeframe, OFLC audited 2,523 (5 percent) of the certified H-2A applications for fixed-site employers, resulting in 33 debarments, 157 instances of special procedures being imposed, 446 warnings, 53 “no findings,” and 71 “other findings.” As illustrated in Chart 2 below, during the same timeframe, OFLC audited 226 (2 percent) of the certified H-2ALC applications, resulting in 5 debarments, 8 instances of special procedures being imposed, 46 warnings, 2 “no findings,” and 36 “other findings.”

**Chart 1: Results of OFLC H-2A Fixed-Site Employer Audits**

| <b>Fiscal Year</b> | <b>Debarment</b> | <b>Imposed Special Procedures</b> | <b>Warning</b> | <b>No Finding</b> | <b>Other</b> | <b>Compliance</b> | <b>H-2A Fixed-Site Audit Totals</b> | <b>% of Total H-2A Audits</b> |
|--------------------|------------------|-----------------------------------|----------------|-------------------|--------------|-------------------|-------------------------------------|-------------------------------|
| <b>2021</b>        | 1                | 1                                 | 66             | 6                 | 14           | 197               | <b>285</b>                          | <b>82%</b>                    |
| <b>2020</b>        | 6                | 69                                | 3              | 2                 | 14           | 369               | <b>463</b>                          | <b>89%</b>                    |
| <b>2019</b>        | 7                | 10                                | 53             | 6                 | 19           | 327               | <b>422</b>                          | <b>85%</b>                    |
| <b>2018</b>        | 7                | 33                                | 151            | 9                 | 16           | 350               | <b>566</b>                          | <b>96%</b>                    |
| <b>2017</b>        | 12               | 44                                | 173            | 30                | 8            | 520               | <b>787</b>                          | <b>99%</b>                    |
| <b>Totals</b>      | <b>33</b>        | <b>157</b>                        | <b>446</b>     | <b>53</b>         | <b>71</b>    | <b>1763</b>       | <b>2523</b>                         | <b>92%</b>                    |

**Chart 2: Results of OFLC H-2ALC Audits**

| <b>Fiscal Year</b> | <b>Debarment<sup>2, 3</sup></b> | <b>Imposed Special Procedures<sup>4</sup></b> | <b>Warning<sup>5</sup></b> | <b>No Finding<sup>6</sup></b> | <b>Other<sup>7</sup></b> | <b>Compliance</b> | <b>H-2ALC Audit Totals</b> | <b>% of Total H-2A Audits</b> |
|--------------------|---------------------------------|---|----------------------------|-------------------------------|--------------------------|-------------------|----------------------------|-------------------------------|
| <b>2021</b>        | 3                               | 0   | 11                         | 1                             | 5                        | 44                | <b>64</b>                  | <b>18%</b>                    |
| <b>2020</b>        | 1                               | 3   | 12                         | 0                             | 10                       | 33                | <b>59</b>                  | <b>11%</b>                    |
| <b>2019</b>        | 1                               | 4   | 12                         | 1                             | 20                       | 37                | <b>75</b>                  | <b>15%</b>                    |
| <b>2018</b>        | 0                               | 0   | 8                          | 0                             | 1                        | 14                | <b>23</b>                  | <b>4%</b>                     |
| <b>2017</b>        | 0                               | 1   | 3                          | 0                             | 0                        | 1                 | <b>5</b>                   | <b>1%</b>                     |
| <b>Totals</b>      | <b>5</b>                        | <b>8</b>                                      | <b>46</b>                  | <b>2</b>                      | <b>36</b>                | <b>129</b>        | <b>226</b>                 | <b>8%</b>                     |

Prior to March 25, 2021, OFLC used a random selection process to audit certified H-2A applications. OFLC also conducted a limited number of targeted audits by selecting applications based on information obtained from a variety of sources, including media articles and interagency referrals. On March 25, 2021, OFLC established a risk-based audit process; the process was created using data analytics to identify risk factors, such as employer type, to be used to determine which applications to select for audit review. This risk-based process will replace the use of random audits when OFLC conducts its upcoming round of H-2A audits.

