



**UFW
FOUNDATION**

April 21, 2022

Dear Secretaries Mayorkas and Walsh,

The United Farm Workers and UFW Foundation write to urge you to engage in future rulemaking to strengthen H-2A worker protections. Specifically, we seek the following protections: 1) stronger and more effective recruitment and anti-trafficking protections, 2) joint employer liability of farm labor contractors and the fixed site employers who benefit from the labor of H-2A workers, and 3) freedom of association and collective bargaining agreements at H-2A workplaces.

Farmworkers are essential to our nation's food security. Despite their important work, farmworkers remain among the lowest-paid workers in the nation and labor under difficult and dangerous working conditions. Farmworkers face entrenched racial discrimination that impacts their labor rights, leaving them without protections such as federal collective bargaining rights and overtime pay, among others. The working conditions and discrimination in agriculture, along with the broken immigration system, have led to a situation in which a large majority of farmworkers are immigrants—roughly one-half are undocumented immigrants and a growing number have temporary, nonimmigrant H-2A status. The lack of immigration status and citizenship for so many farmworkers creates a workforce highly vulnerable to exploitation. While a number of reforms and enforcement strategies are needed to adequately protect domestic farmworkers, this letter focuses on urgent priority policy changes needed in the H-2A program.

As the Operation Blooming Onion investigation and indictment have shown, the H-2A program presents tremendous dangers for farmworkers. The allegations in the Blooming Onion case are horrific, with multiple deaths, rape, and forced labor among the many criminal charges. The Blooming Onion case is illustrative not just of the inherent flaws of the H-2A program, but also of the government's inability to adequately enforce the few H-2A protections that do exist. While the Blooming Onion indictment referenced at least 100 victims, the Defendants petitioned for over 70,000 workers over multiple years (over 95% of H-2A petitions are approved) and no government agency appears to know how many additional potential victims there are. Unfortunately, Operation Blooming Onion is not a stand-alone case; we and other advocates have seen countless other violations of workers' rights resulting from the vulnerability of the workforce and the lack of accountability in the H-2A program. A federally administered program with multiple deaths, rapes, trafficking, criminal indictments and rampant workplace abuses must not be allowed to continue as is. The government has an obligation to make meaningful reforms.

DHS and DOL can address many of these problems through DHS's broad discretion with respect to the H-2A visa program, which permits DHS to impose conditions on the admission of H-2A visa workers, and DOL's authority over the labor certifications that

prospective H-2A employers are required to obtain. The substantial authority delegated to the executive branch under the H-2A statutory framework is reflected in the plain language of the governing statutes and has been recognized in multiple judicial decisions. The Immigration and Nationality Act (INA) confers upon the “Attorney General” (now DHS) significant discretion in imposing conditions on nonimmigrant visas via regulations.¹ Section 218 of the INA, in turn, prohibits the DOL from certifying applications for H-2A workers unless DOL has first determined that there is no adverse impact on the wages and working conditions of domestic workers in corresponding employment and that there are not an adequate number of able, willing, qualified and available U.S. workers.² This statutory language mandates that DHS and DOL take action to put stronger and more effective protections in place in the H-2A program.

INA section 218 gives DOL considerable discretion in promulgating rules that aim to protect the wages and working conditions of domestic workers.³ The D.C. Circuit has concluded that the statute “explicitly envisions implementing regulations that will clarify the meaning and application of its provisions.”⁴ DOL’s authority under INA section 218 includes protecting domestic workers from adverse effects stemming from the employment of foreign workers. As the D.C. Circuit has stated:

*The clear intent of this provision is to protect American workers from the deleterious effects the employment of foreign labor might have on domestic wages and working conditions. In particular, Congress was concerned about (1) the American workers who would otherwise perform the labor that might be given to foreign workers, and (2) American workers in similar employment whose wages and working conditions could be adversely affected by the employment of foreign laborers.*⁵

A significant flaw in the H-2A program is that H-2A workers are completely dependent on their employers for their ability to work and remain in the United States, resulting in extreme vulnerability of H-2A workers. This unequal power and control in the H-2A employer/employee relationship harms H-2A workers, but also results in discrimination against U.S. workers and harm to their wages and working conditions.

