

March 10, 2023

Carol Cribbs
Deputy Chief Financial Officer
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Via Regulations.gov
DHS Docket No. USCIS-2021-0010

Dear Ms. Cribbs,

Comments of the H-2B Workforce Coalition

The H-2B Workforce Coalition is comprised of small and seasonal businesses across the country owned and operated by thousands of employers and their representatives from industries such as lodging, landscaping, seafood, restaurants, tourism, equine, forestry, mobile outdoor amusement, golf courses, and others. Our members are seasonal businesses that rely on the H-2B visa program to supplement their U.S. workforce during seasonal surge and peak business needs.

Ability to Pay Analysis is Flawed

This comment is in reference to the recently published Notice of Proposed Rulemaking (“NPRM”) entitled U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements¹ (“2023 Fee Rule”). As an initial matter the premise that H-2B employers are able to absorb the cost of funding the Asylum Program and other processing activities at the U.S. Citizenship and Immigration Service (“USCIS”) is entirely flawed. Throughout the 2023 Fee Rule, USCIS asserts that it is shifting from a beneficiary-pays model to an ability-to-pay model. Assuming, without evidence, that all H-2B employers have an ability to pay fees that as proposed are sometimes 200% higher than the current fees.

In 2017 the Office of Inspector General conducted an audit of the fees for the H-2 programs and said that fees “should be commensurate with the time and effort required to

¹ 88 Fed. Reg. 402 (January 4, 2023).

adjudicate the requests.”² That is not what USCIS is proposing in this rulemaking, in fact, USCIS ABC model suggests that H-2B fees should be \$796 for named applications and \$426 for unnamed applications.³ Instead USCIS is proposing to shift the cost of other programs onto small and seasonal American businesses and proposing to charge \$1,080 for named applications and \$580 for unnamed applications. This is not including the additional \$600 Asylum Program Fee for every application action.

Proposed Fees by Immigration Benefit Request Immigration Benefit Request

	Current Fees	Model Output	Cost Reallocation	Proposed Fees	Proposed Change in Fees	Percent Change in Proposed Fees
I-129 H-2B - Named Beneficiaries	\$460	\$796	\$284	\$1,080	\$620	135%
I-129 H-2B - Unnamed Beneficiaries	\$460	\$426	\$154	\$580	\$120	26%

Meanwhile in the analysis done by USCIS of H-2B I-129 application processing times shows it takes two hours to complete a review in the 2019 and 2020 biennial review, even as named petitions, and is expected to take just over 2 hours in fiscal years 2022 and 2023.⁴

Appendix Table 12: Completion Rates per Benefit Request Immigration Benefit Request

	FY 2019/2020	FY 2022/2023
I-129 H-2B - Named Beneficiaries	2.00	2.33
I-129 H-2B - Unnamed Beneficiaries	0.58	0.89

This proposed fee increase comes at a time when small and seasonal American businesses are not only struggling with the cost of remaining in business, but also the cost of participating in the H-2B program. Even when they choose to use the program, they are not guaranteed workers due to the arbitrary cap placed on the program in 1990s. Not only do these visa positions help small and seasonal American businesses, but they also help employers and U.S. workers throughout the economy through downstream effects on the economy. Every H-2B worker supports 4.64 U.S. jobs.⁵ Furthermore, a 2020 General Accountability Office report concluded that “counties

² H-2 Petition Fee Structure is Inequitable and Contributes to Processing Errors, OIG-17-42, pg. 4. (March 6, 2017).

³ Fiscal Year FY 2022-2023 Immigration Examinations Fee Account IEFA Fee Review Supporting Documentation, Document ID USCIS-2021-0010-0028, Appendix Table 12, pg. 37. (hereinafter “ABC Model”).

⁴ Fiscal Year FY 2022-2023 Immigration Examinations Fee Account IEFA Fee Review Supporting Documentation, Document ID USCIS-2021-0010-0028, Appendix Table 12, pg. 54.