<sup>2</sup> The referenced H-2ALC integrity actions listed in this chart were not appealed or contested through administrative or legal actions.

<sup>3</sup> A debarment is issued if OFLC determines, subject to the employer’s right to respond to a Notice of Debarment, submit a rebuttal, or appeal a decision, that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers.

<sup>4</sup> Special procedures, or enhanced recruitment measures for U.S. workers, are imposed when OFLC determines the employer has committed a “less than substantial” violation of the Department’s regulations related to the recruitment of U.S. workers and there is reason to believe that past actions on the part of the employer, or agent or attorney may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers. Where this occurs, OFLC may require the employer to conform to special procedures before and after a temporary labor certification determination to enhance U.S. worker recruitment and retention. Special procedures may include, for example, special on-site positive recruitment and streamlined interviewing and referral techniques for a minimum of one year to enhance the employer’s efforts to recruit U.S. workers. While on special procedures, the employer will submit to the OFLC Certifying Officer evidence of all recruitment activities performed at the Certifying Officer’s direction and as specified in the Notice of Acceptance.

<sup>5</sup> A warning is issued if OFLC determines the employer committed a “less than substantial” violation of the Department’s regulations, but such violations were not egregious enough to warrant debarment or imposition of special procedures. For example, the employer must prepare and submit an updated final recruitment report, as specified by Department regulations at 20 CFR § 655.156, reflecting referrals of qualified U.S. workers and the disposition of each U.S. worker. The updated final recruitment report must have been signed and dated after 50 percent of the certified work contract had elapsed. If the employer submits a final recruitment report that is not signed nor dated, a warning will be issued as this is typically not egregious enough in nature to warrant a debarment.

<sup>6</sup> A determination of no finding for the audit is issued if OFLC has determined that the employer could not substantially respond to the audit due to circumstances beyond the employer’s control. For example, if the employer did not use an H-2A certification because the employer was in poor health for the certified season, but cooperated with the audit, OFLC will issue a no finding letter to the employer. The no finding letter acknowledges receipt of the employer’s response to the audit and reminds the employer that it is still obligated to cooperate with the Department of Labor with any other enforcement proceedings. The Department also reserves the right to provide the audit findings and underlying documentation to the Department of Homeland Security or another appropriate enforcement agency, and pursue separate action at a later date.

<sup>7</sup> Where other audit findings are indicated, OFLC has determined that potential issues discovered during audit could not be pursued for various reasons, including active or recent investigations conducted by partner agencies.



To establish a risk-based audit selection methodology, OFLC collaborated with the Office of the Inspector General (OIG) and with WHD, given that both agencies have extensive enforcement and investigative knowledge and experience. OFLC solicited input from both agencies on potential risk factors. Additionally, OFLC evaluated H-2A application information to identify appropriate risk factors based on adjudication experience and available processing data. With the input from OIG and WHD, and evaluation of H-2A applications, OFLC created a new risk-based selection methodology, identifying a pool of certified H-2A applications for potential audit. As a part of this process, OFLC has included H-2ALC applications in risk-based audits for review of the applications for compliance with H-2A terms and conditions.

OFLC recommends the continued use of data analytics to establish and document risk-based audit processes as resources permit. Using a documented, risk-based approach increases the likelihood of identifying program violators and sanctioning that conduct, thereby reducing the risk of potential foreign labor program abuse. Additionally, OFLC recommends continuing to work with our DOL internal partners (such as OIG and WHD) and external partners (such as the Departments of Homeland Security and State) to determine other risk-based factors for audit that would eventually lessen the potential for fraud and other threats that put both U.S. and foreign workers in jeopardy.

