THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS
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THE CITY OF SEATTLE OFFICE OF LABOR STANDARDS

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SENT VIA EMAIL TO: CHARANYA.KRISHNASWAMI@hq.dhs.gov

Alejandro N. Mayorkas
Secretary, U.S. Department of Homeland Security
Washington, D.C. 20528

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Dear Secretary Mayorkas,

The Attorneys General of Illinois and Massachusetts, the Seattle Office of Labor Standards, and the Attorneys General of California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Maine, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont, the California Labor and Workforce Development Agency, the California Labor Commissioner's Office, the California Department of Industrial Relations – Department of Occupational Safety and Health, the California Agricultural Labor Relations Board, the Denver Labor Auditor's Office, the Los Angeles County Office of Labor Equity, the Travis County District Attorney's Office, and the Office of the New York City Comptroller write this letter to recognize the positive impact that the deferred action program for noncitizen victims and witnesses of labor rights violations has had on our enforcement efforts, and to request that DHS extend the deferred action protection period from its current two years to at least four years, subject to renewal.[1] In support of this request, we submit our insight as labor

[1] DHS currently provides for four years of deferred action for special immigrant juveniles. *See* 6 USCIS-PM J.4.

enforcement agencies on the challenges we face in securing witness cooperation in our investigations and enforcement actions when unscrupulous employers target vulnerable noncitizen workers, and how extending the deferred action period to four years would help overcome these challenges.

Our offices enforce a diverse set of labor and employment laws across the country, including state laws, regulations, and local ordinances, designed to create fair and safe workplaces. To enforce these laws, we rely on a broad set of tools, including investigatory subpoenas, civil citations, criminal prosecution, and civil litigation. Our ability to enforce these labor laws and protect workers' rights within our states and localities is heavily dependent on workers being willing to report violations of their labor rights, provide information in our investigations, and act as witnesses in our enforcement actions. This is particularly true where employers rely on "off the books" practices to further their schemes including paying workers "under the table," paying them in cash, employing workers through third party labor brokers and "subcontractors," misclassifying workers as "independent contractors," not getting adequate or any workers compensation insurance, falsifying records, or keeping no records at all. These practices are particularly prevalent in low-wage and high-turnover industries such as construction, cleaning, food service, and others, settings in which vulnerable noncitizen workers are disproportionately employed. Obtaining employer compliance and restitution for workers in these instances often requires complex and protracted litigation and multi-year monitoring to vindicate and protect workers' rights and prevent further violations of the law.

Low-road employers engaging in the unlawful schemes such as those referenced above typically recruit and prey on noncitizen workers precisely because they know noncitizen workers' fear of deportation will keep them from cooperating with enforcement agencies. These unscrupulous employers often respond to any complaints from their workers with retaliation, including threats to contact ICE and report noncitizen workers and their families. Noncitizen workers' fears of deportation combined with threats of immigration-related retaliation from employers have been a serious obstacle to the efficacy of our agencies' enforcement efforts. Noncitizen workers often view contact with government authorities as risky exposure that could result in deportation through employer retaliation or government action. While noncitizen workers are often directly targeted, these unlawful practices suppress wages for both citizen and noncitizen workers and put responsible employers at a competitive disadvantage. In addition, employers underpaying noncitizens workers, paying them in cash and "under the table," and misclassifying them as independent contractors deprives states, localities, and the federal government of vital tax revenue and places additional strain on public safety net programs when workers are forced to rely on them due to employer malfeasance.

DHS's Deferred Action Program has done much to assist our agencies in combatting noncitizen workers' fears of deportation and in securing their cooperation as witnesses and sources of investigative information in our labor enforcement actions. However, the program's 2-year limited duration necessarily means that some workers' protections may or will expire during

the course of our investigations, and workers will once again be vulnerable when that happens. Workers are acutely aware of this risk and some workers remain hesitant to cooperate with our enforcement actions and to avail themselves of DHS's deferred action program because of this limited duration.

A longer deferred action period is necessary to account for the length of time that enforcement actions by our offices in cases involving noncitizen workers can last. As noted, many of the enforcement actions where noncitizen workers are victims of unlawful labor practices, involve complex "off the books" schemes and obstinate employers bent on avoiding liability for these violations. These employers are often also the most likely to prey upon noncitizen workers' fears of deportation with threats of, and/or actual, immigration-related retaliation. These investigations may start with administrative subpoenas but end with litigation. Investigations that end in litigation usually take years to resolve. Further, such enforcement actions may require monitoring following any settlement or judgment to ensure compliance and to guard against post-resolution retaliation against the cooperating workers.

Our offices can provide multiple examples of enforcement actions that have required more than two years to prosecute from the administrative investigation phase through litigation and resolution because of the nature of the violation and the putative employers' determination to violate the law, hide their misconduct, and avoid liability.

