

H-2B WORKFORCE COALITION

PROMOTING A STABLE AND RELIABLE SEASONAL WORKFORCE

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Executive Committee:

American Horse Council

American Nursery &
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American Rental Association

American Trucking
Associations

Asian American Hotel Owners
Association

Associated Builders and
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Associated General
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Essential Worker
Immigration Coalition

Federation of Employers and
Workers of America

Interlocking Concrete
Pavement Institute

International Association of
Amusement Parks and
Attractions

International Franchise
Association

National Association of
Realtors

National Club Association

National Federation of
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National Fisheries Institute

National Roofing Contractors
Association

National Ski Areas Association

National Thoroughbred Racing
Association

Outdoor Amusement Business
Association

Professional Landcare
Network

Tree Care Industry
Association

U.S. Apple Association

U.S. Chamber of Commerce

July 7, 2008

Via Electronic Mail

Thomas Dowd
Administrator
Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue, N.W. Room N-5641
Washington DC 20210

RE: RIN 1205-AB54 – Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes

Dear Mr. Dowd:

On behalf of the H-2B Workforce Coalition (“the coalition”) we submit the following comments on the Proposed Rule (“rule”) cited above. The coalition is a consortium of various industry associations throughout the United States that have joined together to ensure American small and seasonal employers have access to legal short-term temporary workers during peak business periods. The H-2B program provides great benefit to employers who cannot find American workers to fill jobs during peak seasons and to H-2B workers who welcome the seasonal work in the U.S. as an opportunity to provide a higher quality of living for themselves and their loved ones in their native countries.

We commend DOL for its attempts to streamline the H-2B program, but during this key time of labor shortages because of the outdated cap on the H-2B program, the Administration’s main focus should be working with Congress to obtain a returning worker exemption from the H-2B cap. We urge DOL to keep the current H-2B program as is until long-term legislative changes can be made. While we welcome efforts to make the H-2B program more usable and more efficient for employers, we believe that this rule will provide few if any benefits in that regard, while imposing substantial burdens on users of the new system. The coalition is troubled by this rule and urges the Department of Labor (DOL) to reconsider some aspects of the rule.

Positive Aspects of the Rule

As noted above, we welcome efforts to streamline the H-2B program and are eager to work together with DOL to create a better program. While our many concerns over this proposed rule are expressed in the pages that follow, we would like to note some aspects of the rule that we are pleased with. First, we support the move to an attestation-based system. This will be simpler for employers to use and will streamline processing. However, we emphasize that DOL must educate employers on their obligations so the meaning of the attestations is clear to employers filing applications for labor certification.

We also support the proposed lengthening of the maximum period of time that can be considered “temporary” to three years. This is a realistic acknowledgement of employers’ needs and will be a useful change to the H-2B program. DOL should consider expanding this new meaning of “temporary” beyond the “one-time need” category into some of the other types of temporary need.

We also support the creation of an appeals system for denied labor certifications. This will allow H-2B employers a much-needed opportunity to correct errors by DOL certifying officers. However, as noted below, we believe that the opportunity to provide briefs and supplement the record should be allowed.

There are also several items that we believe would merit inclusion in a proposed rule such as this that would improve the H-2B program. For example, we believe that the proposed rule should increase the number of days prior to the date of need an employer can apply for an H-2B. This would serve the purposes of this rule by providing employers added flexibility.

Finally, while we realize that this is not a regulatory matter, we would be remiss if we did not point out that the H-2B cap of 66,000 is very low, and simply not reflective of workforce needs. H-2B employers urgently need this issue to be remedied. In that light, we would like to suggest that after the annual cap has been met that DOL consider “replacement” labor certifications for H-2B workers who are issued a visa but either do not report for work or leave before the validity period of the labor certification has expired. This would allow employers to fully utilize the H-2B “slot” that they have invested in when a worker leaves while still respecting the annual cap.

In addition to the positive features of this proposed rule and our suggestions for additional improvements, we respectfully submit our concerns with the rule.