H-2A workers often “work scared”—and to the limit of their endurance—in order to maintain their jobs. H-2A workers typically come from poorer countries where there are fewer employment opportunities: this poverty and lack of job opportunities in their countries of origin results in workers accepting job opportunities that domestic workers might not accept, given the inherent risk of labor violations, long hours and other

¹ 8 U.S.C. § 1184(c)(1). “The question of importing any alien as a nonimmigrant under [specific subparts, including H-2A] in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe... the provisions of section 1188 of this title shall apply to the question of importing any alien as a nonimmigrant under section 1101(a)(15)(H)(ii)(a) of this title.”

² 8 USC 1188 (a)(1).

³ *Id.*

⁴ See *Mendoza v. Perez*, 754 F.3d 1002, 1021-22 (D.C. Cir. 2014).

⁵ *Id.* at 1017.

challenging conditions. Moreover, H-2A workers are almost always here without their families and have no outside responsibilities that may take them away from working whenever the employer desires—their sole purpose in the U.S. is to work. The result—an intimidated and fearful workforce facing increased expectations of hours, work pace, and productivity, along with frequent violations of their rights—harms the working conditions of U.S. workers who work alongside H-2A workers or are competing for jobs. And because the H-2A program often becomes the predominant source of labor in many crops or geographic localities, the wages and working conditions of H-2A workers can impact the broader industry, not just H-2A workplaces.

Not only do these abuses and changes harm farmworkers, they also harm law-abiding employers who must compete against labor law violators. In addition, such abuses damage the integrity of the U.S. government’s labor protections and immigration system.

International recruitment violations, lack of employer accountability, and captive workers are key problems that the government must address in order to protect domestic farmworkers. **DOL and DHS must ensure the following protections are implemented through future rulemaking:**

International Recruitment Protections

Recommendations:

- **Create a registration and licensing process with a bond for recruiters:** The current recruitment marketplace lacks oversight, structure and protections. Even where countries of origin may have requirements for recruiter registries, they typically have no meaningful mechanisms to effectively enforce the requirements and they only protect a portion of H-2A workers. The DOL should create a registration process for any individuals or businesses, and any of their subcontractors, that are engaged in the process of recruiting workers abroad for employment in the H-2A program. The licensing requirement should include certifications that recruiters are complying with laws in their countries of origin as well as U.S. laws against discrimination, fraud, recruitment fees, and other applicable laws.
This registration process should include a bond to help ensure that only bona fide recruiters may participate in recruitment for the H-2A program. The bond would also provide a means of reimbursing workers for any violations they may face.
- **Ensure that employers use only responsible recruiters.**
 - **Require that employers only use registered and licensed recruiters:** Where H-2A employers choose to use recruiters, they must be required to use only the services of registered and licensed recruiters. Consequences for failure to use registered and licensed recruiters should include strict liability for any recruitment violations, along with other penalties deemed appropriate by DOL.
 - **Employers must be jointly liable along with their recruiters for the actions of their recruiters during the recruitment process.** Only until employers face financial responsibility will they be incentivized to verify the practices of their recruiters.

- **Create a publicly accessible database of registered and licensed recruiters.** In order to ensure the ability of potential workers, employers and advocates to verify whether a recruiter is registered and licensed, and that they are recruiting for the job opportunities they advertise, the registry must be publicly available and accessible to potential workers in their countries of origin. DOL should explore opportunities to use the seasonaljobs.dol.gov webpage to include both job opportunities and recruiters, and should work to make the database accessible to workers in rural regions with limited access to internet and computers, in the languages of migrant communities.
- **Remove the disincentives for workers to report recruitment fees.** Currently, many workers are reluctant to report recruitment fees because they fear they may, and often do, lose their visa and opportunity to work in the United States. This policy should be changed so that workers are incentivized to report labor violations. Workers who come forward to disclose illegal recruitment fees (and other violations) should be ensured a work opportunity at least equal in income potential and length of time as the original offer, through mechanisms such as parole, deferred action, and other forms of relief. Workers also should be made whole for any fees, regardless of whether or not the employer includes the required recruitment fee prohibition in contract clauses.

