STATEMENT OF
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U.S. DEPARTMENT OF LABOR
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Introduction

Mr. Chairman and Members of the Committee, I want to thank you for this opportunity to appear before this Committee to testify about H-2B regulations and the seafood industry. I am Portia Wu, Assistant Secretary for the Department of Labor's (DOL) Employment and Training Administration (ETA).

The H-2B program allows U.S. employers to meet a legitimate need for temporary, foreign workers. DOL is responsible for issuing foreign labor certifications for this program and other temporary worker programs. In addition, under the Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act, ETA also funds state and local workforce systems and therefore we are responsible for connecting U.S. workers to jobs, including in the seafood industry. ETA will continue to fund these activities under the Workforce Innovation and Opportunity Act, which supersedes WIA and the Wagner-Peyser Act.

As I will explain today, our new H-2B regulations are intended to support our nation's businesses – including the seafood industry – by expeditiously reinstating the H-2B program to allow for access to foreign workers in cases where U.S. workers are not available. These regulations will bring certainty, stability, and continuity to the program in response to litigation on multiple fronts that has jeopardized the continuity of the H-2B program.

DOL's Role in the H-2B Program

The Immigration and Nationality Act (INA) establishes the H-2B nonimmigrant visa classification for employers to bring foreign workers to the United States to perform non-agricultural services or labor on a temporary basis if qualified U.S. workers capable of performing such services or labor cannot be found in this country (8 U.S.C. 1101(a)(15)(H)(ii)(b)). Section 214(c) of the INA requires employers to petition the Department of Homeland Security (DHS) to classify such temporary workers as H-2B nonimmigrants. The INA also requires DHS to consult with appropriate agencies of the Government, which DHS has long interpreted to include DOL, before adjudicating an employer's petition seeking to employ individuals under the H-2B nonimmigrant visa classification.

Under DHS regulations, before DHS can adjudicate an H-2B petition, the petitioner must receive a certification from DOL that there are insufficient qualified workers in the U.S. to perform the temporary labor or services for which the employer seeks foreign workers, and that the employment of the foreign workers will not have an adverse effect on the wages and working conditions of U.S. workers similarly employed (see 8 CFR 214.2(h)(6)(iii)(A) and (D)). Each DOL H-2B labor certification is specific to the employer and the temporary period of employment requested and corresponds to the geographic location in which the employer attempted to recruit U.S. workers for the job opportunity. That certification also includes the

obligation to offer and pay the required prevailing wage rate issued by DOL for the occupation and area of intended employment. After being granted a temporary labor certification by DOL, the employer may petition DHS for approval to bring foreign workers into the U.S. to fill the employer's need for requested labor or services stated in the approved H-2B temporary labor certification. If the petition is approved by DHS, foreign workers may then go to a U.S. embassy or consulate in their country to apply for an H-2B nonimmigrant visa from the Department of State. If the visa application is approved, the worker is issued a visa that he or she can use to apply for admission to the United States at a port of entry to perform the temporary work.

DOL strives to administer its part of the H-2B program, and other temporary worker programs, in a manner that is responsive to legitimate employer needs for labor where qualified U.S. workers are not available, and that provides adequate protections for U.S. and foreign temporary workers under our Nation's immigration and labor laws. In this context the regulations governing the H-2B program establish the minimum wages and employer obligations that apply to both H-2B and U.S. workers, as well as the recruitment criteria employers must meet to demonstrate eligibility to hire foreign labor. The Department's Office of Foreign Labor Certification issues prevailing wage determinations and temporary labor certifications in accordance with those regulatory standards to help ensure that U.S. workers have meaningful access to these job opportunities, and that the wages and working conditions of U.S. workers are not adversely affected by the employment of foreign workers though a temporary worker program. In addition, the Department's Wage and Hour Division enforces the laws within its jurisdiction that apply to all covered workers, such as the Fair Labor Standards Act, as well as specific worker protections in the H-2B program that not only help protect foreign workers from exploitation, but also provide similarly-employed U.S. workers with wages and working conditions that are at least equal to those provided to temporary foreign workers.