The Rule Will Not Be Effective

The primary stated benefit of the rule seems to be that by eliminating the State Workforce Agency (SWA) from the labor certification process and requiring labor certification applications to be filed directly with the Chicago National Processing Center (NPC), local and regional variations in processing times caused by surges of filings in a particular industry and area will be eliminated. However, simply moving filing from the SWA to a national entity does not eliminate the root cause of the delay and unpredictability of processing times; it simply subjects employers nationwide to those delays. The rule states that filings will be considered on a first-in, first-out basis, so an employer in one part of the country who files behind a surge in another part of the country will still be affected by the delay. In other words, average processing times across the country may become more consistent as a result of the rule but they will not improve overall. The rule simply shuffles the delay from the SWA to the NPC.

Improvements in Processing Time Predicted by the Rule are Illusory

The rule cites that statistic that the average processing time for the SWA portion of a labor certification is 64 days as compared to 31 days at the NPC, implying that processing time will improve by eliminating the SWA portion of the process. But again, the SWA portion of the process is not truly eliminated; it is simply shifted to the NPC. As the rule itself points out, the substantive methods of determining the required wage for an H-2B certification are not changed by this rule. The workload is simply shifted to the NPC. Also, this projection does not take into account the fact that under the current process the SWA does the majority of the work involved in the certification and the NPC bears a lesser portion of the work involved in the certification process. Finally, any promised improvements in processing under the new rule must take into account that under the new rule the application for labor certification cannot be filed with DOL until after recruitment is complete. Under the current process, the recruitment period is considered part of the labor certification processing time. Moreover, the SWA will continue to be involved even under the proposed process as it must be used to place a job order.

DOL Needs to Establish a Hotline for Employers to Contact if They Have Problems with the Labor Certification Process

While admittedly there are often delays obtaining a labor certification from the SWAs, often, because it is a local entity, employers are able to directly call the SWA if they have a problem, and can talk to a person to try to resolve any issue. If the labor certification process is moved from the SWAs to DOL, it is extremely important that employers have a way to get answers from DOL if they have a problem. It is not acceptable for phone calls to just be ignored or dismissed. Setting up a designated hotline with staff to deal with this is key if DOL is serious about taking over the entire labor certification process. Employers need a reliable way to reach DOL officials when they have legitimate problems.

The Requirement to Notify DHS of Early Termination of a Worker or the Departure of a Worker is Burdensome, Too Short of a Timeframe, and May Create Liability for the Employer

The proposed rule requires that H-2B employers attest that they will notify the Department of Homeland Security (DHS) within 48 hours when a worker is terminated prior to the end of the employment period or when an employee “absconds” during that period. This requirement is problematic for several reasons. This requirement is especially ill-suited for H-2B employers and is likely to impose an administrative burden on them. Also, where an employer has multiple worksites, it may not become aware of the departure of an employee within the required 48 hours, thus opening the employer up to liability. A timeframe of 30 days would be much more reasonable. DHS should implement an easy phone and Internet-based reporting system so that employers can quickly notify them when there is a change.

Also, the rule does not require notification when the worker has another legal basis to remain in the U.S., such as an extension or change of status. The employer is unlikely to know this fact if the worker has been hired by another employer under the H-2B program, and, moreover, status determinations are a complex legal issue. Thus the reporting requirement forces employers to make this determination and potentially opens them up to legal liability from the departed employee if they incorrectly report the employee to DHS. If a status violation occurs, it does so by operation of law, and the immigration consequences for that individual attach at the time the violation occurs. DHS will still be able to take legal action against the employee when it encounters him or her. Given this fact, and the fact that DHS is unlikely to use its limited resources to pursue individuals who are the subject of these reports, the reporting requirement will accomplish little while imposing significant burdens on employers. If this requirement must be kept in the rule, DOL should allow additional time for the employer to report the required information. DOL should also consider not starting the notification period until the employer actually learns that the employee has departed. Also, DOL should clarify in the regulation that an employer’s reporting of the fact that an employee has left is not a status determination by the employer, and that the employer is not responsible for any immigration related consequences that may result for the worker as a result of the employer’s compliance with the reporting obligation.