Explanation: Reports and worker stories have long exposed the many abuses that take place during international recruitment, including fraud, illegal recruitment fees, discrimination and other abuses.⁶ Abuses that occur during recruitment make workers even more vulnerable to exploitation, including human trafficking and slavery.⁷ Polaris’s recent reports reveal alarming statistics about trafficking in the H-2A program, with one report noting that the visa category with the most reported trafficking cases workers was the H-2A program.⁸

H-2A workers who arrive indebted are reluctant to enforce their workplace rights as they are desperate for work to repay their debt, and also understand that they or their families may face other repercussions if they do not successfully complete their contract. U.S.

⁶ See, e.g., Polaris, “Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic,” June 23, 2021, available at chrome-extension://efaidnbnmnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fpolarisproject.org%2Fwp-content%2Fuploads%2F2021%2F06%2FPolaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf&clen=10855098&chunk=true; Centro de los Derechos del Migrante, “Ripe for reform: Abuse of Agricultural Workers in the H-2A Visa Program,” 2020, available at <chrome-extension://efaidnbnmnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcdmigrante.org%2Fwp-content%2Fuploads%2F2020%2F04%2FRipe-for-Reform.pdf&chunk=true>

⁷ USA Today, “‘Beyond troubling’: Current, former government officials tied to human trafficking probe in Georgia,” Maria Pérez, Drew Favakeh and Abraham Kenmore, April 19, 2022. Polaris, “Labor Trafficking and H-2A Visas: Employer Essentials,” 2021, available at <chrome-extension://efaidnbnmnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fpolarisproject.org%2Fwp-content%2Fuploads%2F2021%2F10%2Fessential-Guide-for-H2A-Visa-Sponsors.pdf&clen=3860495&chunk=true> (last visited 3/31/22)

⁸ Polaris, “Human Trafficking on Temporary Work Visas: A Data Analysis 2015-2017,” June 2018, p. 20, available at <https://polarisproject.org/human-trafficking-on-temporary-work-visas-a-data-analysis-2015-2017/>.

workers know they can be displaced by an essentially unlimited supply of H-2A workers who are reluctant to assert their rights to enforce their protections or seek better conditions. Unscrupulous employers can take advantage of worker fear and dependency by violating legal requirements and offering only the bare minimum protections, turning away domestic workers who may seek better protections or assert their rights. As a result, the wages, working conditions and job opportunities of U.S. workers are adversely impacted.

In addition, H-2A employers engage in blatant gender, age, and national origin discrimination—typically hand-picking their ideal worker demographic—as demonstrated by the fact that H-2A workers are predominantly young, Latino men.⁹ As a result, U.S. workers that don't meet those characteristics may face discrimination.¹⁰

Existing DOL and DHS regulations do not protect workers from recruitment abuses, and have even had the opposite effect. Workers experience a disincentive to report illegal recruitment fees as they fear, often rightly so, they may lose their visa and opportunity to work in the United States. The current structure of the required contract clause prohibiting recruitment fees often ends up protecting employers from liability for recruitment abuses and can also prevent workers from recouping recruitment fees that were charged.

Joint Employer Liability with H-2A Labor Contractors

Recommendation: DOL should prohibit farm labor contractor from accessing the H-2A program; or, at a minimum, should limit H-2ALC applications to those submitted with the fixed-site employers as joint employers. The H-2A program is intended to provide employers who anticipate a labor shortage the ability to petition for workers from abroad. FLCs themselves do not have a labor need, they are merely an intermediary supplying workers to growers and other fixed site businesses.¹¹ As such, FLCs should not have access to the H-2A program. If DOL declines to prohibit FLCs from accessing the H-2A program, it should, at a minimum, only allow farm labor contractors to access the H-2A program if they submit an application with an underlying agricultural operator as joint employers. This shared responsibility would legitimize the FLC participation in the H-2A program and ensure growers are incentivized to hire law-abiding labor contractors and maintain responsibility for the treatment of workers in their workplaces. Moreover, if labor violations occur, both the growers/fixed-site employer and the labor contractor would be jointly liable to make workers whole and pay any penalties.