The H-2B program is capped at 66,000 visas per fiscal year. Workers engaged in temporary non-agricultural employment under the H-2B program come from a diverse set of countries and work in a range of industries. Each year, significant numbers of H-2B workers work in landscaping, forestry, hospitality services, construction, and seafood. Seafood industry employers who use the H-2B program each year are small and seasonal businesses primarily located in states along the eastern and gulf coasts. Because participation in the program is limited by the statutory cap, employer demand for foreign workers in the H-2B visa program often exceeds the current statutory limit. In Fiscal Year (FY) 2010, DOL certified approximately 3,726 temporary labor certification applications covering more than 93,000 worker positions. By FY 2014, employer requests for temporary non-agricultural labor certifications increased almost 25 percent with DOL certifying more than 4,638 temporary labor certification applications covering more than 94,000 worker positions. Within just the first six months of FY 2015, DOL certified more employer applications for H-2B workers than during all of FY 2014, many of them small businesses.

The H-2B Program and the Seafood Industry

First, I want to address the H-2B program and its relationship with the seafood industry. DOL understands that many seafood employers are family-owned businesses—some spanning generations—which proudly provide seafood products for domestic and international markets and that struggle each year to attract and retain a productive and stable workforce. We know that the seasonal jobs these businesses provide are critical to local communities, create additional jobs in other related industries, and are a source of cultural pride in coastal areas. DOL is

committed to maintaining a fair and reliable application process for these small and seasonal businesses.

Over the last five years, employers in some of the largest seafood-producing states were among the top ten users of the H-2B program. DOL has consistently certified H-2B applications for seasonal seafood jobs primarily located in Louisiana, Maryland, Virginia, Texas, North Carolina, and Massachusetts. In FY 2014, we certified more than 5,700 work positions related to the harvesting, processing, and packaging of seafood including, but not limited to, crab, shrimp, crawfish, and oysters, which is a 15 percent increase in program usage over the prior year. Approximately 55 percent of the certified seafood jobs were located along the Gulf Coast states, ranging from shrimp boat deckhands in Texas to seafood and crawfish processors and packagers in Louisiana. Employer temporary labor certification applications in the seafood industry during FY 2014 were certified 92 percent of the time and processed by the Department, on average, within 16 days of receipt – this is compared to a certification rate of 84 percent and an average processing time of 18 days for all other H-2B employers.

Achieving Stability in the H-2B Program

In recent years, DOL and DHS have faced difficulties in achieving stability in the H-2B program because DOL's H-2B regulations have been subject to litigation brought by both employers and worker advocates. The history of H-2B-related litigation has dictated the timing and in part the substance of the Departments' issuance of new regulations on April 29, 2015, which I discuss in further detail below. The two new regulations that DOL and DHS have just jointly issued are*:* the *Temporary Non-Agricultural Employment of H-2B Aliens in the United States, Interim Final Rule and Request for Comments* (2015 IFR), which establishes the overall framework for the H-2B program, and the *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Final Rule* (2015 Wage Final Rule), which implements the complete wage methodology for the H-2B prevailing wage process. These regulations are designed to bring stability, certainty, and clarity to the program.

Background on DOL's H-2B Program Regulations and Litigation

Before 2008, DOL used regulations to structure the H-2B program, but set many substantive program standards in sub-regulatory guidance. Since 2008, DOL has published several regulations governing the H-2B program, including:

- A comprehensive rule setting program requirements and prevailing wage rates for the H-2B program, 73 FR 78020 (2008 H-2B Rule), published in 2008, which took effect in January 2009;
- A 2011 Wage Rule revising the wage methodology from the 2008 H-2B Rule, 76 FR 3452 (2011 Wage Rule), which never took effect because, as explained below, Congress declined to fund administration and enforcement;
- A 2012 H-2B rule setting program requirements other than prevailing wages for the H-2B program, 77 FR 10038 (2012 H-2B Rule), which never took effect because, as explained below, its implementation and enforcement was enjoined; and
- A 2013 Interim Final Rule issued jointly with DHS revising the wage methodology for setting H-2B prevailing wages, 78 FR 24047 (2013 IFR), which took effect in April 2013.

Litigation Involving DOL's Rulemaking Authority and Procedures

DOL's authority to issue its own regulations in the H-2B program is the subject of dispute in the Federal appellate courts. The U.S. Court of Appeals for the Third Circuit concluded that DOL has independent authority under the INA to issue H-2B program regulations to provide advice to DHS. *See Louisiana Forestry Ass'n v. Perez*, 745 F.3d 653 (3d Cir. 2014). Contrary to that decision, the U.S. Court of Appeals for the Eleventh Circuit affirmed a trial court preliminary injunction concluding that DOL lacks authority under the INA to independently issue H-2B regulations. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013). These conflicting court decisions have made it difficult for DOL to carry out its duties under the INA.