⁵ Zavodny, Madeline. *Immigration and American Jobs*. American Enterprise Institute, 15 Dec. 2011, www.aei.org/research-products/working-paper/immigration-and-american-jobs/seek.

with H-2B employers generally had lower unemployment rates and higher average weekly wages than counties that do not have any H-2B employers.”⁶

The uncertainty that comes from participating in the H-2B program, due to the arbitrary cap, leaves small and seasonal American businesses teetering on the edge of being in business one year and out of business the next. All users of the H-2B program are simply trying to fill their labor needs with a legal workforce. When they are unable to get workers, they are forced to modify their hours and production to ensure their current employees have ample time off to rest and spend time with their families. The additional cost burdens of the proposed 2023 Fee Rule are astronomical and small and seasonal American businesses do not have the ability-to-pay that USCIS assumes.

USCIS articulates that it understands because of these increased fees some employers will as a result file less applications.⁷ When small and seasonal American businesses are unable to find ready, willing, and available U.S. workers, they turn to the H-2B program to ensure that they can hire a legal workforce to continue to stay in business. These applications are not being filed because the employer wants to hire a specific worker like the H-1B or L-1 programs. These applications are being filed due to a lack of a U.S. workforce in the level needed to make sure their businesses continue to function. If small and seasonal American businesses must file less H-2B applications, the result will be that these businesses will not grow or be able to operate at full capacity, this not only harms small and seasonal American businesses but the economy as a whole. As previously mentioned, small and seasonal American businesses that use the H-2B program support their local economy not just through their services but through the 4.64 American jobs supported by every H-2B beneficiary. In short, small and seasonal American businesses do not have the ability to continue to be burdened with additional costs and uncertainty of the H-2B program and do not have the ability-to-pay as USCIS assumes.

Unconscionable Asylum Program Fee

USCIS using this flawed ability-to-pay analysis proposes to pay for the Asylum Program by requiring an additional \$600 per application fee from law-abiding employers who seek to employ a legal workforce, one that follows the laws of this country and returns home after their contract. This fee would be in addition to the proposed increased filing fee and would be assessed for each action taken on Form I-129, further penalizing small and seasonal American businesses for trying to hire a legal workforce. This additional Asylum Program Fee becomes even more problematic because USCIS is also proposing limiting named petitions to 25 workers, requiring employers to file multiple petitions. Because of the arbitrary cap, small and seasonal American businesses have turned to filing transfer petitions to obtain their needed workforce when U.S. workers are not willing or available. As such, based on fiscal year 2022 H-2B Employer Data, small and seasonal American businesses filed transfer petitions for 29,652

⁶ United States, Congress, “H-2B VISAS: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers.” *H-2B VISAS: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers*, GAO-20-230, U.S. Government Accountability Office, 2020, pp. 13–14.

⁷ 88 Fed. Reg. 444.

beneficiaries on 2,165 petitions.⁸ If the Asylum Program is a priority to the United States, it should be funded through the appropriation process and tax dollars of the whole country, not out of the pockets of the small and seasonal American businesses who are trying to employ a legal workforce at a time of near record unemployment and inflation.

ABC Model is Flawed

In the USCIS ABC model USCIS determined that the H-2B program expects only 2,460 named petitions in two fiscal years, this appears to be a gross underestimation.⁹ The USCIS H-2B Employer Data Hub data for fiscal year 2022 shows the true picture of named applications that would potentially be filed. In the H-2B Employer Data Hub there were a total of 29,652 beneficiaries who did not consular process, and at least 27,495 beneficiaries who were either continuing approval or continuing denial applications.¹⁰ The continuing approval or continuing denial category are most certainty named petitions because they would be workers currently in the United States. Further proving the incorrect assumptions in the ABC model, in the fiscal year 2022 data there are 2,165 records that did not require consular processing and thus were named beneficiary applications.