⁹ See Migrant Women's USMCA Complaint, filed 3/23/2021 and amended versions, available at <https://cdmigrante.org/migrant-worker-women-usmca/> and chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fcdmigrante.org%2Fwp-content%2Fuploads%2F2021%2F03%2FUSMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf&chunk=true

¹⁰ Jordan, Miriam, "Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More," New York Times, Nov. 12, 2021.

¹¹ See, e.g., *In re Irmael Labor Company*, 2022-TLC-00098 (BALCA Apr. 8, 2022)

Explanation: The H-2A temporary foreign agricultural worker program has expanded rapidly during the past several years and continued growth is expected, particularly if immigration reform does not occur in the near future. Much of the recent growth has been driven by the increased use of the H-2A program by H-2A Labor Contractors. According to research by USDA, the share of H-2A employers who were farm labor contractors (FLCs) increased tremendously from 2010-2019—from 15 to 42 percent.¹² As a result of this rapid growth, in some industries FLCs overtook individual employers in terms of the number of labor certifications approved by DOL. For example, in the vegetable and melon sector, FLCs had only 17% of approved labor certifications in 2011, but by 2016, FLC certifications had surpassed certifications obtained by individual employers, and by 2018 had reached 57%.¹³

The rapid growth of farm labor contractors in the H-2A program is very troubling. Labor contractors are often poorly capitalized, small entities or individuals that have little bargaining power with the growers to whom they provide labor, often bidding down their fees for job opportunities.¹⁴ If workers seek relief for any workplace violations, the farm labor contractor is often unable to afford the required remedies given their thin margins. Many of the growers that hire FLCs deny that they hire farmworkers and often use the FLCs as a shield for any potential immigration or labor violations. A recent study by the Economic Policy Institute includes data supporting the high incidence of abuses associated with farm labor contractors. The 2020 study found that while labor contractors constituted only 14% of agricultural employment, they represented 24% of all wage violations investigated by the Wage and Hour Division in the agricultural sector.¹⁵

The recent Blooming Onion H-2A investigation and criminal indictment in Georgia highlights the challenges associated with farm labor contractors. Despite the fact that this case involves egregious violations; at least 100 victims, with many more likely given that the Defendants petitioned for over 70,000 H-2A positions over multiple years; and 24 Defendants, only two of those Defendants were fixed-site business owners, the rest were farm labor contractors or recruiters.¹⁶ The growers who benefitted from the labor of these trafficked workers were not held responsible for their treatment.

While DOL has included some additional requirements for farm labor contractors in the H-2A program (referred to as H-2ALCs), the requirements are inadequate to protect farmworkers, both domestic and H-2A. As discussed above, the INA requires the Department of Labor to ensure that U.S. workers' wages and working conditions are not

¹² Castillo, Marcelo, Skyler Simnitt, Gregory Astill, and Travis Minor. August 2021. "Examining the Growth in Seasonal Agricultural H-2A Labor," EIB-226, U.S. Department of Agriculture, Economic Research Service. p. 2.

¹³ Id at pp 10-11.

¹⁴ See Maria Perez, What led to a migrant worker's death from heatstroke?, USA TODAY (Dec. 17, 2021), <https://www.usatoday.com/in-depth/news/investigations/2021/12/17/migrant-guest-workers-risks-farm-labor-contractors/8808652002>.

¹⁵ Daniel Costa et al., Federal labor standards enforcement in agriculture, ECONOMIC POLICY INSTITUTE (Dec. 15, 2020), <https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/>.