- The Illinois OAG started an investigation of Drive Construction Inc., ("Drive") in October 2020 in response to complaints that Drive was engaging in violations of the Illinois Prevailing Wage Act. During the investigation, the OAG discovered that Drive set up a web of shell companies controlled by Drive which were used to compensate Drive employees in cash in violation of Illinois law. In the early stages of this investigation, a key noncitizen witness was deported. Drive spread the word among its workers that it had played a role in this witness's deportation. Whether such statements were truthful or not, they had a chilling effect on potential witnesses. The Illinois Office of the Attorney General sued Drive in September 2022, and the litigation continues. This investigation will take well over 4 years from its inception to its ultimate conclusion. It is essential that noncitizen workers employed by entities like Drive feel they are protected, and that they are in fact protected for the full span of our enforcement actions. Even if the current deferred action program had been in place in 2020, the two-year protection period would not have been enough to properly protect workers in this investigation because of its duration.

- The Massachusetts OAG began a complex investigation in June 2022 into the wage and hour practices of a large cleaning company upon receipt of multiple complaints alleging that workers were not paid for all hours worked, not paid correct rates of pay, and were often required to pay fees to managers in order to obtain jobs and/or additional work hours. The company, which held numerous contracts with state and municipal agencies,

attempted to shield itself from liability by forming another company in the name of its Operation Manager's wife. Immigrant workers were "employed" by that company, which did not maintain any records of time worked or wage payments made. The investigation has taken several years to conduct and relies in great part on the testimony of the primarily-immigrant workforce in order to prove the underlying violations and calculate restitution owed for prevailing wage work, kickback payments, unpaid hours worked, and overtime. There are hundreds of workers involved, without whom the OAG could not have conducted the investigation.

- In May 2020, the Seattle Office of Labor Standards (OLS) opened an investigation into two construction companies and a number of individuals based on complaints from a group of workers. The initial investigation was prolonged by the companies' failure to provide all requested information to OLS (leading to OLS issuing a subpoena) and their concurrent litigation against one another. Ultimately, the investigation determined that two companies and two individuals acting as employers violated Seattle's Minimum Wage, Paid Sick and Safe Time, and Wage Theft Ordinances. On August 25, 2021, OLS issued an order requiring the employers to pay $2,055,204.10 to 53 affected workers and $170,786.20 to the City of Seattle. On September 3, 2021, the respondents filed to appeal the Director's Order before the Seattle Office of Hearing Examiner. The City Attorney's office continued to rely on worker participation throughout the trial. While the Hearing Examiner affirmed the findings of the OLS investigation on March 23, 2024, both companies petitioned for a writ of review in King County Superior Court and additional litigation remains pending. The investigation and ongoing litigation have relied heavily on the testimony and evidence provided by the employees of the two companies, most of whom are noncitizens, over the course of more than 4 years. Their continued presence in the United States facilitated OLS' contact with them throughout this time. It is essential to OLS' enforcement efforts that noncitizen workers feel that they can safely participate in enforcement actions and remain long enough to benefit from the results of these investigations.

- In June 2018, the New York OAG began an investigation of Envy Nails, a chain of more than twenty nail salons in the New York City area, after several workers complained of minimum wage and overtime violations and employee intimidation. The investigation revealed that the employer ordered many workers not to answer investigators' questions truthfully, and other workers were coerced to wrongfully list ownership interests on corporate forms. Several workers explained that they were extremely reluctant to speak with investigators about their conditions at the nail salons because of their fear of retaliation and deportation. Many workers contacted refused to speak with investigators at all, even after intensive investigative outreach. The New York OAG did submit a Statement of Interest on behalf of workers affected by this employer in May 2023, but

two years would not have been enough time to accomplish all that was required to successfully investigate, litigate against, and prosecute the owner. That resolution was not reached until August 2023, and the New York OAG continues to distribute restitution to the worker victims to this date.

- In November 2021, the County of Los Angeles Department of Consumer and Business Affairs' Office of Labor Equity (OLE) initiated an investigation into the franchise owner of two Wingstop restaurants located in the unincorporated areas of the County. This investigation originated from a complaint from a former employee who was a noncitizen. Suspecting that the owner was in violation of local minimum wage laws, the OLE conducted an exhaustive investigation, reviewing four years of payroll records for over three hundred employees, many of whom were also noncitizens. A wage enforcement order was issued which in turn resulted in the franchise owner negotiating a settlement agreement with the County for a total of $667,414.05 in back wages and fines. Had the investigation been extended by litigation, it would have easily lasted more than two years and could have potentially been compromised by the absence or withdrawal of key witnesses.