Where OFLC selects a certified application for audit, the Certifying Officer (CO) initiates the audit by issuing a Notice of Audit Examination to the employer, and its agent or attorney, as appropriate. The audit letter requests documentation from the employer, specifies a date no more than 30 days from the date of the audit letter for submission of the documentation, and informs the employer that failure to comply with the audit process may result in further action, such as debarment or revocation. During the course of the audit, the CO may request supplemental information and/or documentation from the employer to complete the audit. The CO issues a letter at the conclusion of the audit, notifying the employer of the audit's findings and resulting actions, if any. The employer's audit response is reviewed against the H-2A regulations, the employer's application, and its supporting documentation to determine whether the employer adhered to the H-2A regulations. The OFLC Administrator may debar an employer from receiving future H-2A labor certifications if the audit reveals the employer substantially violated a material term or condition of its temporary labor certification. Additionally, the CO may refer audit findings to other agencies for review or action.

## V. WHD Investigations and Findings

Workers with H-2A visas are particularly vulnerable to abuse due to their dependence on their employer for housing, meals, transportation, and their temporary status in the country. WHD works to ensure that investigators receive the training and guidance they need to be aware of – and sensitive to – this reality; that they take steps to protect the confidentiality of workers who cooperate with our investigations; and that they immediately report any potential criminal activity that they may detect.

Typically, an H-2A investigation begins with an initial conference in which the Wage and Hour Investigator identifies himself, presents official credentials, and explains the investigative process and the types of records required during the investigation to the employer. An investigation usually consists of an examination of various records, interviews with employees, discussions with the employer, and inspections of housing and vehicles. This portion of the investigation is referred to as the fact-finding phase. After the fact-finding phase of the investigation, a final conference is held with the employer. During the final conference, the employer is afforded an opportunity to explain each violation, provided compliance assistance, and given an opportunity to agree to future compliance. Employer responses are taken into account when computing any applicable civil money penalties. Employers are also advised that they will receive a written determination letter outlining the findings and providing due process rights.

House Report 117-96 requests an analysis of investigations, administrative complaints, and judicial litigation regarding findings of violations by farm labor contractors in the H-2A program, including remedies. WHD’s legacy case management system does not include the ability to readily separate findings in investigations of H-2ALCs from those of investigations of other types of H-2A employers. Therefore, to fulfill this request, WHD combined four methodologies using the best available indicators to isolate this data from the larger H-2A case dataset. These indicators include cross-referencing employer identification numbers (EIN) with OFLC filing data in which H-2ALC was indicated in the entity’s application,<sup>8</sup> H-2ALC case naming conventions, and other case data to produce the most accurate set of information given the limitations of the available data. WHD’s new case management system, expected to begin rolling out for certain cases by the end of this fiscal year, will provide a mechanism for the isolation of H-2ALC case data in the future.

The table below details the results of this analysis of concluded H-2A investigations of H-2ALCs for the previous five fiscal years. As explained above, because WHD does not have the current capability to track this data, these figures represent the cases identified based on the methodology and available sources. Between fiscal years 2017 and 2021, WHD concluded an estimated 647 investigations of H-2ALCs. Within this timeframe, WHD found violations in more than three-quarters of those investigations. These investigations found more than \$4,700,000 in back wages owed to 10,720 workers and resulted in the assessment of almost \$5,600,000 in civil money penalties. In the previous fiscal year alone, WHD concluded an estimated 117

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<sup>8</sup> Due to limitations in available data from OFLC’s legacy electronic filing system, WHD cross-referenced data from applications in OFLC’s new electronic filing system for the 2020 and 2021 filing seasons only.

investigations of H-2ALCs. WHD found violations in 92 of those cases which resulted in \$1,438,930 in total back wages owed to more than 2,000 employees. WHD most frequently cites violations for failure to pay the required rate of pay, to state actual terms and conditions in the job order, to comply with housing safety and health and transportation-related requirements, and to provide pay statements.