¹⁶ Indictment, U.S. v Patricio et al., CR 521-0009, S.D. Ga, 2021; see also "In 'modern-day slavery' bust, arrests largely spared farmers. Here's why." Lautaro Grinspan, Atlanta Journal and Constitution, 12/20/21.

adversely affected by the hiring of temporary foreign workers.¹⁷ When there are a disproportionate number of violations associated with a type of employer and workers are often unable to obtain relief for those violations, the result is harmful impacts on the wages and working conditions in those specific workplaces as well as in the region and occupation/crop generally. This impact is exacerbated by the inherent flaws of the H-2A program, as discussed above. Given the INA mandate to prevent adverse effects on the wages and working conditions of U.S. workers and the intent of the H-2A program to provide relief for anticipated labor shortages, DOL must strengthen protections for workers and ensure greater accountability in the H-2A program by prohibiting farm labor contractors from petitioning for H-2A workers; or, in the alternative, ensuring that FLCs can only access the H-2A program if they are submitting an application as joint employers with the fixed site employer.

In addition to addressing the INA's statutory mandate to protect domestic workers, this reform would bring the regulations in line with the treatment of labor contractors under the H-2B program.¹⁸ Finally, this regulatory revision also would promote integrity in the program, which is important not only for affected farmworkers but also for law-abiding employers.

Collective Bargaining Agreements for H-2A Employers

Recommendation: DOL should require that all employer H-2A applications for labor certification demonstrate that the employer has a Collective Bargaining Agreement (CBA) with a bona fide union. A CBA with a bona fide labor union will provide H-2A workers and U.S. workers in corresponding employment the ability to assert their rights without fear of retaliation. Worker-led accountability mechanisms can detect and resolve violations that would otherwise evade government regulators. A CBA and union representation can ensure worker education about their rights, a trusted representative with whom to discuss potential violations or concerns, and a protected voice in the workplace. Government enforcement is no substitute for worker-led accountability mechanisms. H-2A and domestic workers could also be guaranteed a right of recall, eliminating the need to pay recruitment fees for the coveted opportunity to work in the United States. In North Carolina, for example, FLOC has successfully represented a number of H-2A workers in a CBA with the North Carolina Growers Association and has tackled recruitment abuses and workplace violations, with the result that their H-2A members can now rely on FLOC to assert their rights and guarantee their ability to return in future years, if desired. With a CBA, many workers would be able to remedy violations through the agreement's grievance mechanism. Employers would benefit by avoiding litigation given the ability of workers to grieve their complaints and by enjoying the security of a stable workforce.

Explanation: As noted above, the H-2A program suffers from extensive and systemic abuses. One of the key flaws of the H-2A program is the lack of worker voice due to employer control over H-2A workers. When workers depend on their employer for their ability to work and remain in the U.S., the result is that workers are extremely reluctant to

¹⁷ 8 USC 1188(a)(1)(B).

¹⁸ 20 CFR 655.19(a).

assert their rights or seek improvements in wages and working conditions. The resulting potential for employers to abuse and exploit these workers leads to adverse effects on the wages and working conditions of the U.S. agricultural workforce, two important interests that the H-2A program is supposed to protect.

The executive branch has authority to attach conditions to the H-2A visa program that would further the program's goals. In particular, the executive branch has authority to require employers to agree to collective bargaining agreements (CBA) as a condition of their participation in the H-2A program. As discussed above, Congress has given DOL and DHS broad discretion in ensuring adequate protections in the H-2A program to protect domestic farmworkers.

Moreover, the U.S. Government's use of project labor agreements in federal construction projects provides an important example for the implementation of a CBA requirement for H-2A employers. The Biden administration has strongly supported project labor agreements, including a new policy imposing a Project Labor Agreement requirement on all contractors involved in large-scale federal construction projects.¹⁹ Similarly, a CBA requirement for H-2A employers would advance important objectives for worker rights.