- The New Jersey Department of Labor and Workforce Development (NJDOL) has submitted 35 Statements of Interest in support of deferred action. In one case, NJDOL initiated an investigation into an employer in January 2020 pursuant to complaints from a group of 11 workers, many of whom are undocumented. The investigation revealed that the employer had misclassified workers, failed to pay overtime, failed to keep records, hindered the investigation, and failed to pay wages. The employer owes the workers back wages and owes penalties and fees to the state. NJDOL's efforts to enforce the judgment are ongoing as the employer continues to evade liability. Consequently, there is an active "stop-work" order against the employer and the employer has been placed on the Workplace Accountability in Labor List (the "WALL"), a public list of businesses that have been found to be in violation of state wage, benefit, and tax laws. NJDOL received information that the employer continues to do business in other states, which led to a referral to the Maryland Department of Labor. NJDOL has benefitted greatly from the testimonies and information provided by the workers throughout the course of its investigation. These workers continue to live in fear of deportation as the protection given to them via deferred action expires in the summer of 2025 and they have yet to be made whole. It is unlikely that NJDOL's efforts will conclude prior to the expiration of the worker's protections due to the employer's continued efforts to evade liability.

- In September 2022, the Minnesota OAG began an investigation into the wage and hour practices of a mega-dairy with multiple farms, thousands of dairy cows, and hundreds of people who had been employed over the previous 3 years. Almost all the farm's workers

are immigrants from Mexico and Nicaragua. Many workers lack English language skills and a basic understanding of our legal system – leaving them vulnerable to exploitation and intimidation. Workers have reported that the employer was shaving both regular and overtime hours from workers' paychecks, not paying wages owed at the beginning and end of workers' employment, and unlawfully deducting rent for onsite housing that fails to meet standards of habitability under Minnesota law. Exacerbating the problem, the employer did not fully maintain records of time worked or wages paid. As a result of these missing wage records, investigators have had to rely on worker interviews, taken in Spanish (some workers speak Spanish as a second language, with their first language being an indigenous language only spoken by a few thousand people in remote locations), then translated into English. The statements from workers have been key to the investigation and are essential to proving the underlying violations and to calculate restitution. The Minnesota Attorney General filed a lawsuit in January 2024, and the parties have only recently entered into discovery. Trial is currently scheduled for July 2025. It is critical that these individuals remain the U.S. to testify.

The examples referenced above illustrate that many of our enforcement actions, particularly those where noncitizen workers were a primary victim of the violations, can take several years to resolve. Under DHS's current deferred action program, workers are likely to lose the protection under the program at some point during the investigation. Noncitizen workers will know this up-front and may forgo cooperation with our agencies and the program's protections. Even those who choose to assist initially may eventually lose the program's protections and either withdraw their cooperation out of fear or deportation, or actually get deported. These consequences may result in our agencies losing key witnesses.

DHS's decision to clarify that the deferred action period may be extended for two years, while commendable, does not sufficiently resolve noncitizens workers' vulnerability and fear during the pendency of our investigations, litigation, and monitoring periods. Noncitizen workers may be understandably reluctant to put themselves at risk by cooperating with our investigations and serving as witnesses with only the *possibility* that their requests for further deferred action will be extended. In addition, the renewal process entails administrative and financial burdens for both the workers and the interested labor enforcement agencies. For example, the renewal process requires that workers request a new statement of interest and interested agencies quickly issue such statements. The request and issuance of these statement must be very carefully timed to lessen the period during which workers are vulnerable to deportation and loss of work authorization – and therefore to retaliation and lost wages - after expiration of their first deferred action period.

Further, noncitizen workers who typically earn low wages must also secure legal assistance - and find the funds to pay for this assistance not just once, but for a second time to avoid losing the protection of deferred action for a significant period. In our experience, securing funding and legal assistance to obtain deferred action in the first instance is already challenging.

There is a shortage of low-cost or *pro bono* legal assistance for noncitizen workers vis a vis the need. Processing fewer renewal applications would also reduce the administrative burden on DHS.

All of these burdens introduce doubt into the protections afforded by the deferred action program, create risk for noncitizen workers cooperating with our enforcement actions, and act as a barrier to our office securing that cooperation. For the reasons stated above, our offices request that DHS further its policy goal of supporting the work of labor enforcement agencies by extending the deferred action period to four years.

Respectfully submitted,

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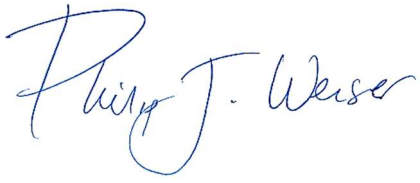

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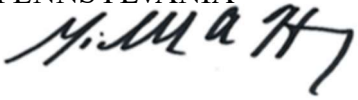

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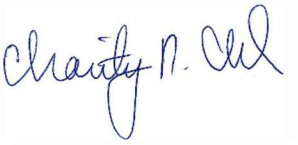

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