That is just for fiscal year 2022 and the ABC model assumes fee-paying receipts for two fiscal years. In just one fiscal year USCIS received 88% of the estimated number of fee-paying receipts in the ABC model relied upon to determine the appropriate fee. Clearly the assumptions in the ABC model USCIS used to conduct the biennial review is incorrect based on publicly available data. In the 2021 H-2B Employer Data Hub data USCIS reported that 1,414 petitions did not consular process, the increase in named petitions between 2021 and 2022 is a 53% increase. Even using a modest increase of 15% the two fiscal year number that should have been in the ABC model should be over 4,600 fee-paying receipts for named beneficiaries.

Similarly, for unnamed beneficiary applications USCIS estimated 4,000 fee-paying receipts in two fiscal years. However, in the 2022 H-2B Employer Data there were 7,933 applications that would be unnamed beneficiaries because they had to consular process. The publicly available data shows fee-paying receipts in excess of the ABC estimate by over 98% for just one fiscal year. Again, clearly the ABC model is flawed and cannot reasonably be relied upon for this biennial review. From the administrative record it is unclear how USCIS could come up with such a flawed model, and it calls into question whether other data points through the proposed rule are flawed as well.

⁸ FY 2022 H-2B Employer Data, <https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub/h-2b-employer-data-hub-files> (last visited March 8, 2023).

⁹ ABC Model, Appendix VI – Projected Total Cost by Immigration Benefit Request, pg. 34.

¹⁰ FY 2022 H-2B Employer Data, <https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub/h-2b-employer-data-hub-files> (last visited March 8, 2023).

Appendix Table 3: Projected Total Cost by Immigration Benefit Request Cost Object

	Total Cost	Fee-Paying Receipts	Model Output
I-129 H-2B - Named Beneficiaries	\$1,957,678	2,460	\$796
I-129 H-2B - Unnamed Beneficiaries	\$1,705,465	4,000	\$426

The flawed analysis in the ABC model has vastly underestimated the number of petitions that will be filed and therefore vastly underestimated the impact on small and seasonal American businesses and the public. But further, because USCIS is proposing that employment-based applications cover the cost for paying other benefits this underestimation in the H-2B program filings likely shows that other employment filings likely are off as well, meaning the proposed fees and cost offsets need to be further reviewed with more adequate data.

Arbitrary and Capricious H-2B Application Fees

The proposed increases in fees for the H-2B program are excessive, punitive, and without explanation. Throughout the 2023 Fee Rule, USCIS fails to explain why and how it determined the cost shifting amounts for the H-2B program. Undoubtedly, USCIS explained its belief that the small and seasonal American businesses have the ability-to-pay, but as explained above that belief is not correct for all small and seasonal businesses and users of the H-2B program. As stated above, the flippant contention that small and seasonal American businesses will just file less petitions is egregiously incorrect and not founded in fact.

In fact, because of the arbitrary cap many small and seasonal American businesses have had to change their model for using the H-2B program and have started to file more transfer petitions for named workers. This proposed fee is excessive and well above the flawed ABC model. For example, a hotel in Cape Cod, because their season picks up in April and May due to the weather, they are routinely capped out of the H-2B program. They cannot find the local workforce because the Cape has a limited year-round population. The H-2B program is the only way they can hire enough workers to operate during their season when tourist flood the Cape. For them to access H-2B visas they have partnered with a ski resort that brings workers in the first half of the fiscal year to transfer their workers after the ski resort's season has ended. Their transfer petition under the 2023 Fee Rule would increase from \$460 for filing the I-129 to \$1,680, a 365% increase.

By way of another example, in the forestry industry employers often transfer workers as the weather permits from the south to the northwest. The forestry industry has the very important job of both planting new trees in remote locations, but also fire prevention. Many forestry industry crews exceed 100 workers. Under the 2023 Fee Rule, when employers file transfer petitions for a crew of 100 workers, they would be required to file four petitions and pay the Asylum Program Fee four times. The original \$460 fee increases to \$6,720 an increase of 1,461%. This is an unconscionable fee increase when the flawed ABC model shows that it only costs USCIS \$796 to process a named H-2B petition.

