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Adele Gagliardi, Administrator
Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue NW
Room N-5641
Washington, DC 20210

RE: RIN 1205-AB89
DOL Docket No. ETA–2019–0007
Temporary Agricultural Employment of H–2A Nonimmigrants in the United States
[Federal Register 84:144, p.36168ff

Dear Administrator Gagliardi:

The organizations referenced below respectfully submit the following comments in response to the United States Department of Labor's Proposed Rules to Modernize the H-2A Program.

It is indisputable that the H-2A program has become an increasingly vital tool for agricultural employers to access labor to produce critical food and fiber for the nation. While the program's positive recruitment and enforcement components ensure that domestic U.S. workers cannot be displaced by foreign workers, the reality is that the pool of willing, able and qualified U.S. workers willing to engage in labor intensive agriculture is shrinking at an unsustainable rate. For this reason, agricultural employers now rely on the H-2A program in record numbers to gain access to a legal, reliable workforce.

Western Growers is an agricultural trade association headquartered in Irvine, California with members that grow, pack, and ship fruits, vegetables, and tree nuts from California, Arizona, New Mexico, and Colorado. Beyond our home states, Western Growers members produce in and directly contribute to the economies of more than 30 states and 25 countries. In total, Western Growers' members account for roughly half of the annual fresh produce and tree nuts grown in the United States, providing American families with healthy, nutritious food. In addition, Western Growers serves as an agent on behalf of its members, and as such, Western Growers staff is intimately familiar with the technical aspects of the H-2A application process.

Western Growers also sits on the Executive Committee of the National Council of Agricultural Employers (NCAE), a coalition of agricultural employers that has filed separate, more detailed comments on the proposed regulations. The undersigned completely endorses NCAE's detailed, comprehensive comment letter. The fact that a specific issue discussed in the NCAE comment letter is not addressed herein should not be interpreted as meaning that the omitted issue is unimportant or that we disagrees with NCAE's position on an omitted issue. Rather, some issues are simply too complex or technical and are already well presented in NCAE's letter which we endorse in its entirety and those comments are incorporated herein.

Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties represents over 170 growers, shippers, farm labor contractors, and supporting agribusinesses that are interdependent with a vibrant agricultural economy. Our members grow diverse field and nursery crops such as broccoli, strawberries, celery, cauliflower, and wine grapes on California's Central Coast. Our members have experienced a severe and ongoing shortage of ready, willing, and able employees and in response to this crippling effect our members have increasingly turned to the H-2A temporary agricultural guestworker visa program. We appreciate the opportunity to improve the implementation of the program.

Established in 1930, the **Grower-Shipper Association of Central California** was created to help strengthen the marketplace position of growers and handlers of fresh vegetables in Monterey, Santa Cruz, Santa Clara and San Benito Counties by addressing issues and creating opportunities for producers and handlers of iceberg lettuce; and eventually evolving to capture hundreds of producers, contractors, handlers, processors of an array of commodities grown on the Central Coast, from vegetables and berries, to mushrooms and wine grapes. Due to the tightening of an available labor supply, a growing number of producers rely upon the H-2A program as the only avenue for addressing the labor supply deficiency.

Ventura County Agricultural Association is an employer trade association consisting of agricultural employers, packing houses, farm labor contractors, nurseries and transportation businesses. Its members grow, harvest, pack, market and transport virtually all of the fresh vegetables, strawberries, citrus, raspberries and related agricultural commodities in Ventura County. Its members include some of the largest H-2A employers and H-2ALCs in the United States located in Ventura, Monterey and Santa Barbara counties. Due to the severe labor shortages experienced by many of our members, the Federal H-2A program has served as a critical buffer for employers to meet their production needs. VCAA appreciates the opportunity to provide comments on the improvement and future implementation of this critical program for our membership.

Collectively, we understand firsthand the challenges our respective members have in accessing and navigating the H-2A program. The proposed rule directly seek to address many of the impediments that impose unnecessary cost, inefficiency and frustration into the program. We greatly appreciate the Administration's commitment and willingness to modernizing the H-2A program and the Department's efforts to implement regulations to streamline the program.

Specific Comments

Definition of Area of intended employment

The proposed definition of "place of employment" is too broad and untenable in practice. The proposed definition would include locations that are incidental or used for a short duration as "worksites" for purposes of determining the area of intended employment analysis. The undersigned respectfully urges the Department to consider using the H-1B definition of "place of employment," which in many cases excludes locations where work is performed for short durations. See 20 CFR 655.715. We believe this is a reasonable and useful framework for the H-2A area of intended employment analysis as

well. This framework was also adopted and applied by BALCA in several cases, precedents which should be codified into the H-2A regulations. This would provide clarity and certainty to affected H-2A employers.

The proposed rule perpetuates the use of Metropolitan Statistical Areas (MSA) and associated commute times for the definition of area of intended employment. MSAs and commute times within those areas bear little resemblance to how agricultural workers get to their jobs.

