

December 17, 2021

Secretary Marty Walsh  
United States Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Dear Secretary Walsh:

We are writing to you regarding our concerns about the U.S. Department of Labor's administration and oversight of the temporary agricultural guestworker program, also known as the H-2A program. American agricultural employers are increasingly relying on the H-2A program to fill their capacity needs. Unfortunately, in all too many instances, importation of these foreign workers has been to the extreme detriment of rural U.S. employees, many of whom are people of color.

These issues were the focus of a recent *New York Times* article examining the use of H-2A workers in the Mississippi Delta ("Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More," by Miriam Jordan, November 12, 2021). The article, which stemmed from a discrimination lawsuit filed by the Mississippi Center for Justice and Southern Migrant Legal Services against a Delta agricultural employer, highlighted the widespread use of H-2A workers in the Delta to displace the long-time Black workers on area farms. To make matters worse, the report indicated that the local Black workers were being paid several dollars per hour less than the H-2A workers, even though they were performing the same jobs. Unfortunately, this does not appear to be an isolated situation. A *Buzzfeed* investigative report in 2015 revealed similar treatment of Black farmworkers by H-2A growers in Georgia ("All You Americans Are Fired," by Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, December 1, 2015).

Nearly 40 years ago, the U.S. Supreme Court looked at the department's administration of the agricultural guestworker program and summed it up succinctly:

The obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers...First, these workers are given a preference over foreign workers for jobs that become available in this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

Sadly, the department's efforts are falling far short of achieving these objectives with respect to many Black farmworkers in the South.

As the *Times* article made clear, the department's failures are particularly acute in the Mississippi Delta. The Delta is among the poorest regions in the country. Unemployment is chronically high, invariably at

least twice the national average. Many of the Delta's residents, the majority of whom are Black, lack advanced job skills or education.

As they have for generations, many Delta residents earn their livelihoods on area farms, helping plant, cultivate, harvest, and transport the area's soybean, grain, and cotton crops, which thrive in the area's rich soil. For a large portion of the Delta's population, farmwork is the job they know best and is oftentimes the only occupation available to them.

We are troubled by several aspects of the *Times* article and other similar reports. First, Delta H-2A employers appear to discriminate on the basis of race in their selection of H-2A workers. We believe that all of the agricultural equipment operators hired in the Delta, as well a number of the H-2As hired as general farmworkers, are from the Republic of South Africa. As far as we are able to ascertain, all of these workers are white, despite the fact that South Africa's population is more than 90 percent nonwhite. Some have justified this racially based hiring on the fact that whites own a disproportionate number of the farms in South Africa and therefore are the persons most likely to have experience in operating farm equipment. These rationalizations do not ring true. First, there are hundreds of thousands of nonwhite South Africans who operate farm equipment, either as employees or farm owners. Second, as the *Times* notes, many if not all of the South African H-2As had no experience operating the types of highly sophisticated farm equipment used on Delta farms. Instead, they had to be trained to use the equipment by the farms' local Black workers. And the supposed experience operating equipment does not explain why only white South Africans are hired to fill jobs that do not require workers to operate farm equipment, such as positions on Delta catfish farms. The hiring procedures involving South African H-2As needs to be closely scrutinized to ensure that the department is not supporting and enabling a racially discriminatory employment program.

Second, the growing use of H-2A workers in the Delta is also troubling given the chronic unemployment and underemployment and the large pool of experienced farmworkers among the local population. And from the *Times*' reporting, it appears that the use of guestworkers has led to depressed wages and reduced job opportunities for the local Black population. The department's policies and practices have contributed mightily to this situation.

It is illegal for farms to pay their Black employees less than their H-2A workers when they are all working as equipment operators. The shocking wage differential described in the *Times* story does not appear to be an aberration. We have received multiple reliable reports that many, if not most, H-2A farms in the Delta pay their local Black workers substantially less than the adverse effect wage rate paid to the H-2As. It is deeply worrisome that the Wage and Hour Division apparently has yet to sanction a single Delta H-2A grower for such transgressions. This is perplexing, because the Wage and Hour Division has penalized several Delta employers for underpaying H-2A workers. We are at a loss to explain how, during the course of these investigations that resulted in recoupment of back wages for H-2A workers, the department never undertook investigative or enforcement actions to recover the wages due the local Black employees engaged in corresponding employment. We sincerely hope that this is the result of inattention on the part of the Wage and Hour Division rather than an outgrowth of department policy to simply ignore these blatant violations of the department's H-2A regulations.

At a minimum, in the wake of the *Times*' reporting, the Wage and Hour Division should adopt a protocol in all future investigations of farms that hire both H-2A and local workers of determining if (1) there are U.S. workers engaged in corresponding employment to the H-2A workers and (2) if the correspondingly employed U.S. workers are receiving wages and benefits at least equal to those of the H-2As. Where U.S. workers in corresponding employment are receiving wages below those of the H-2As, the Wage and Hour Division should immediately initiate steps to recover the additional wages due the U.S. workers. Given the impact of these jobs on the Delta economy, a thorough payroll review, supplemented by employee interviews, should be among the top priorities next year of the Jackson district of the Wage and Hour Division.

Finally, we are troubled that neither the employers nor the Mississippi Department of Employment Security (MDES) appear to be making any concerted effort to publicize these jobs and to affirmatively recruit U.S. workers to fill them. Under the H-2A regulations, farms are required to file positive recruitment reports attesting that they have notified their employees from the previous season to alert them to the jobs for which H-2A workers have been requested, as well as the essential job terms, such as the wage rates being offered. Despite the fact that hundreds of local Black workers are employed by farms in corresponding employment with H-2A workers, we have not yet found a single one of these workers who has been notified by his employer of the H-2A jobs, and, most importantly, the higher wage rates that come with them. If this is confirmed by the department's investigators, this should result in major sanctions against the offending employers, including possible debarment from the H-2A program.

Additional steps should be undertaken to increase the number of U.S. workers hired to fill these positions. The MDES reports very few referrals to H-2A jobs. This is remarkable, because these jobs are among the best-paying low-skill jobs from the Delta listed in the MDES' employment database. Lack of publicity seems to be a major problem; quite simply, most Delta residents are unaware of these jobs and, most importantly, the wage rates offered. We are confident that an aggressive publicity campaign would result in numerous job applicants. Such a campaign should actively involve the MDES staff, especially those with specific responsibilities to serve migrant and seasonal farmworkers (outreach workers and the monitor advocate). It also should involve the Delta area agency receiving funds through the department's National Farm Worker Jobs Program.

We greatly appreciate your attention to these important matters. We welcome the opportunity to engage with you and others in the Department of Labor on these vital issues.

Sincerely,



Wade Henderson, Interim President and CEO  
The Leadership Conference on Civil and Human Rights



Derrick Johnson, President and CEO  
NAACP



Dr. Corey Wiggins, Executive Director  
Mississippi State Conference, NAACP



Vangela Wade, President and CEO  
Mississippi Center for Justice