| <b>Fiscal Year</b> | <b>H-2ALC Cases</b> | <b>H-2ALC Cases with Violations</b> | <b>Employees Receiving Back Wages</b> | <b>Back Wages</b> | <b>Civil Money Penalties</b> |
|--------------------|---------------------|-------------------------------------|---------------------------------------|-------------------|------------------------------|
| <b>2021</b>        | 117                 | 92                                  | 2,086                                 | \$1,438,930       | \$828,434                    |
| <b>2020</b>        | 142                 | 117                                 | 3,013                                 | \$1,285,564       | \$1,798,501                  |
| <b>2019</b>        | 175                 | 146                                 | 2,313                                 | \$836,150         | \$1,179,955                  |
| <b>2018</b>        | 105                 | 82                                  | 2,153                                 | \$686,084         | \$1,188,926                  |
| <b>2017</b>        | 108                 | 70                                  | 1,155                                 | \$462,573         | \$596,561                    |
| <b>Total</b>       | 647                 | 507                                 | 10,720                                | \$4,709,301       | \$5,592,377                  |

Summary data of concluded agricultural investigations by fiscal year and program is available to the public at <https://www.dol.gov/agencies/whd/data/charts/agriculture>.

### ***H-2ALC Surety Bonds***

Every H-2A program employer applicant that meets the definition of an H-2ALC must obtain and maintain a surety bond based on the number of workers to be employed under the labor certification throughout the period the certification is in effect. H-2ALCs must amend the bond, or obtain a new bond, to cover any extension of the certification period. The bond is a contract in which a surety, typically an insurance or bonding company, assumes liability for the H-2ALC's unmet financial obligations to its workers. Each bond is payable to the WHD Administrator and obligates the surety to pay any sum, up to the face value of the bond, for wages and benefits owed to a worker with an H-2A visa or worker engaged in corresponding employment, or to a U.S. worker improperly rejected, laid off, or displaced based on a final decision finding H-2A violation(s). Each bond must remain in force, *i.e.*, subject to a claim for payment from the WHD Administrator, for three years after the expiration of the labor certification, including any extensions. However, if WHD has commenced any enforcement proceedings, the bond must remain in force until the conclusion of the proceedings and any related appeals or litigation.

When WHD determines that back wages are owed under the H-2A program, it uses all available means to recover those wages on behalf of affected workers. Too often, farm labor contractors are transient and undercapitalized, making back wage recovery difficult. In order to address this problem and facilitate back wage recovery, WHD may make a claim against the H-2ALC's surety bond based on a final decision finding H-2A violations. As of May 2022, the Department has liquidated nearly \$1,000,000 in employer surety bonds to secure back wages owed to workers by H-2A labor contractors.<sup>9</sup>

<sup>9</sup> See U.S. Department of Labor Blog *Getting Hard-Earned Wages into the Hands of Farmworkers*: <https://blog.dol.gov/2022/06/08/getting-hard-earned-wages-into-the-hands-of-farmworkers>

## ***Debarment***

When appropriate based on the findings of an H-2A investigation and the relevant regulatory criteria, WHD considers debarment action. WHD exercises its authority to debar where the action is deemed necessary to achieve compliance from employers who substantially violate a material term or condition of its temporary labor certification. In instances where the initially cited violation or violations do not warrant debarment, an employer's failure to pay the back wages or civil money penalties may result in debarment.

When a debarment becomes a final Order of the Secretary, WHD provides formal notification to OFLC, DHS/USCIS, and the Department of State. The notice includes the employer's name, geographic location, federal employer identification number, length of debarment including the beginning and end dates, and a copy of the notice of debarment containing due process rights that was provided to the employer. Upon notification by WHD of an H-2A debarment, OFLC publishes the debarment, along with debarments that OFLC independently finalizes, in one public registry available at:

[https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment\\_List.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf)

Below is a table of H-2A debarments finalized by WHD over the previous five fiscal years. The table also indicates the number and percentage of total debarments of H-2ALCs versus H-2A fixed-site employers. Out of 13 total debarments in FY 2021, more than three-quarters of those debarments were of H-2ALCs. In the previous five fiscal years, two-thirds of debarments have involved H-2ALCs.