On remand from the Eleventh Circuit, the district court in *Bayou* vacated the 2012 H-2B rule, and permanently enjoined DOL from enforcing the rule on the ground that DOL lacks rulemaking authority in the H-2B program. *See Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, No. 3:12-cv-183 (N.D. Fla. Dec. 18, 2014) (*Bayou II*). DOL has appealed that decision to the Eleventh Circuit. Due to this injunction and vacatur of the 2012 H-2B Rule, DOL had continued to operate the program under the 2008 H-2B Rule. However, on March 4, 2015, the same district court that vacated DOL's 2012 rule also vacated the 2008 H-2B Rule and permanently enjoined DOL from enforcing it, *See Perez v. Perez*, No. 14-cv-682 (N.D. Fla. Mar. 4, 2015). Based on the *Perez* vacatur order and the permanent injunction, DOL was required to immediately cease implementing its H-2B labor certification regulations to comply with the court's order. In response to a motion from DOL, the court in *Perez* subsequently stayed its vacatur, ultimately until May 15, 2015, which allowed the Department to continue processing H-2B temporary labor certification applications under the 2008 H-2B Rule pending publication of the new DOL-DHS joint 2015 IFR. On April 30, 2015, the *Perez* Court lifted the stay of its vacatur of DOL's 2008 rule because DOL and DHS replaced it with a new comprehensive H-2B rule published in the *Federal Register* on April 29, 2015.

When DOL's 2008 H-2B regulations were vacated, DOL had no prior regulations it could implement to operate the H-2B program, nor was it able to run the H-2B program based on sub-regulatory guidance. At least two federal courts have made clear that DOL cannot set substantive requirements for its temporary labor certification programs through sub-regulatory guidance that has not gone through notice and comment procedures. *See Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (holding that DOL violated the procedural requirements of the APA when it established requirements that "set the bar for what employers must do to obtain approval" of the H-2A labor certification application, including wage and housing requirements, in guidance documents); *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, No. 2:09-cv-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (*CATA I*) (holding that DOL's failure to issue its pre-2008 H-2B guidance document through the notice and comment process was a procedural violation of the Administrative Procedure Act (APA) .

Litigation and Congressional Action Involving H-2B Prevailing Wage Rates

DOL's prevailing wage regulations, which are established so that the importation of foreign workers will not have an adverse effect on the wages of U.S. workers, have also been the subject of litigation and Congressional appropriations riders. In *CATA I*, a district court invalidated DOL's then-existing methodology, which included setting the H-2B prevailing wage based on skill levels. In response, DOL issued the 2011 Wage Rule, which concluded, among other things, that the vast majority of H-2B jobs involved unskilled labor, and that setting the

prevailing wage based on skill levels had little relevance in the H-2B program. Shortly before the 2011 Wage Rule came into effect, Congress issued an appropriations rider effectively barring implementation of the 2011 Wage Rule, and the same rider was issued in every appropriations enactment until January 2014. During the period DOL was unable to implement the 2011 Wage Rule, DOL continued to rely on the 2008 H-2B Rule, which allowed employers to use wages based on skill levels. In 2013, however, a district court vacated the problematic provision in the 2008 H-2B rule requiring skill-level-based prevailing wages (20 CFR 655.10(b)(2)), and ordered DOL to come into compliance in 30 days. *See Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (*CATA II*).

In response to the court's order in *CATA II*, and in order to address the Eleventh Circuit's decision in *Bayou* raising questions about DOL's regulatory authority, DOL and DHS jointly promulgated the 2013 IFR, which again revised the wage methodology, eliminating the four-tiered wage based on skill levels and generally establishing the Occupational Employment Statistics (OES) mean wage as the prevailing wage. The 2013 IFR also permitted the use of employer-provided surveys as an alternative to the OES wage. However, in December 2014, the U.S. Court of Appeals for the Third Circuit vacated the regulatory provisions that permitted employers to submit the employer-provided surveys as an alternative to that OES wage, concluding that those provisions had substantive and procedural defects under the APA. *See Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014). This vacatur prohibited DOL from accepting employer-provided surveys unless it engaged in further rulemaking.