The requirement for a CBA for participating H-2A employers also helps bring the H-2A laws into compliance with the United States–Mexico–Canada Agreement (USMCA). Under the USMCA Article 23.3: Labor Rights 1, each country agrees to include in its laws certain rights from the ILO Declaration on Rights at Work. One such right is the “freedom of association and the effective recognition of the right to collective bargaining.”²⁰ Currently, U.S. law violates this requirement through its racist exclusion of farm workers from collective bargaining rights. By implementing regulations requiring CBAs for employers to participate in the H-2A program, DOL and DHS would be satisfying the ILO requirement of the right to collective bargaining.

Conclusion:

We call on DHS and DOL promptly to engage in future rulemaking to address the urgent crisis in the H-2A program. We look forward to discussing these recommendations with you.

Sincerely,

United Farm Workers
UFW Foundation

¹⁹ Executive Order 14063, February 2022 (“in awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, agencies shall require every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.”)

²⁰ United States–Mexico–Canada Agreement, Article 23.3: Labor Rights 1(a), Office of the U.S. Trade Representative, available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fustr.gov%2Fsites%2Fdefault%2Ffiles%2Ffiles%2Fagreements%2FFTA%2FUSMCA%2Ftext%2F23-Labor.pdf&clen=113652&chunk=true](https://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fustr.gov%2Fsites%2Fdefault%2Ffiles%2Ffiles%2Fagreements%2FFTA%2FUSMCA%2Ftext%2F23-Labor.pdf&clen=113652&chunk=true) (2020).



May 26, 2022

Giev Kashkooli
Vice President
United Farm Workers of America
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P.O. Box 62
Keene, CA 93531

Dear Mr. Kashkooli:

Thank you for your April 21, 2022, letter to the Department of Homeland Security (DHS). Secretary Mayorkas asked that I respond on his behalf.

In your letter, you urge DHS to engage in future rulemaking to strengthen H-2A worker protections. You also emphasize the importance of H-2A farmworkers and their essential role in ensuring our nation's food security, as well as their vulnerability to exploitation as shown by the recent Operation Blooming Onion investigation and indictment. I was grateful to have had the opportunity to meet with President Teresa Romero in person on March 28 to discuss our shared concern over the tragic events, including the deaths of two H-2A workers, that led to the recent federal indictment. I remain committed to ensuring that no H-2A worker is subjected to similar or any forms of abuse. Your letter also provided specific suggestions for strengthening protections for H-2A workers, some of which I did not have an opportunity to discuss with President Romero. DHS is actively considering potential reforms in the H-2A program. As we continue to explore USCIS' role in these efforts, I would welcome the opportunity to discuss your recommendations in greater detail.

Some of our efforts to date to strengthen protections for noncitizen workers asserting workplace claims and for cases in which a workplace investigation or proceeding is ongoing include:

- **U Visa BFD:** Implementation of the Bona Fide Determination (BFD) process in the U visa program on June 14, 2021, which provides access to employment authorization and deferred action to noncitizen victims of crime with pending, bona fide U visa petitions who merit a favorable exercise of discretion. This process further stabilizes vulnerable noncitizen victims who are cooperating with law enforcement in the detection, investigation, or prosecution of qualifying crimes such as sexual assault and trafficking.
- **T Visa Law Enforcement Agency Resource Guide:** Publishing the first-ever standalone T visa resource guide for law enforcement agencies and comprehensive policy manual guidance for adjudicating T visa applications for victims of human trafficking.

- **U Visa Law Enforcement Agency Resource Guide:** Publishing an updated U visa law enforcement resource guide, which adopted stakeholder feedback to incorporate a more victim-centered approach when working with noncitizen victims.
- **Expanding Expedite Criteria for USCIS Benefits:** USCIS updated the criteria for an Expedite Request to include consideration of requests for expedited processing made by federal, state, and local labor and employment agencies.

I want to assure you that the Department is dedicated to ensuring the integrity of the immigration process and works tirelessly to deter and detect fraud and abuse in all immigration programs. Thank you for your input, recommendations, and sharing the lived experiences of H-2A workers you represent. I look forward to speaking soon.

Sincerely,

A handwritten signature in black ink, appearing to read "Ur M. Jaddou", with a long horizontal flourish extending to the right.

Ur M. Jaddou
Director