



American Road
& Transportation
Builders Association

250 E Street, S.W.
Suite 900
Washington D.C. 20024

P 202.289.4434
W artba.org

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VIA ELECTRONIC SUBMISSION

Hon. Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: Modernizing H-2 Program Requirements, Oversight, and Worker Protections (Docket No. USCIS-2023-0012).

Dear Secretary Mayorkas:

The American Road & Transportation Builders Association (ARTBA) respectfully submits the following comments on behalf of our approximately 8,000 members working in the transportation construction industry. ARTBA supports features of the proposal from the Department of Homeland Security (DHS) that would streamline the visa process and offer worker protections to H2-B visa participants. At the same time, ARTBA respectfully requests that DHS clarify portions of the rule that would otherwise place liability on employers for situations out of their control. DHS should also consider additional streamlining provisions that would make the program less burdensome.

Background

ARTBA's members represent all facets of the transportation construction industry. Coming from both the public and private sectors, they plan, design, build, maintain, and repair our nation's transportation infrastructure. In preparing these comments, ARTBA consulted with contractors who are familiar with, have utilized, or intend to utilize the H2-B visa program to address portions of their construction workforce needs.

Despite record employment and rising interest rates, demand for labor persists across much of the United States. As of August, the number of available jobs in the economy (i.e. employment level plus job openings) exceeded the civilian labor force by 3.26 million. For context, between 2015 and February 2020 – prior to the onset of the COVID-19 pandemic – there was an average

excess of more than 640,000 potential workers relative to available jobs.¹ Labor market trends in the construction industry – which encompasses ARTBA’s construction contractor members among other types of construction – are similar. In August, there were still 350,000 job openings despite construction employment exceeding eight million for the first time in U.S. history.² In January 2015, the ratio of construction job openings to employment was 2.3 percent; today it is 4.4 percent.³ This underscores the need for solutions to address workforce shortages, including the use of temporary visa workers.

DHS’ proposed rule would offer several revisions to the current H2-B visa program, including:

- (1) initiating whistleblower protections;
- (2) imposing penalties on employers who charge workers prohibited fees;
- (3) significantly extending grace periods under several scenarios prior to expiration of the visa;
- (4) granting workers already legally employed in the U.S. the permanent ability to port their visas to a new placement;
- (5) allowing workers employed in temporary capacities to concurrently take steps towards lawful citizenship; and
- (6) streamlining the petition process by allowing employers to submit a single such document for multiple workers from different countries.⁴

ARTBA’s Comments

I. DHS should explore additional streamlining measures to make the process less burdensome.

In deploying record federal funding from the Infrastructure Investment and Jobs Act (IIJA), ARTBA members are drawing on U.S. citizens as – ideally – long-term additions for their respective workforces, helping them build careers in the transportation construction industry. This is a key economic benefit of the IIJA’s investments. However, to supplement these domestic workforce initiatives and ensure expeditious delivery of IIJA-funded projects, some ARTBA members have utilized the H2-B visa program as a source of short-term personnel. Others have expressed the desire to do so. Members who have used the program noted that these seasonal workers have returned in subsequent years or have recommended family members for similar employment. Given the value provided by the visa program, ARTBA appreciates DHS’s measures to streamline its process. Extending the grace periods and making visa portability a permanent feature would offer greater flexibility for workers to seek new employment without having to restart the entire process.

¹ See jobs data available by the U.S. Dep’t. of Labor Bureau of Labor Statistics, available at <https://www.bls.gov/>.

² *Id.*

³ *Id.*

⁴ “Modernizing H-2 Program Requirements, Oversight, and Worker Protections,” 88 Fed. Reg. 65040, (September 20, 2023) at 65042-65045.

ARTBA also agrees with efforts by DHS to reduce the paperwork burden by allowing employers to request workers from multiple countries within the same petition. ARTBA encourages DHS to explore additional streamlining measures mutually beneficial to the employer and employees. This may include a shorter or more efficient process for return applicants who have favorable reviews from previous employers. This would eliminate administrative costs for all parties and allow these workers to return swiftly in subsequent years.

Finally, ARTBA supports DHS's proposals offering workplace protections for visa holders (e.g., whistleblower protections and ensuring that workers are not charged prohibited fees). However, DHS should establish parameters preventing abuse of these protections.

II. New program requirements should not dissuade employers from participating in the program.

Employers utilizing the H2-B visa program often utilize third-party facilitators tasked with ensuring compliance with its requirements. ARTBA opposes the provision of this proposed rule that would impose liability on employers for the actions of those third parties. DHS's proposal would require employers to provide "clear and convincing" evidence to show that a third party did not assess prohibited fees on a visa applicant.⁵ The proposal states that an employer cannot rely solely on its contract with the facilitator prohibiting imposition of these fees. Employers would have to take affirmative steps to demonstrate that the third party was not engaging in prohibited conduct, or else be liable themselves for the associated penalties.⁶ In reality, however, punitive measures disincentivize employers to participate in these programs, not wanting to take on the risk of liability for actions out of their control.

DHS should clarify that an employer's documented, good faith vetting of a third party's business practices will hold it harmless for conduct outside of the employer's knowledge. Examples of this due diligence would include written inquiries with responses directly from the third party, requests to review employment documents prepared by the third party, and payment ledgers between visa applicants. Moreover, DHS should establish a reasonable "clear and convincing" standard so that actions of H2-B facilitators cannot constitute grounds of punishment for an employer except under extraordinary circumstances.

Conclusion

ARTBA members continue working to maximize benefits from the Infrastructure Investment and Jobs Act's record investment. The H2-B visa program remains an important option for transportation construction industry employers as a supplement to their core workforce development efforts. ARTBA therefore urges DHS to further streamline this process and minimize the inappropriate risk of liability for participating employers.

⁵ *Id.* at 65055.

⁶ *Id.*

Thank you for considering these comments. Should you have any questions or need additional information, please contact Prianka Sharma, Vice President and Counsel for Regulatory Affairs by email at psharma@artba.org.

Sincerely,

Prianka Sharma

Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs