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July 15, 2022

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Washington, DC 20528

The Honorable Martin J. Walsh
Secretary of Labor
200 Constitution Ave NW
Washington, DC 20210

SUBJECT: Urgent need for Additional Protections for Immigrant Whistleblowers and Those Engaged in Labor Disputes

Dear Secretary Mayorkas and Secretary Walsh:

For many years the undersigned elected officials, unions, and labor and community-based organizations have advocated on behalf of U.S. and immigrant workers who were victims of labor law violations. Several worker organizations and labor unions have for some time urged you to adopt a policy that would strengthen the enforcement of labor and civil rights laws, help to ensure that immigration enforcement does not become a tool of unscrupulous employers, and increase the willingness of immigrant workers to assert their labor and civil rights.

This letter is to provide support for the effort to promptly develop and implement a more robust policy aimed at encouraging immigrant workers to report labor law violations and cooperate in their investigation and to extend temporary protection from arrest or removal to immigrant workers engaged in labor disputes. As discussed below, under such a policy successful enforcement of federal and state laws would become more cost-effective and efficient, many more unscrupulous employers and sweatshop owners would be identified and investigated, and U.S. workers would benefit in numerous ways. Law-abiding employers would obviously also benefit from increased reporting by the elimination of unfair competition by employers who seek an edge by breaking the law.

We do not here attempt to address the overall impact of migrant flows on U.S. labor markets. As the literature shows, huge differences across coefficients make it extremely difficult to generalize about the effect of immigration on labor market outcomes. In any event, the policy now advocated for does not involve introducing new workers into the country but rather how existing workers may be encouraged to participate in workplace enforcement programs.

On the other hand, labor economists across the board agree that the ability of employers to circumvent criminal and labor laws by exploiting undocumented workers creates thousands of

workspaces across the country that are unsafe and unsanitary for U.S. and immigrant workers.[1] And employers' persistent efforts to weaken unions—often exploiting the vulnerability of immigrant workers—leads to lower wages and deteriorating working conditions. Unsanitary conditions for workers can also cause harm to the general public, as has repeatedly occurred in meat-packing plants.

While the Biden administration does not have the constitutional or statutory authority to grant lawful resident status to undocumented workers who report labor law violations or cooperate in their investigation, it unquestionably does have the authority to encourage their participation in lawful concerted labor actions and cooperation with labor law enforcement agencies by providing them with temporary employment authorization and temporary Deferred Action Status ("DAS").

As discussed below, we are confident a workable, cost-effective, and lawful program can be adopted that is consistent with the Immigration and Nationality Act ("INA") and will withstand any legal challenge by states arguing they have 'standing' because of added costs allowing them to challenge the adopted policy that somehow violates the statutory terms of the INA. The policy that worker organizations have consistently advocated for would not increase state costs nor would it violate the INA.

The US Department of Labor ("DOL") spends hundreds of millions of dollars each year enforcing labor laws throughout the United States.[2] The states and localities also annually dedicate hundreds of millions of dollars to labor law enforcement.[3] Given the enormous federal, state, and local expenditures on labor law enforcement, it makes little sense to effectively sideline the best reporters of and witnesses to violations because they are easily exploited and afraid to cooperate based on their immigration status.

Below we briefly review several existing programs that encourage immigrant victims to cooperate with law enforcement and explain why a new and more robust policy for immigrant workers is essential.

Today, thousands of violent criminals are behind bars because undocumented immigrant victims are encouraged to report crimes and cooperate in their prosecution by being extended *prompt* work

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[1] *See, e.g.*, Economic Policy Institute, Daniel Acosta, Employers Increase Their Profits and Put Downward Pressure on Wages and Labor Standards by Exploiting Migrant Workers (August 27, 2019) available at https://www.epi.org/publication/labor-day-2019-immigration-policy/; Forbes, Tom Spiggle, Why Workplace Abuse Plagues Undocumented Workers (August 22, 2019) https://www.forbes.com/sites/tomspiggle/2019/08/22/why-workplace-abuse-plagues-undocumented-workers/?sh=42ca22d849b2

[2] *See* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.dol.gov/sites/dolgov/files/ETA/budget/pdfs/FY2021BIB.pdf

[3] *See, e.g.*, Georgia Department of Labor budget ($12.9M) https://gbpi.org/overview-2023-fiscal-year-budget-for-the-georgia-department-of-labor/#:~:text=The%20amended%20budget%20request%20brings,million%2C%20up%20from%20%2412.9%20million; Missouri Department of Labor and Industrial Relations operating budget ($102,340,702) https://labor.mo.gov/media/pdf/2021annualreport page 10; Texas ($4,262,118) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.twc.texas.gov/files/agency/fy-2022-operating-budget-twc.pdf; etc.

permits and Deferred Action Status ("DAS") pending adjudication of their visa petitions. Thousands of unscrupulous employers operating unsafe and unsanitary workplaces or violating wage and hour laws could be investigated and their illegal practices ended if the most obvious witnesses engaged in labor disputes were offered prompt temporary employment authorization and DAS.

In June 2021 the administration implemented a *bona fide* determination process for victims of crimes with the goal of promptly "providing eligible victims of qualifying crimes with employment authorization and deferred action ..."[4] By providing undocumented immigrants who report crimes or cooperate in their investigation with *prompt* work permits and DAS, the administration encourages immigrant victims of crimes to come forward and help put violent criminals behind bars.

However, in the employment context, workers may only qualify for employment authorization and DAS under the June 2021 policy in the limited circumstances in which (1) they suffered a serious and documented physical or psychological injury, and (2) the following conditions are met: (a) the qualifying criminal activity arises in the context of an employment relationship or work environment and there is a credible allegation of a violation of a law that DOL's Wage and Hour Division ("WHD") enforces related to the work environment or employment relationship; (b) it has detected violations of one of the following qualifying criminal activities: involuntary servitude, peonage, trafficking, obstruction of justice, witness tampering, extortion, fraud in foreign labor contracting, or forced labor; and (c) the petitioner has demonstrated that he or she has been, is being, or is likely to be helpful to law enforcement officials in any investigation or prosecution of the qualifying criminal activity.[5]

Because of these limitations, largely required by federal statutes, the administration's June 2021 policy only provides a very limited number of immigrant workers with encouragement to join lawful labor actions or report incidents when labor laws are violated.

While Congress mandated that USCIS provide employment authorization to all trafficking victim petitioners upon approval of their T-visa applications,[6] the administration nevertheless grants employment authorization and DAS to T visa applicants who file *prima face* approvable petitions.[7] Again, by *promptly* providing undocumented immigrants who report trafficking crimes with work permits and DAS, the DHS encourages immigrant victims of criminal trafficking to come forward and help put criminals behind bars.

DAS is also sometimes made available to workers who are material witnesses in criminal investigations or prosecutions. ICE gives law enforcement agencies' requests to exercise DAS

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[4] USCIS, U Nonimmigrant Status Bona Fide Determination Process FAQs (Sep. 23, 2021). https://www.uscis.gov/records/electronic-reading-room/u-nonimmigrant-status-bona-fide-determination-process-faqs.

[5] https://www.dol.gov/agencies/whd/immigration/u-t-visa

[6] 8 U.S.C. § 1101(i).

[7] USCIS policy states that "DHS is authorized to grant an EAD in connection with a *bona fide determination* [of T visa petitions] …Once an application is deemed bona fide ... the applicant can request employment authorization ... *See* 8 CFR 274a.12(c)(14)." 81 Fed. Reg. 92266, 92285 (Dec. 19, 2016) (emphasis added). A 2009 Memorandum from Acting USCIS Deputy Director Aytes confirms "[i]f a[ ] [T visa] application is *deemed bona fide*, USCIS will provide written confirmation to the applicant and use various means ... whether through continued presence or as a result of a bona fide determination, [to] grant[ ] employment authorization ..." *Id.* (Emphasis added).

consideration as part of its commitment to assist its law enforcement partners and in accordance with its obligation to cooperate with the Attorney General in protecting witnesses in the Witness Security Program.[8] ICE considers DAS requests based on a variety of factors and balances those interests against its core mission to remove persons unlawfully present in the United States. The factors generally considered include: the criminal history of the immigrant, if any; national security implications; the likelihood of removal; the presence of sympathetic factors favoring the case; and/or whether a law enforcement agency (LEA) desires the person's presence for an ongoing investigation or prosecution.[9]

ICE's HSI labor exploitation criminal and civil investigations are conducted in large part because these efforts "protect jobs for U.S. citizens," "eliminate [or at least reduce] unfair competitive advantages for companies that hire [or exploit] an illegal workforce," and "strengthen public safety …"[10]

On December 7, 2011, ICE and DOL entered into a Memorandum of Understanding ("MOU") to set forth the ways in which the Departments would "work together to ensure that their respective civil worksite enforcement activities do not conflict and to advance the mission of each Department."[11] The MOU recognized that "[e]ffective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status," and "[e]ffective enforcement of immigration law is essential to protect the employment rights of lawful U.S. workers, whether citizen or non-citizen …" *Id*.

While the policies discussed above all contribute to effective law enforcement, in the end they impact a relatively small number of workers and do little to encourage exploited workers to participate in concerted labor actions or come forward and report serious labor law violations. Nevertheless, with the programs discussed above in mind, we turn to a brief discussion about DAS and how a more robust program to enforce labor laws may be approached.

The Administration clearly may provide temporary protections to immigrant workers who are engaged in labor disputes or who have been helpful, are being helpful, or are likely to be helpful *to local, state or federal labor law enforcement agencies*, in the investigation, adjudication, or prosecution of labor law violations.

Regarding granting DAS to immigrant workers, this form of temporary relief is simply used to describe the decision-making authority of the DHS to allocate resources to focus on high priority cases, potentially deferring action on cases with a lower priority.[12]

There is no statutory definition of DAS, but federal regulations provide a description: DAS is "an act of administrative convenience to the government which gives some [detention and removal] cases

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[8] *See* 18 U.S.C. § 3521.
[9] Guidelines for Prosecutors re DA Status for Undocumented Victims, page 5, (available online at https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf).
[10] *See* https://www.ice.gov/investigations/labor-exploitations
[11] *See* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf
[12] Guidelines for Prosecutors re DA Status for Undocumented Victims, page 4, (available online at https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf).

lower priority.…"[13] Basically, DAS means the government has decided that it is not in its interest to arrest, charge, prosecute or remove an individual at that time for a specific, articulable reason.[14] It derives from the Executive's inherent authority to allocate resources and prioritize cases.[15] While the proposed policy may involve certain discretionary aspects, it is also true that the Executive Branch has frequently applied deferred action and other forms of discretionary relief to entire classes of otherwise removable immigrants. The Congressional Research Service has compiled a list of twenty-one such "administrative directives on blanket or categorical deferrals of deportation" issued between 1976 and 2011.[16]

An immigrant granted DAS may legally be granted employment authorization by USCIS.[17]

Clearly, a more robust and systematic program that permits immigrant workers to engage in lawful labor activities without fear of prompt arrest or removal and encourages them to report and cooperate in the investigation of labor law violations would be fully consistent with the INA and missions of the DOL and DHS. To place this in context, its worth recalling some of the missions of DOL's various components.

The primary goals of the United States Department of Labor are to "foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights."[18] The Department has made clear that the investigation and enforcement of labor law violations is vital in ensuring that all employees in the United States are afforded all protections available under the law, and furthermore, that they be able to report labor law violations without fear of retaliation, let alone arrest and possible deportation.

Within DOL are several agencies that would all function more efficiently and cost-effectively if immigrant workers suffering statutory or rule violations within the jurisdiction of these agencies' missions were encouraged to cooperate in uncovering violations and their investigation. Briefly, the Occupational Safety and Health Administration (OSHA) ensures safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance. Workers in the United States are protected from retaliation for reporting issues relating to employee safety, consumer product and food safety, environmental protection, fraud and financial issues, health insurance, and transportation services**.** Health and safety laws are

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[13] *See* 8 C.F.R. § 274a.12(c)(14)

[14] Guidelines for Prosecutors re DA Status for Undocumented Victims, page 4, (available online at https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf); *see also Barahona-Gomez v. Reno,* 236 F.3d 1115, 1119 n.3 (9th Cir. 2001) ("Deferred action refers to an exercise of administrative discretion by the [immigration agency] under which [it] takes no action to proceed against an apparently deportable alien based on a prescribed set of factors generally related to humanitarian grounds." [internal quotation marks omitted]).

[15] *Cf.* 6 U.S.C. § 202(5) (charging the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities")

[16] Andorra Bruno et al., Cong. Research Serv., Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 20-23 (July 13, 2012); *see also id.* at 9 ("The executive branch has provided blanket or categorical deferrals of deportation numerous times over the years.")

[17] 8 C.F.R. § 274a.12(c)(14); see also Guidelines for Prosecutors re DA Status for Undocumented Victims, page 6.

[18] https://www.dol.gov/general/aboutdol.

intended to protect all employees regardless of their immigration status**.** OSHA has delegated that role in some states to state agencies operating in accordance with federal regulations. Whether or not enforcement has been delegated to a state agency, OSHA's existing protections are of vital importance to the health and safety of all workers. Yet, several of these protections have little relevance to a worker who may easily be terminated, or reported to ICE for arrest and placement in removal proceedings in retaliation for filing an OSHA complaint or cooperating in its investigation.

Similarly, the Wage and Hour Division (WHD) mission is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. The agency enforces federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act. WHD also enforces the Migrant and Seasonal Agricultural Worker Protection Act and a number of other employment standards and worker protections as provided in several related statutes. It generally enforces these labor standards by protecting complainants from identification and retaliation. Yet again, retaliatory termination is an easy remedy for an employer when the worker is not authorized to be employed, as is reporting the worker's presence to ICE.[19]

The National Labor Relations Act (NLRA) protects the rights of workers to organize a union, elect a union, and collectively bargain with employers. It also allows workers to engage in "concerted activity" to improve working conditions for all employees even if there is no union yet. When an employer violates the NLRA by retaliating against workers for their union activity or by committing other unlawful labor practices, undocumented workers' remedies are limited because of their immigration status. Even if they were unlawfully fired, they will not be entitled to "backpay" (wages for the time they were unemployed because of the firing) nor will they get their jobs back because they do not have work authorization. The NLRB lacks jurisdiction over state and local public employees, as well as agricultural employees, which some states have addressed by creating their own agencies, like the Agricultural Labor Relations Board and Public Employee Relations Board in California.

By making temporary work permits and DAS promptly available to workers engaged in labor disputes or who report violations of the types of protective laws discussed above, the various *to* local, state and federal labor law enforcement agencies tasked with identifying, investigating, and adjudicating or prosecuting violations of these laws would significantly increase their effectiveness and increase the number of employers brought into compliance with federal, state, and local labor laws.

As you know, because of the strong bonds of family ties, and the widespread violence and poverty in their home countries, the risk of arrest and removal may discourage many immigrant workers from engaging in labor disputes or reporting labor law violations or assisting in their investigation.

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[19] Also relevant is Section 11(a) of the Fair Labor Standards Act ("FLSA"), which authorizes representatives of the Department of Labor to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any provision of the FLSA. Section 15(a)(3) makes it a violation for any person to "discharge or in any manner discriminate against" any employee because such employee has filed a complaint or instituted any proceedings under the FLSA, or has testified or is about to testify in any such proceedings. As with NLRB violations, however, employers may fire undocumented workers with virtual impunity, and there is no right to backpay or reinstatement.

As with U visas which require a predicate certification of cooperation with law enforcement to seek temporary protection from removal and employment authorization, and Special Immigrant Juvenile petitions which require predicate state court orders, the predicate letters or certifications issued by labor law enforcement agencies or their officers that an immigrant is involved in an an-going labor dispute should generally not be re-adjudicated by USCIS officers. The labor officials issuing such letters or executing certifications are in the best position to assess whether the immigrant is involved in an an-going labor dispute or is cooperating or has agreed to cooperate in an enforcement action.

Also to be considered is the *mechanism* used for workers to be granted employment authorization. On March 29, 2022, USCIS announced new agency-wide backlog reduction goals, expanding premium processing to additional form types, and working to improve timely access to employment authorization documents.[20] Nevertheless, at present the processing time for an application for employment authorization at the National Benefits Center and the California Service Center is 9 months.[21] At the Texas Service Center it is 8 months while at the Nebraska Service Center it is 4.5 months. Consideration should be given to processing EAD applications submitted by immigrant workers at one location that can adjudicate the applications within the shortest time reasonably possible.

Consideration may also be given to providing prompt DAS in appropriate cases and *permitting the approval notice of DAS to serve for a short time as a temporary employment authorization document* while workers apply for regular EADs.

EADs should be automatically extended at minimum while related proceedings are ongoing. Today, even affirmative asylum seekers routinely have their work permits expire while waiting for their EAD renewal applications (Form I-765) to be approved, with USCIS's current median processing time taking approximately 7.3 months. The backlog and delayed processing times have forced many EAD's to expire, leaving thousands of asylum seekers without jobs, health insurance, or driver licenses, or working in underground, exploitable jobs.

Finally, DHS and DOL should make clear to the public when their policy is issued that *whatever number of immigrant workers may be encouraged to report labor law violations or cooperate in their investigation, the number of U.S. workers helped by more efficient enforcement will be far greater*. If an employer hires tens or hundreds of U.S. workers, for each one immigrant worker granted DAS or a work permit for reporting a labor law violation, tens or hundreds of U.S. workers may in fact benefit.