| <b>WHD H-2A Debarments by Type</b> |                         |               |                 |                            |                              |
|------------------------------------|-------------------------|---------------|-----------------|----------------------------|------------------------------|
| <b>Fiscal Year</b>                 | <b>Total Debarments</b> | <b>H-2ALC</b> | <b>H-2ALC %</b> | <b>Fixed Site Employer</b> | <b>Fixed Site Employer %</b> |
| <b>2021</b>                        | 13                      | 10            | 77%             | 3                          | 23%                          |
| <b>2020</b>                        | 13                      | 8             | 62%             | 5                          | 38%                          |
| <b>2019</b>                        | 24                      | 14            | 58%             | 10                         | 42%                          |
| <b>2018</b>                        | 24                      | 19            | 79%             | 5                          | 21%                          |
| <b>2017</b>                        | 10                      | 5             | 50%             | 5                          | 50%                          |
| <b>Total</b>                       | 84                      | 56            | 67%             | 28                         | 33%                          |

## ***Litigation and Appeals***

Whenever the WHD Administrator decides to assess a civil money penalty; to debar; or to proceed administratively to enforce contractual obligations; or to enforce obligations under the statute or implementing regulations, including for the recovery of wages owed to workers, the person against whom such action is taken is notified in writing of such determination. The notification includes the amount of any monetary relief due, actions necessary to fulfill a contractual obligation, amount of any civil money penalty assessment, whether debarment is sought, and the term of debarment. The notification also includes relevant information on the right to request a hearing on the determination. The notification outlines the timeline and method for requesting a hearing as well as the procedures related to such a hearing. It also advises the recipient that in the absence of a timely request for hearing, the determination of the WHD Administrator becomes final and unappealable.

Under the H-2A program, written requests for hearing are sent to the WHD official who issued the determination. Once received, a timely appeal is referred to the Chief Administrative Law Judge. A timely request for a hearing stays the determination pending the outcome of the appeal proceedings. An administrative law judge may affirm, reverse, or modify the WHD's determination, and the employer may further appeal the decision of an administrative law judge before the DOL's Administrative Review Board (ARB). The Secretary may, in his or her sole discretion, review the ARB's decision. Absent such review, the ARB's decision constitutes the final agency decision. Decisions of the ARB or the Secretary, as applicable, may be appealed to federal District Court under the Administrative Procedure Act.

Due to previously mentioned data limitations within the current system, the table below indicates the number of H-2ALC cases where the status in WHD's case management system was changed to reflect that an appeal was filed. For context, in the last five fiscal years, fixed site employers appealed 50% of the time compared to 22% for H-2ALCs. The chart reflects cases that were concluded in the listed fiscal year. For example, a case concluded in FY 2021 may have been appealed in a prior fiscal year.

| <b>H-2ALC Case Appeals - WHD</b> |                        |                |                 |
|----------------------------------|------------------------|----------------|-----------------|
| <b>Fiscal Year</b>               | <b>Violation Cases</b> | <b>Appeals</b> | <b>Appeal %</b> |
| <b>2021</b>                      | 92                     | 18             | 20%             |
| <b>2020</b>                      | 117                    | 15             | 13%             |
| <b>2019</b>                      | 146                    | 39             | 27%             |
| <b>2018</b>                      | 82                     | 23             | 28%             |
| <b>2017</b>                      | 70                     | 16             | 23%             |
| <b>Total</b>                     | 507                    | 111            | 22%             |

The Office of Administrative Law Judges (OALJ) provided the following information on H-2A cases docketed and disposed during the previous five fiscal years. This list contains information on all H-2A cases, not solely cases related to H-2ALCs. Docketed cases are those that were scheduled for a hearing. Disposed cases are those in which a disposition was reached. Disposed cases may have been docketed in a prior fiscal year.

| <b>H-2A Case Appeals - OALJ</b> |                       |                       |
|---------------------------------|-----------------------|-----------------------|
| <b>Fiscal Year</b>              | <b>Cases Docketed</b> | <b>Cases Disposed</b> |
| <b>2021</b>                     | 15                    | 27                    |
| <b>2020</b>                     | 18                    | 22                    |
| <b>2019</b>                     | 25                    | 21                    |
| <b>2018</b>                     | 36                    | 25                    |
| <b>2017</b>                     | 20                    | 13                    |
| <b>Total</b>                    | 114                   | 108                   |