The 2015 H-2B Interim and Wage Final Rules

On April 29, 2015, DOL and DHS jointly issued two regulations: the 2015 IFR establishing the overall framework for the H-2B temporary labor certification program, and the 2015 Wage Final Rule implementing the complete wage methodology for the H-2B prevailing wage process. As noted, these regulations are intended to bring certainty, stability, and continuity to the H-2B program after a period of uncertainty brought on by litigation.

The 2015 IFR strengthens recruitment and protections for U.S. workers, ensuring that they have a greater chance of finding and applying for jobs for which employers are seeking H-2B workers, and that U.S. workers who are doing essentially the same jobs as H-2B workers have substantially the same rights and benefits as those workers.

For example, the 2015 IFR improves U.S. worker access to jobs by requiring employers to extend recruitment efforts relating to the position described in the temporary labor certification until 21 days before the employer's date of need. This addresses an inadequacy in the 2008 rule, under which employers conducted a minimal recruitment effort almost four months before the start date of work. U.S. applicants – particularly unemployed workers – seeking temporary work often need work right away and cannot wait for four months. Under the 2015 IFR, employers must also make jobs available to former U.S. employees who worked for the employer in the occupation in the prior year, except those terminated for cause or who quit. The 2015 IFR also requires DOL to establish a national electronic registry that will improve U.S. worker access to these jobs. In areas of substantial unemployment the employer may be required to conduct additional recruitment efforts to ensure more opportunities for and a greater response from available and qualified U.S. workers.

In addition, employers bringing in foreign workers under the H-2B program must:

- Show temporary need to help prevent the program from being used for jobs that are really permanent and, therefore, not available to temporary foreign workers;
- Guarantee employment for a total number of work hours equal to at least three-fourths of the workdays during the periods for which they have requested H-2B workers, for both H-2B and U.S. workers in corresponding employment; and
- Pay visa fees of H-2B workers, the inbound transportation and related subsistence costs of workers who complete 50 percent of the job order period, and the outbound transportation and related subsistence expenses of employees who complete the entire work period.

The 2015 IFR also contains a number of provisions that will lead to increased transparency and address potential issues around foreign labor recruitment, such as requiring employers to 1) disclose their use of foreign labor recruiters in the solicitation of workers, which was the subject of a recent Government Accountability Office report issued in March 2015; 2) provide workers with earnings statements that clearly specify hours worked and offered and deductions from pay; and 3) display a poster describing employee rights and protections. And finally, the 2015 IFR strengthens DOL's enforcement and program integrity mechanisms by, for example, extending the potential period of debarment from the H-2B program resulting from employer violations from three to five years, and providing the Department with enhanced authority to revoke a temporary labor certification based on fraud, willful misrepresentation, or substantial program violations. (Additional information can be found at http://www.foreignlaborcert.doleta.gov/.)

The 2015 IFR also permits employers in the seafood industry, in certain circumstances, to stagger the entry of their H-2B workers into the United States (general users of the program must bring all their H-2B workers into the U.S. when work begins). Under section 108 of the Consolidated and Further Continuing Appropriations Act, 2015 (the "2015 Appropriations Act"), Pub. L. No. 113-235, 128 Stat. 2130, 2464, staggered entry of H-2B nonimmigrants employed by employers in the seafood industry is permitted under certain conditions. DOL and DHS have incorporated the requirements into the 2015 IFR.

The companion joint 2015 Wage Final Rule establishes the complete prevailing wage methodology for the H-2B program, which includes permitting employers to submit employer-provided surveys to set the prevailing wage in limited circumstances. We believe that this offers employers flexibility, while simultaneously ensuring that the prevailing wage is established at a level that meets DOL's obligation to ensure no adverse effect on U.S. workers similarly employed.

The 2015 Wage Final Rule retains as the primary prevailing wage the mean wage of all workers in the occupation in the geographic area of the H-2B work based on the OES survey. The OES mean wage has been governing prevailing wage determinations since April 2013, and the vast majority of employers using the H-2B program have been using this wage rate. The Wage Final Rule made two changes to streamline the prevailing wage process and address recent litigation concerning employer-provided surveys.