The states may also increase their revenue streams through the collection of more fines, penalties, and tax payments. And unlike the claims of certain states that have challenged termination of the Title 42 and MPP exclusions,[22] in this case the policy does not involve potentially allowing

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[20] USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work

[21] *See* https://egov.uscis.gov/processing-times/

[22] *State of Louisiana v. Centers for Disease Control & Prevention*, Case No. 6.22-Cv-00885-Rrs-Cbw (USDC, Western District of Louisiana, Lafayette Division); *Texas v. Biden*, No. 21-67 (USDC N.D. Tex.). *See also Biden v. Texas*, No. 21-954 (Supreme Court, June 30, 2022) (the Government's rescission of MPP did not violate section 1225 of the INA, and the October 29 Memoranda constituted final agency action).

additional immigrants to enter the United States because the workers reporting labor law violations or cooperating in their investigation are all already here.

It cannot be argued, as it was in the *State of Louisiana v. Centers for Disease Control & Prevention* and *Texas v. Biden* cases, that implementation of a policy extending DAS and employment authorization to certain workers who assist labor law enforcement agencies may significantly raise the states' emergency medical costs. In this case the impacted immigrant workers are equally entitled to emergency medical care *before and after* they may be extended DAS and employment authorization.

Most states also do not extend non-emergency medical care to immigrants who only possess DAS and employment authorization. For example, Texas only extends non-emergency medical care to a set of described immigrants which include immigrants issued employment authorization but only if linked to having been granted refugee or asylum status or if deportation was "withheld" under INA ¶¶ 253(h) or 241(b)(3).[23] Similarly, in Texas, it does not appear that having DAS or an EAD would change the tuition a college student must pay.[24]

Finally, after agreeing upon and issuing a revised policy on worker protections, and for a reasonable time thereafter monitoring its impact, DOL and DHS should consider later promulgating a regulation incorporating the terms of the policy.

We do not wish to see the issuance of a policy in any way delayed as a result of any of the observations outlined above. If the issuance of a policy is currently delayed by operational or legal

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[23] *See* https://www.hhs.texas.gov/handbooks/medicaid-elderly-people-disabilities-handbook/d-8900-alien-status-eligibility-charts; 42 U.S.C. 1396b(v)(3) ("no payment may be made to a State under this section for medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law"). States have thus passed statutes and regulations prohibiting non-qualified aliens from receiving Medicaid services other than emergency services. *See, e.g.*, Arizona Revised Statutes Title 36 § 36-2903.03 ("a noncitizen who does not claim and provide verification of qualified alien status … may receive only emergency services pursuant to section 1903(v) of the Social Security Act."); Family MO HealthNet (MAGI) Manual § 0905.010.30.20 ("non-qualified aliens are ineligible in Missouri for the state's Medicaid healthcare coverage"); Louisiana Administrative Code Title 50 §2523(A)(c) ("[q]ualified non-citizens entering the United States on or after August 22, 1996 are not eligible for Medicaid coverage for five years after entry into the United States and … are eligible for emergency services only"); *see also* 8 U.S.C. § 1614 defining "qualified non-citizens."

[24] The Texas Dream Act of 2001 [H.B.104 Section 54.051(m)] extends in-state tuition and grants eligibility to long-term residents of the state who are not U.S. Citizens or Permanent Residents. Texas Dream Act students include both students who are documented (e.g., visa holders) and students who are undocumented; In contrast, however, ARIZ. REV. STAT. § 15-1803 provides that "a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student pursuant to section 15-1802 or entitled to classification as a county resident pursuant to section 15-1802.01"

[24] Memorandum, Alejandro N. Mayorkas, Sec'y of DHS, Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual, (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcementwhose te.pdf.

concerns that are addressed above, then we hope our suggestions may assist in bringing about a prompt resolution of those concerns.

At bottom, Secretary Mayorkas' October 12, 2021 Worksite Enforcement Memorandum, clearly recognizes that DHS's worksite enforcement efforts "can have a significant impact on the well-being of individuals and the fairness of the labor market."[25] Unscrupulous employers harm "each worker competing for a job," and "unfairly drive down their costs and disadvantage their business competitors who abide by the law." *Id*.

Based on many years of advocating for both U.S. and immigrant workers, as well as employers who endeavored to comply with all applicable labor laws, it is clear to us that the prompt issuance of a policy extending DAS and employment authorization to workers engaged in labor disputes or who report labor law violations or cooperate in their investigation will benefit both immigrant and U.S. workers, those employers who do not violate labor laws but must compete with those who do, the public at large, and the federal, state, and local agencies tasked with enforcing the nation's protective labor laws. We fully endorse the proposals put forward by other organizations before and after Secretary Mayorkas' October 12, 2021 Worksite Enforcement Memorandum was issued, and look forward to the prompt issuance of an efficient, cost-effective, and workable policy.

Respectfully,

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[25] Memorandum, Alejandro N. Mayorkas, Sec'y of DHS, Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual, (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcementwhose te.pdf.

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