H-2A workers are typically offered voluntary transportation by the employer from the housing to the field or other worksiteand travel times can vary widely depending on traffic patterns and other variables. As defined, Farm Labor Contractors (FLCs) will not be able to know for certain whether their clients fields fall within the arbitrary commute time for that specific MSA. Due to the highly localized circumstances influencing typical commute times and distances we do not believe a quantitative measurement would be appropriate.

For purposes of H-2A, the housing or pick-up point, rather than the worksite, should be the determining factor of the Area of Intended Employment's labor market test, which would better reflect the typical commuting patterns of potential applicants.

The undersigned strongly opposes the Department's proposal to apply Area of Intended Employment to fixed site growers instead of only to Farm Labor Contractors, as is now the case.

The application of the Area of Intended Employment to Farm Labor Contractors may be justified for monitoring purposes since an FLC may provide labor services to disparate fixed site growers in different locations. However, that logic does not apply to a fixed site grower, even one with multiple locations, since the Department can always go to a known fixed site location to perform its monitoring function.

The Department also proposes to limit employers to a single H-2A application covering "the same area of intended employment, period of employment, and occupation or comparable work to be performed." However, such a proposal runs counter to the Department's intent to streamline and modernize the H-2A program and does not reflect the diversity and complexity of modern agricultural operations. Employers should have the freedom to file as many job orders and applications that they need to perform the work, regardless as to whether the job order/application covers the same or comparable work duties and the same period of employment. The Department should rescind the provision, or, alternatively, modify the provision to allow for greater employer flexibility to account for different needs and circumstances across the U.S.

In addition, the Department now proposes to empower the NPC, rather than the employer, to decide which SWA it will transmit the job order to in cases in which the job opportunity is located in more than one state within the same area of intended employment. Employers now have, and should continue to enjoy, the freedom to choose the SWA in which to file when more than one SWA has jurisdiction over the place(s) of employment. The employer is in the best position to understand which SWA is in the best position to advance its job order.

Staggered Entry

The undersigned supports the Department's proposal to permit the staggered entry of H-2A workers into the U.S. We encourage the Department to add the word "anticipated" prior to "latest date on which such workers will enter," in paragraph (f)(2)(i)(A), as the exact date which such workers will enter may not be known to the employer at the time of the request and delays might even be the result of program processing delays beyond the control of the employer.

Agricultural work is inherently uncertain. The vagaries of weather including cold snaps, high heat, heavy rain, and damaging hail, may prevent planting or delay harvesting. In some cases weather events accelerate anticipated seasonal events. Employers should have the ability to stagger the entry of their workforce, which would provide a more efficient use of farm resources while removing some of the program's rigidity that now vexes many employers. US workers interested in the job will not be prejudiced as they may apply for the opportunity during the staggered entry period.

Definition of a temporary or seasonal nature.

The Department solicits comments regarding the adjudication of temporary need. In the view of the undersigned, such determinations should remain exclusively in the domain of a single agency— specifically, the Department of Labor (DOL), and not Department of Homeland Security (DHS). DOL is generally responsive to inquiries or issues employers may have navigating the program's processes. Labor decisions for agricultural operations are very time sensitive and DOL generally allows employers the opportunity to mitigate negative labor determinations with mitigating measures and alternative solutions.

Offered Wage Rate (AEWR Determinations)

The proposed rule would disaggregate data by occupation groups in surveys using the existing USDA Farm Labor Survey (FLS) as the primary data source, followed by data from the Bureau of Labor Statistics (BLS) where necessary and nationwide data where regional-level data is not available.

Generally, the undersigned supports the disaggregation of data by occupation to more accurately reflect the duties, experience, and commensurate compensation for those job functions instead of artificially skewing wages for positions and duties that are not comparable. However, we are concerned that the proposal as written uses *too many* job categories. In California for example, the proposal would have eight different job categories. A more suitable number may be four and no more than six.

In recent history, the DOL has required employers to file multiple applications for different job codes which is unduly cumbersome and adds additional cost to program utilization for both employers and the administering agencies. The undersigned request that the regulation be drafted to expressly allow for employers to include multiple SOC codes in the same job order if related to the same job.

In addition, we strongly suggest the AEWR calculation should consider the additional benefits furnished primarily for the workers' benefit and convenience, including employer-provided housing and transportation, visa cost, subsistence, etc., and additional costs to the employer. Additionally, the Department should impose a maximum percentage year-over-year increase (e.g., not to exceed 3%) to avoid the rapid and unsustainable wage escalation, such as the 22% AEWR increase that Colorado and other mountain states experienced this year.

We also urge that piece rates, bonuses, overtime, etc., not be considered when determining the guaranteed hourly wage rate, that is the AEWR. It makes no logical sense to include these items that are tied to productivity and efficiencies which may vary from week to week and season to season. Such inputs into the wage calculation artificially inflate wage rates, disconnect them from the labor market, and cause U.S. agriculture to be less equipped to compete with foreign producers.