First, and significantly for many employers in the seafood industry, the Wage Final Rule permits the submission of employer-provided surveys in the following limited circumstances: (1) if the OES does not collect data for the geographic area or the OES reports the wage rate in the geographic area at only the national level for the occupation; (2) if the job opportunity is not

included within an occupational classification of the OES or is within an occupational classification of the OES designated as a general "all other" classification; or (3) where the survey is independently conducted by a state entity. Based on DOL's extensive experience partnering with the states to collect wage data, DOL and DHS have determined that occupational wage surveys conducted and issued by state agencies, such as state agricultural, natural resources, or maritime agencies, or state colleges and universities, are neutral and reliable, and that they will not suffer the same shortcomings as other employer-provided surveys. Therefore, as long as these surveys meet the methodological standards contained in the new regulations, the Department will continue to accept state-conducted surveys.

Second, the Wage Final Rule no longer permits use of wage determinations under the Davis-Bacon Act (DBA) and the McNamara-O'Hara Service Contract Act (SCA) to set the prevailing wage in the H-2B program. The decision to discontinue these wage sources in the H-2B program is based largely on DOL's challenges in conforming the SCA and DBA categories to employer requests for prevailing wages in the H-2B program, and the desire to issue consistent prevailing wage determinations (PWDs) in the H-2B program. SCA and DBA will remain in force and effect independent of the H-2B program for all workers performing work under government contracts.

Smooth Transition between Former Regulations and the 2015 IFR

Both DOL and DHS are trying to ensure a smooth transition between the former regulations and the 2015 IFR and Wage Final Rule. All H-2B labor certifications granted under the provisions of the 2008 Final Rule will continue to be valid for the positions and period of employment certified. Pending applications for prevailing wage determination or for temporary labor certification will be processed under the regulations in place at the time they were filed (the 2008 Final Rule, as amended by the 2013 IFR). The 2015 regulations also include flexibility for employers who are seeking workers with a start date of need before October 1, 2015 by establishing a process for expedited recruitment of U.S. workers, including credit for recruitment employers had already completed under the 2008 Final Rule. The regulations grant these employers the ability to obtain a prevailing wage simultaneously with filing the application for temporary labor certification so that employers who are affected by the change in regulations can still quickly access the workers they need. Employers with a start date of need on or after October 1, 2015, must file their H-2B temporary labor certification applications under the regular filing procedures of the 2015 IFR.

Employers with an existing PWD or a pending or approved H-2B temporary labor certification also may submit a request for a Supplemental PWD (SPWD) in order to request a prevailing wage based on an alternate wage source. Such supplemental determinations will only apply to those H-2B workers who were not yet employed by the employer on the date the SPWD was issued, and will not apply to H-2B workers who were already working for the employer on or before the date of the SPWD, or U.S. workers who were recruited and hired under the original job order. Seafood employers using staggered entry likewise may request SPWDs.

To reduce the burdens and save time for employers who have recurring temporary needs, DOL will implement over time a new pre-filing process allowing an employer to "register" its temporary need for a specific number of positions the employer needs and will continue to need. Instead of having to prove temporary need each time the employer files an H-2B application, the employer will submit an H-2B registration in the first year this process is implemented and the registration will be valid for a period of up to three consecutive years during which the employer

will benefit from the streamlined application process. The Department will also continue to accept H-2B temporary labor certification applications for professional athletes, tree planting and related reforestation, and professional/outdoor entertainers under the existing special procedures.[1]

Conclusion

The Department will continue to focus on maintaining a fair and reliable H-2B temporary labor certification process while enforcing necessary protections for both U.S. and nonimmigrant foreign workers. To do so is good not only for workers but also for the law-abiding employers, including those who most participate in this capped visa program, including our nation's seafood employers. The Department has worked hard to prepare robust guidance for employers to help them navigate the new regulations, including a technical, dedicated Web page with Frequently Asked Questions and other resources that explain the differences between the old and new regulations, and guide employers on how to file their applications. In addition, the Department published a number of Factsheets that help employers comply with program obligations. We hope that these will significantly reduce the time and effort employers must invest to successfully use the H-2B program. The Department is confident that as program users become more familiar with these new requirements, overall program compliance will continue to increase and any delays attributed to failure to follow the program's rules will continue to decrease.

Mr. Chairman and Members of the Committee, thank you again for the opportunity to discuss the U.S. Department of Labor's role in addressing regulatory issues related to the H-2B program and its relevance to the seafood industry. I look forward to answering your questions.

[1] The 2015 IFR does not include the regulatory provision authorizing DOL to create new special procedures. A recent decision by the U.S. Court of Appeals for the D.C. Circuit held invalid such a provision in DOL's H-2A temporary agricultural worker program. *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014).