Even the fee for an employer who is fortunate enough to have their petition accepted under the arbitrary H-2B cap is unconscionable. Under the 2023 Fee Rule, when an employer files an unnamed petition the fee, regardless of the number of workers is \$1,180 a 257% increase. All while the flawed ABC model shows that it cost less than the current \$460 fee to process an unnamed petition at \$426.

Premium Processing

In the 2023 Fee Rule, USCIS is proposing to shift the premium processing timeframe from calendar days to business days. USCIS gives the explanation that Congress was silent on the timeframe for these premium services and therefore USCIS has the authority to define the timeframe, even though it incorrectly assumed in the original regulation creating the premium processing service that it was required by statute to provide the service in 15 calendar days. USCIS must refund a premium process fee when it cannot meet the current 15 calendar day timeframe, and states that it must move resources to meet this timeframe during peak filing seasons for certain visa categories.

The H-2B visa is one visa within the categories of visas eligible to file for premium processing. Because of the limited time an H-2B beneficiary can be in the country, USCIS should still premium process H-2B visas on a 15 calendar day timeframe, instead of the 15 business day timeframe. Other visas that are eligible to file for premium processing, such as immigrant visas or H-1B visas, have a longer duration. For instance, immigrant visas are a permanent visa that allows a beneficiary to remain in the country indefinitely; and H-1B visas have an initial period of 3 years, renewable for an additional 3 years, and carry a dual intent that is ostensibly a pathway to an immigrant visa.

However, an H-2B visa carries a limit of less than a year and is often less than 9 months. This shortened timeframe for the H-2B visa carries some urgency in the visa adjudication being timely processed. Further, with the increased demand in the H-2B program at the Department of Labor, and their repeated failure to meet their regulatory timeframe in processing temporary labor certifications, H-2B employers are filing their petitions at USCIS closer and closer to their actual start dates of need. It is critically important that USCIS maintain, for the H-2B visa, the 15 calendar day timeframe in processing.

Regulatory Flexibility and Regulatory Alternatives

First and foremost, the regulatory flexibility analysis is inherently flawed. In Table 32c there is a note that claims in the analysis there is no distinction between named and unnamed applications. Clearly, USCIS did not consider the 25 named worker limitation in calculating the regulatory impact. As outlined above, just 100 workers is a 1,461% increase in fees. Additionally, based on the 2022 H-2B Employer Data, when an employer filed for more than 25 beneficiaries on average, they requested 56 named workers. Further in 2022, there were 273 petitions for more than 25 beneficiaries. This shows that USCIS assuming there is no difference in named and unnamed petitions is incorrect. In fact, an analysis of the 2022 H-2B Employer Data would result in an additional 753 named applications with more than 25 beneficiaries under the 2023 Fee Rule.

USCIS needs to redo the ABC model with proper numbers instead of estimates. The estimates, just in the H-2B program, are vastly different than publicly available disclosure data. After updating the ABC model with proper numbers, USCIS should consider other ways to reduce the cost of employers who are seeking to hire a legal workforce when there are not sufficient U.S. workers. At a minimum, the H-2B program should not exceed the revised ABC model's cost to perform the H-2B functions. The small and seasonal American businesses are getting squeezed on all ends through increased cost for inputs, increased labor costs, increased shipping costs, and runaway inflation that is increasing costs on the American public that make it difficult to pass along further cost increases. If small and seasonal American businesses increase their prices to include these excessive fees, the American people are left to foot the costs leading to more inflation.

Additionally, USCIS and the Executive Branch should fund the Asylum Program through Congressional appropriations. The Asylum Program fee penalizes employers trying to hire a legal workforce. If the Asylum Program fee must remain, employers should only be required to pay the fee one time for each group of petitions. As outlined above, USCIS has grossly underestimated the fee-paying receipts and should reconsider how the arbitrary Asylum Program Fee will change filing behavior.

Thank you for the opportunity to comment on the 2023 Fee Rule, we strongly encourage USCIS to recalculate the ABC model with proper data and republish a new 2023 Fee Rule with proper data.

Sincerely,

H-2B Workforce Coalition