Several of DOL’s Proposals Are Ultra Vires

Section 101(a)(15)(H)(ii)(b) defines an H-2B worker as an alien “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country...” Nowhere does this definition require that DOL, as opposed to another agency, make the determination that U.S. workers are unavailable. It is U.S. Citizenship and Immigration Services (USCIS) that has the authority to make H-2B determinations, and it shares that authority by consulting with DOL. Section 214(c)(1) of the Act states that “The question of importing any alien as a nonimmigrant under subparagraph (H) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government...For purposes of this subsection with respect to nonimmigrants described in section 101(a)(15)(H)(ii)(a), the term “appropriate agencies of Government” means the Department of Labor and includes the Department of Agriculture. While USCIS is required by statute to *consult* with DOL in determining H-2A petitions, nowhere is there such a requirement for H-2B petitions. DOL’s role in the H-2B process has evolved over the years with Legacy INS and USCIS as those two entities have recognized DOL’s expertise and shared their authority with DOL as a result. But DOL has no independent authority over the H-2B program.

In light of this fact, several of the changes proposed by this rule are *ultra vires*. DOL’s proposal to end “unilateral” amendments to approved labor certifications by other agencies, such as USCIS, is one of these changes. Another is DOL’s statements in the rule concerning the period of admission of H-2Bs and the requirements of employers upon the termination of H-2B employment.

DOL acknowledges this reality in the rule itself, which in the context of proposing a hypothetical enforcement process in the event that USCIS/DHS should agree with DOL on a delegation of their enforcement authority, acknowledges that DOL has no current enforcement authority. DOL should leave to USCIS those issues relating to H-2B status and limit itself to

determining whether H-2B employment will have an adverse effect on U.S. workers.

The Recordkeeping Requirements of the Rule are Onerous

The proposed rule requires that employers maintain records for a period of five years from the date of application for labor certification. These records are extensive and include the complete recruitment file, including all resumes and job applications received and the reasons for not hiring workers not hired during the recruitment. The requirement also extends to all materials relevant to the wage determination and all materials relevant to demonstrating that all H-2B attestations were complied with. This is a significant burden on many users of the H-2B program, who are small employers dealing with a highly mobile workforce employed for what are by definition short time periods. At a minimum, DOL should consider a shorter time frame. For example, DHS regulations require employers to retain Forms I-9 upon separation of an employee for one year from the date of separation or three years from the date of hire, whichever is later. Another possibility would be for DOL to require employers to retain these records for one additional labor certification period. In other words, DOL would still be able to revisit a prior recruitment and certification effort in a subsequent application for labor certification and thus deter fraud, but employers would not be required to keep and maintain years worth of records.

Issues Relating to the Re-Test of the Labor Market

The proposed rule would expand the current definition of “temporary” to allow for a temporary need of up to three years in certain situations. We welcome this change. However, the supplementary information to the rule also states that where the temporary need is longer than one year, the employer must re-test the labor market annually to obtain a new wage rate. This requirement should be limited in its application to situations in which a significant time period beyond the ordinary ten-month period is left on a labor certification. Imposing this requirement on a one-time need lasting only 18 months, for example, is unnecessary and imposes an undue burden on the employer. DOL should refine the instances of when the new wage rate will be required to take the length of the temporary need into account rather than adopt a one-size-fits-all approach.

The Layoff Attestation is Unfair

The proposed rule creates several new attestations for H-2B employers. Among them is an attestation that there have been no layoffs of similarly employed individuals within 120 days of the date of need of the H-2B workers and that if there have been, each of those workers has been contacted and notified of the job opportunity and been fairly considered for it. Locating and contacting laid off workers will be difficult and will delay the certification process. Even worse is the similar provision for employers who place workers at the job sites of other employers. In such a case, the placing employer must contact the other employer and verify that it also has not laid off workers within the last 120 days. This requirement is unfair and will be unduly burdensome.

The Use of E-Verify by SWAs is Problematic

The proposed rule states that SWA's must verify the employment authorization of all job seekers they refer to employers. The rule encourages, but does not require, the use of E-Verify for this purpose. However, the rule states that an employer may not refuse to accept a referral due to a tentative non-confirmation from E-Verify, but the SWA must notify the employer if E-Verify ultimately generates a final non-confirmation. Thus, depending on the length of time it takes to resolve a nonconfirmation, the employer faces the prospect of hiring, but then later losing, the non-confirmed worker, but being unable to replace that worker through the H-2B process if the certification has already been issued and used. This adds an unwanted element of uncertainty to the process. The E-Verify system has no place in the labor certification process. All employers are required to verify the employment authorization of all hires regardless of this rule, and enforcement of that process should be left to the purview of DHS where it belongs.

