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United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director  
JENNIFER DUCK, Democratic Staff Director

May 17, 2017

**VIA ELECTRONIC SUBMISSION**

The Honorable John Kelly  
Secretary  
U.S. Department of Homeland Security  
Washington, D.C. 20528

The Honorable R. Alexander Acosta  
Secretary  
U.S. Department of Labor  
Washington, D.C. 20520

Dear Secretary Kelly and Secretary Acosta:

We are writing to express concerns regarding the approval of more foreign workers on H-2B visas, and the impact this will have on U.S. workers.

Section 543 of Division F of the Omnibus appropriations bill permits Secretary Kelly to distribute extra H-2B visas beyond the 66,000 cap only after he, in consultation with Secretary Acosta, determines that “businesses cannot be satisfied in fiscal year 2017 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor.”<sup>1</sup> Such a determination should not be made lightly and should, at a minimum, be supported by statistical data, an assessment of the projected needs of specific businesses, evaluation of employer recruitment efforts, fair calculations of the relevant prevailing wage, and a review of potential labor pools’ qualifications and availability. Before Secretary Kelly exercises the discretion afforded to him, Congress clearly needs to understand all factors that could encourage businesses to hire foreign nationals, instead of U.S. workers, so that we can best protect our American interests.

We understand and sympathize with the needs of employers who rely on seasonal H-2B workers if the U.S. workforce can’t meet the demand, but unless it is carefully managed, the H-2B program puts all workers at risk.<sup>2</sup> The program is not only used by small and seasonal

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<sup>1</sup> Public Law 115-31.

<sup>2</sup> See, e.g., Chairman Grassley, Statement for the Record, Senate Judiciary Committee Hearing “The H-2B Temporary Foreign Worker Program: Examining the Effects on Americans’ Job Opportunities and Wages,” Jun. 8,

employers.<sup>3</sup> Large corporations employ significant numbers of H-2B workers as well. Studies show that wages have stagnated<sup>4</sup> and there has been a significant “long-term decline in the labor force participation rate”<sup>5</sup> for U.S. workers in H-2B fields. In one recent study, employers using H-2B workers undercut the wages of similarly employed U.S. workers by nearly twenty-five percent.<sup>6</sup>

As you know, a new provision requires Secretary Acosta to accept “private wage surveys” as evidence of the prevailing wage, unless he “determines that the methodology and data . . . are not statistically supported.”<sup>7</sup> This improperly places the burden on an already overburdened Department of Labor, which now has to prove to itself that an employer is paying a fair wage, instead of the other way around. It also flies in the face of evidence suggesting that such surveys suppress wages.<sup>8</sup> In short, a large body of evidence suggests that our increasing reliance on the H-2B program cuts wages, pushes American workers out of jobs, and may, in some cases, discourage them from ever applying again. Indiscriminate increases in the number of H-2B workers will only exacerbate these problems.

On top of the harm to American workers, some unscrupulous employers take advantage of H-2B workers’ unique vulnerabilities, which can result in human trafficking and labor abuse.<sup>9</sup> And because employers control workers’ visa status “[t]he H-2B program greatly reduces the likelihood that workers will leave an abusive employer or complain about unpaid wages or poor working conditions.”<sup>10</sup> As one investigator put it: “[t]he way H-2 visas shackle workers to a single employer leaves them almost no leverage to demand better treatment.”<sup>11</sup> A recent investigation showed that the program condemns thousands of workers each year “to exploitation

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2016 available at <https://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-h-2b-temporary-foreign-worker>.

<sup>3</sup> AFL-CIO, *Fact Sheet on why the H-2B Program is Bad for Working People* June 23, 2016 available at <https://aflcio.org/about/advocacy/legislative-alerts/fact-sheet-why-h-2b-program-bad-working-people> [hereinafter AFL-CIO].

<sup>4</sup> Costa, Daniel, *the H-2B Temporary Foreign Worker Program – For Labor Shortages or Cheap, Temporary Labor?* Jan. 19, 2016, Econ. Plcy Inst. available at <http://www.epi.org/publication/h2b-temporary-foreign-worker-program-for-labor-shortages-or-cheap-temporary-labor/> (“The evidence presented here—flat wages and persistent high unemployment rates in the top 15 H-2B occupations for the past decade—sheds doubt on claims that there are labor shortages in the top 15 H-2B occupations”) [hereinafter Costa].

<sup>5</sup> See Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, available at <https://data.bls.gov/timeseries/LNS11300000> (showing a reduction from 66 percent to 62.9 percent, from 2007 to 2017; statistics generated on May 15, 2017); see also Camarota, Steven A., *The Employment Situation of Immigrants and Natives in the First Quarter of 2017, BLS Data Shows Labor Force Participation Remains Abysmal*, May 2017, Cent. For Imm. Studies available at <http://cis.org/sites/cis.org/files/u6-q1-17.pdf>.

<sup>6</sup> AFL-CIO.

<sup>7</sup> PL 115-31, Division H § 112.

<sup>8</sup> Costa.

<sup>9</sup> See generally, Polaris Project, *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas* Oct. 2015 available at <http://polarisproject.org/resources/labor-trafficking-us-closer-look-temporary-work-visas>.

<sup>10</sup> AFL-CIO.

<sup>11</sup> Bensinger, Ken; Garrison, Jessica; and Singer-Vine, Jeremy; *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare* BuzzFeed News July 25, 2015 available at [https://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-?utm\\_term=.vtmkWwKqJ#.orb34Nxb](https://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-?utm_term=.vtmkWwKqJ#.orb34Nxb).



and mistreatment, often in plain view of the government officials charged with protecting them.”<sup>12</sup>

Given the available statistical data, it is essential that you carefully evaluate hiring and recruitment efforts to ensure that any proposed increase in H-2B numbers does not disadvantage U.S. workers. Please maintain careful records of your assessment prior to any exercise of discretion to accept petitions beyond the statutory cap. If Secretary Kelly does determine that American workers are not adequate to serve U.S. business needs, we request that you provide a written report to the Senate Judiciary Committee, describing how you arrived at that determination.

We are counting on your years of collective experience and public service to help us protect American workers. Thank you in advance for your cooperation with this request. If you have questions, please contact Brad Watts at (202) 224-5225.

Sincerely,



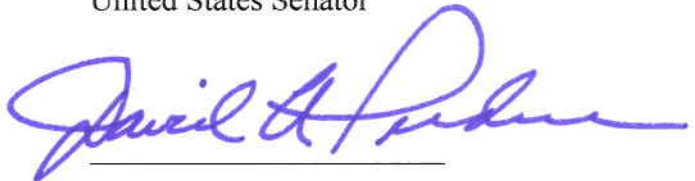
Charles E. Grassley  
United States Senator



Richard J. Durbin  
United States Senator



Richard Blumenthal  
United States Senator



David Perdue  
United States Senator

Cc: The Honorable Rex Tillerson  
Secretary  
U.S. Department of State

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<sup>12</sup> *Id.*