The ARB provided the following information on H-2A cases appealed from the OALJ and disposed during the previous five fiscal years. As with the OALJ data presented above, this list contains information on all H-2A cases, not solely cases related to H-2ALCs. Appealed cases are those for which a petition for review was filed with the ARB. Disposed cases are those in which the ARB reached a disposition. Disposed cases may have been docketed in a prior fiscal year.

| <b>H-2A Case Appeals - ARB</b> |                       |                       |
|--------------------------------|-----------------------|-----------------------|
| <b>Fiscal Year</b>             | <b>Cases Appealed</b> | <b>Cases Disposed</b> |
| <b>2021</b>                    | 2                     | 5                     |
| <b>2020</b>                    | 7                     | 3                     |
| <b>2019</b>                    | 0                     | 3                     |
| <b>2018</b>                    | 1                     | 1                     |
| <b>2017</b>                    | 0                     | 0                     |
| <b>Total</b>                   | 10                    | 12                    |

The ARB has identified three of its decisions in H-2A cases that have been appealed to a federal District Court in the previous five fiscal years. The ARB was affirmed in two of the cases; the third remains pending.

## **VI. Recommendations and Improvements**

WHD routinely looks for areas to improve compliance in the H-2A program from all participants, including H-2ALCs. Below are recommendations for potential statutory changes that Congress may wish to consider for future enhancements as well as programmatic improvements WHD has begun making or already made.

Congress could improve the labor certification process by: authorizing fee authority for the Department of Labor, including allowing the Department to keep the fee it currently collects from employers in connection with certified H-2A labor certification applications and to use H-2A fee revenue to increase audits and other integrity measures; prohibiting H-2ALCs from participating in the program unless they are registered with DOL (in addition to the current registration requirements of the Migrant and Seasonal Agricultural Worker Protection Act) and

abide by fair practices as defined by DOL; instituting joint and several liability for agricultural businesses, including those who purchase agricultural goods in arms-length transactions for resale, who are beneficiaries of the H-2A labor; requiring Administrative Law Judges to apply the clear and convincing evidence standard for employers to meet their burden of proof in employer challenges to DOL determinations; assessing agency litigation fees against employers that bring unsuccessful challenges to DOL determinations; and prohibiting employers from utilizing H-2A labor unless they participate in prevailing wage surveys conducted within their state when requested to do so.

Congress could also consider limiting the number of workers petitioned for by H-2ALCs in a given fiscal year. Unlike fixed-site growers or agricultural associations, H-2ALCs are often independent entities that are not affiliated with the farms to which they supply labor. H-2ALCs have grown in size in recent years and are often undercapitalized, making it difficult to recover wages for workers when violations are found.

To increase protection of worker rights under the H-2A program generally, Congress could consider enacting the following statutory changes to the Immigration and Nationality Act:

- Permit debarment of individuals and business entities known to be related to a debarred employer.
- Provide for permanent debarment for repeat violators of H-2A program requirements.
- Provide for permanent debarment if the employer violates the U.S.-worker retention or recruitment components of the program or retaliates against any workers for raising issues about their rights.
- Provide a longer period of time than two years from the occurrence of the violation in which the notice of debarment may be issued and extend the maximum debarment period from three years to five years.
- Provide WHD with statutory subpoena authority that it could exercise during its H-2A investigations.
- Provide workers with a private right of action to bring suit in federal court for an employer's violation of the terms and conditions of employment under an H-2A labor certification.
- Adopt the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act definition of "employ," in contrast to the present use of the common law of agency definition (which applies in the absence of a statutory definition).
- Require H-2ALCs to file H-2A labor certifications jointly with the fixed-site farm(s) to which the labor is being supplied, which would subject fixed-site farms to potential joint employer liability for the violations of H-2ALCs.
- Institute visa portability such that H-2A visa holders would no longer be tied to individual employers, but rather have the ability to choose to work for any of a pool of employers with certified Temporary Labor Certifications.

