



VIA ELECTRONIC SUBMISSION

July 18, 2022

Brian D. Pasternak  
Administrator, Office of Foreign Labor Certification  
Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

**RE: Docket No. ETA-2022-0004, Exercise of Time-Limited Authority to Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers [RIN: 1205-AC10 and 1615-AC79]**

Dear Mr. Pasternak:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor and the U.S. Department of Homeland Security in the above-referenced docket published in the Federal Register on May 18, 2022, at 87 Federal Register 30334.

### **About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for private and government customers. Moreover, the vast majority of ABC's contractor members are classified as small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)<sup>1</sup> and industry workforce employment (more than 82% of the construction industry is employed by small businesses).<sup>2</sup> In fact, construction companies that employ fewer than 100 construction

---

<sup>1</sup> U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

<sup>2</sup> 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.<sup>3</sup>

In addition to small businesses that build private and public works projects, ABC also has large member companies that contract directly with federal, state and local governments to successfully build projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals.<sup>4</sup>

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

## **Background**

On May 18, the DHS and the DOL issued a temporary rule increasing the total number of noncitizens who may receive an H-2B nonimmigrant visa.

Accompanying this temporary rule is a requirement that:

When a job is in a traditionally or customarily unionized occupation or industry and during the time the SWA is actively circulating the job order, the employer must affirmatively contact the nearest American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) office covering the area of intended employment to provide written notice of the job opportunity and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity.<sup>5</sup>

## **ABC's Response to the Temporary Rule**

Outside of the temporary rule, extensive requirements already exist for prospective H-2B employers to advertise the available job opportunity and recruit U.S. workers, including providing a "statement directing applicants to apply at the nearest office of the [State Workforce Agency] SWA in the State in which the advertisement appeared, that SWA's contact information, and, if applicable, the job order number."

Further, the SWA is required to "circulate the job order to the appropriate union(s) to elicit referrals," making the requirement for the employer to contact the nearest AFL-CIO office, at the very least, an unnecessary redundancy.

---

<sup>3</sup> U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, Available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

<sup>4</sup> For example, ABC members won 57% of the \$128.73 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2021.

<sup>5</sup> See 87 Federal Register 30355: <https://www.federalregister.gov/d/2022-10631/p-284>.

The temporary rule calls for contacting the AFL-CIO “when a job is in a traditionally or customarily unionized occupation or industry.” It is not clear why construction is included in the list of these occupations when more than 87% of the construction industry is comprised of workers who have already chosen not to join a union.<sup>6</sup>

ABC has additional concerns with the requirement for employers to contact their local AFL-CIO, as the AFL-CIO has been an organization starkly opposed to the H-2B visa program and to the expansion of these visas under the new temporary rule. Providing this non-governmental, typically partisan organization with the final decision on an H-2B application sets a dangerous precedent, and ABC is concerned that this new requirement in the temporary rule could resurface in a final rule impacting the future of the H-2B visa program.

According to ABC’s analysis, the construction industry will need to hire an additional 650,000 additional workers on top of the normal pace of hiring in 2022 to meet its labor demands.<sup>7</sup> With a number of other industries competing for American workers, the need to access a temporary foreign workforce is imperative to construction. Though it typically only provides approximately 3,000 workers per year<sup>8</sup>, the H-2B visa is the most widely used visa program by construction and is vital to filling critical gaps in the workforce.

## **Conclusion**

Significant hurdles currently face the construction workforce and its access to the skilled workers needed to complete critical construction projects throughout the country. While ABC continues to promote the U.S. workforce and help hardworking Americans to become skilled craft professionals, the construction industry must in some cases rely on access to a temporary foreign workforce to supplement its needs. Adding more barriers to this process will only cause further delays, additional costs and unnecessary requirements for the construction industry.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



Ben Brubeck  
Vice President of Regulatory, Labor and State Affairs

---

<sup>6</sup> See Bureau of Labor Statistics, “[Union Members Summary](#),” Jan. 22, 2022.

<sup>7</sup> “[ABC: Construction Industry Faces Workforce Shortage of 650,000 in 2022.](#)” February 23, 2022.

<sup>8</sup> See the Department of Labor’s H-2B Visa Performance Data: <https://www.dol.gov/agencies/eta/foreign-labor/performance>