Moving Wage Determinations from the SWA to the NPC Ignores Local Knowledge of and Expertise in State and Local Labor Markets

The proposed rule's plan to “federalize” wage determinations in the interest of uniformity and

with the promise of quicker processing is misguided. As the recruitment process is a local one and many H-2B needs are uniquely tied to local and regional concerns, such as in the resort industry, the SWA is in the best position to determine an appropriate local wage. Centralizing these determinations at the NPC, which lacks this expertise, will lead to inaccurate wage determinations.

The Imposition of One Prevailing Wage for Work in Multiple Areas is Unfair

As part of the move to a federal prevailing wage system, the proposed rule would require that where the job opportunity encompasses two or more metropolitan statistical areas, the NPC will analyze the various prevailing wage rates in the various MSAs and impose the highest wage from among those areas. This change is unfair and may impose requirements on employers that are inconsistent with the labor market. For example, many employers who do business in multi-jurisdiction areas choose to locate their business where labor, real estate, and other costs of doing business are lowest. An employer doing construction work might be located in the outer suburbs of a major metropolitan area in order to control costs but might send workers to projects throughout the region. DOL's unilaterally imposing the highest wage rate effectively overrides the employer's business decision and subjects him or her to the higher costs associated with other parts of a region. This problem is likely to be exacerbated by the fact that the SWAs with their local knowledge and expertise, which might allow them to take factors such as this into account, are being replaced by a monolithic federal entity that will likely disregard such local factors.

The Requirement of Mandatory Union Recruiting is Burdensome and Serves no Legitimate Purpose

The proposed rule would, if implemented, require mandatory union recruiting. Specifically, the proposed rule would require an employer use union organizations as a recruitment source if it is appropriate for the occupation and customary to the industry and area of intended employment. This requirement is not authorized by statute and DOL has no basis to impose it. Also, the proposed rule does not provide guidance on the circumstance under which employers would need to comply with this requirement or which labor organizations need to be contacted. This requirement also has the potential to subject non-unionized employers to "salting" campaigns. As DOL knows, "salting" occurs when a union tries to coerce non-union firms to hire pro-union workers and union organizers. When a pro-union applicant is rejected, the union will file an unfair labor practice complaint based on discrimination against the applicant due to his union affiliation. This requirement thus unfairly and unnecessarily injects the DOL into an area it should not be involved in, except as an impartial mediator. Finally, since unions are fully capable of reading the job advertisements the employer is required to post or able to obtain job information from the SWA, this requirement adds no value to the process.

The Limitations on the Appeal Process are Unfair and Deny Employer's Due Process

The rule proposes a new system for the appeal of a denied application for labor certification in which the employer may appeal such a denial to the Board of Alien Labor Certification Appeals (BALCA). While we welcome the creation of an appeals system, we feel that the system as proposed is unfairly limited. The rule states that BALCA will limit itself to the record of proceedings in the case and that no additional briefs or other documentation will be allowed. Without the ability to explain how the original denial was in error, this system virtually guarantees that BALCA will be little more than a rubber stamp for DOL decisions. If DOL wishes to create a truly meaningful appeals process, it must allow for the submission of argument and evidence.

The Limitations on Subsequent Amendments to Approved Labor Certifications are Unfair and Vague

Under current practice, an employer may amend a labor certification before the USCIS either at the time of filing a petition for a nonimmigrant worker or at any time after filing. This allows the employer to respond to changes beyond the employer's control, such as changes in a client's needs, changes in the availability of needed supplies and materials for a project, and, for some resorts, changes in weather patterns that might cut short or bring an early start to a season. The proposed rule would end this practice and not allow adjustments to the date of need once a labor certification is granted.

Extending the Proposed Rule's Changes to PERM, H-1B, H-1B1, and E-3 Prevailing Wage Requests is Premature and Dangerous

The proposed rule can be seen as an experiment. At best it is unclear whether the improvements promised by DOL in the rule will come to pass. Thus extending the proposal to Prevailing Wage Requests under the H-1B, H-1B1, E-3 and PERM programs is premature. DOL should at least wait to assess the changes made by this rulemaking before extending them to other programs.

Thank you for your consideration of these comments.

Respectfully submitted,

H-2B Workforce Coalition

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