Finally, Congress could increase or remove the cap on U visas to enable more victims of labor violations to bring forward their cases without fear of immigration enforcement and losing their work authorization.

To achieve the greatest impact possible, WHD routinely conducts national initiatives focused on enforcement and outreach in the agricultural industry. These initiatives augment WHD's consistent and ongoing enforcement efforts of the H-2A provisions. In addition to its enforcement efforts, WHD also seeks to promote compliance by educating employers, agents, and recruiters on their obligations, including providing confidential compliance assistance. Since 2021, WHD has conducted over 500 outreach events addressing H-2A program requirements, including numerous engagements with national, regional, and local agricultural employer groups and H-2ALCs. Additionally, the agency continues to make new H-2A outreach materials available to workers and employers in both English and Spanish.<sup>10</sup>

In recognition of the unique vulnerabilities faced by farmworkers, WHD collaborates with community groups, state agencies, local officials, and organizations to ensure that workers are aware of their rights and employers understand their responsibilities. WHD staff maintain productive relationships with State Monitor Advocates and State Workforce Agencies to facilitate information sharing and referrals. WHD participates in the National Action Plan to Combat Human Trafficking, as well as state and local human trafficking task forces. Additionally, WHD regularly exercises its authority to certify victims of trafficking and other severe crimes who are applying for T and U visas. In addition, the Department is committed to supporting worker organizing as part of the White House Task Force on Worker Organizing and Empowerment chaired by Vice-President Kamala Harris and vice-chaired by Secretary Walsh.

WHD does extensive outreach to ensure that workers and their advocates understand the protections provided under the law and know how to reach WHD. Across the country, WHD employs over 50 Community Outreach & Resource Planning Specialists (CORPS) whose job is to leverage limited resources to maximize impact and create long lasting compliance changes in communities by organizing, facilitating, and conducting compliance assistance and outreach. CORPS focus on building partnerships and interacting with local stakeholders to get our information into the hands of those who need it.

WHD routinely reviews and updates its agricultural training series for investigators. Investigators are trained on all aspects of program compliance including how to conduct inspections related to H-2A housing and transportation safety.

The Department published a final rule on October 12, 2022, promulgating regulations governing the H-2A program.<sup>11</sup> This final rule, which became effective on November 14, 2022, amends the current H-2A regulations to strengthen protections for agricultural workers, prevent fraud and

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<sup>10</sup> See Protections for U.S. Workers under the H-2A Program in English and Spanish:

<https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1401.pdf>

and <https://www.dol.gov/sites/dolgov/files/WHD/publications/WH1401SPA.pdf>;

Key Protections for H-2A workers in English and Spanish: <https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a.pdf> and [https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a\\_Spanish.pdf](https://www.dol.gov/sites/dolgov/files/WHD/h2a/key-protections-h2a_Spanish.pdf); and

Notice of Vaccine Rights for H-2A workers in English and Spanish:

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1046H-2ACOVIDPOSTER.pdf> and

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH1046SPAH-2ACOVIDPOSTER.pdf>.

<sup>11</sup> See H-2A Final Rule: <https://www.federalregister.gov/documents/2022/10/12/2022-20506/temporary-agricultural-employment-of-h-2a-nonimmigrants-in-the-united-states>.



abuse, and simplify and modernize the administrative processes while enhancing the enforcement capabilities of OFLC and WHD. The Department has provided and continues to provide significant outreach and guidance on the regulation's requirements, including a recent OFLC/WHD joint webinar with over 600 participants.

The Department also recently announced that it intends to engage in additional H-2 program rulemaking. In particular, the Department will consider new ways to support workers' voices and promote employer accountability. We will have a formal notice and comment process once any Notice of Proposed Rulemaking is published.

WHD is dedicated to enforcing the law and regulations governing the H-2A program and continues to take actions to increase protections for agricultural workers in general and workers with H-2A visas in particular. WHD will continue to seek out opportunities to educate workers, employers, and stakeholders as well as to increase compliance within the regulated community.