The undersigned *recommends* that the Secretary should annually determine whether or not there is in fact an adverse effect on US workers created by the employment of H-2A workers in concert with statutory requirements. If there is no adverse effect, there should be no need for an "Adverse Effect Wage Rate," in which case the highest of the local, state and federal, or collective bargaining rate would be the wage rate floor.

The undersigned opposes any mid-contract adjustment in wages. When the employer has faithfully advertised the wages, housing provisions, visa costs, subsistence, transportation and other available benefits within the contract to which the employer and employee agreed, there is no basis to adjust the wage mid-contract. The Department should not arbitrarily abrogate the terms of a binding agreement. However, if mid-contract adjustments are to be mandated then such adjustments should be allowed to be made upward or downward, as the case may be. If downward adjustments are deemed unfair to the worker, the converse is true to the employer, who is also already paying for housing, transportation, visa costs, subsistence, etc., during times of greatest need in the absence of ready, willing, and able domestic employees. Increases in wages mid-contract only adds to uncertainty and dissatisfaction with the program.

Prevailing Wage Surveys

The undersigned support the Department's proposal to rescind the Handbook 385, which is obsolete and unavailable. We agree with the Department that the regulations promulgating prevailing wage surveys must have concrete guidance and criteria. However, we believe the Department's proposal as written will not produce valid and reliable statistical results. The Department should consider higher standards for survey validity, and reject survey methodologies that are inherently flawed. The Department

should also consider permitting the use of private wage surveys. Prevailing wage rates should not be adjusted by the CPI or ECI indices in subsequent years when a prevailing wage data is not available. Surveys older than 12 months should not be permitted to be relied upon.

Job Order Filing Requirements

The undersigned supports the Department's proposal to have employers submit a completed job order to the National Processing Center, prior to submitting to the SWA. In our experience, some (not all) SWA's imposed extra-regulatory requirements and assurances of employers in the job order, such that employers are compelled to assure that they will comply with an ever increasing list of references to state statutes and regulations. This is unnecessary since every job order must contain an assurance that the employer will comply with all local, state and federal laws. SWA's that require more specific assurances are inconsistent with the Department's mandate to streamline the program. It is also unclear whether such additional assurances are compatible with the Department's new streamlined Forms ETA 790 and 9142.

Certification of Employer-Provided Housing

We believe that the Department's proposal to vest housing inspections in federal agencies is fraught and inappropriate. Housing inspections should remain with the SWA or its delegate.

The undersigned supports the Department's proposal to permit housing certifications of up to 24 months when certain criteria are met. However, the rule should be written such that the employer will obtain the benefit of the regulatory change if those conditions are met. The SWA should not be given discretion to deny longer term housing certifications when the employer has a history of compliance and attests that it has inspected the housing and that the housing is available and sufficient to accommodate the number of workers being requested and continues to meet all applicable standards.

Contents of Job Orders

The undersigned recommend that the Department expressly require the reimbursement of transportation and subsistence costs at 50 percent of the work contract period. We concur with NCAE's belief that requiring reimbursement at this point of the contract not only protects the terms and conditions of the agreement reached between the employer and the employee, but also enhances US national security.

We also support the Department's proposal that provides, for foreign workers, "the place from which the worker departed", will mean the appropriate US Consulate or Embassy issuing the H-2A visa.

The undersigned recommends that the regulation be amended to include a requirement that the SWA must initially verify the work authorization of U.S. workers referred to the employer. This would promote efficiency and avoid unnecessary delay in filling the job order.

With regard to the three-fourths guarantee, we recommend the requirement be based on the 35-hour required minimum. Uncertainty as to weather, market conditions, crop yields and other variables unique to agriculture, make the three-fourths guarantee as currently written and as proposed, an untenable regulatory challenge.

In addition, we encourage the Department to clarify that the language that pertains to work required on the worker's Sabbath or Federal holidays, is not a prohibition from requiring work on the Sabbath or Federal Holidays. The purpose of this provision is to establish criteria for calculating three-fourths guarantee compliance, however some SWAs have misconstrued this provision to mean that employers cannot require workers to work on the Sabbath or Federal holidays. A clarification to avoid misapplication of the regulatory requirements by the SWAs is recommended.

We also recommend the Department remove the requirement to include "hours offered" from the earnings records and pay statement requirements. We do not believe this requirement benefits workers, but it is impractical and burdensome for employers to administer. Many automated payroll systems do not accommodate this data since there is no corollary outside of the H-2 context, necessitating a burdensome manual "fix" by the employer, in order to comply. The three-fourths guarantee itself is the mechanism that compels employers to track the hours offered. However, it need not be required for purposes of earnings records, pay statements, and document retention requirements.

The undersigned support the proposed rule change with regard to contract impossibility.

We support the proposal relative to electronic filing requirements and limited exceptions, including scanned signatures, and the electronic submission of H-2A labor contractor surety bonds. However, we do not believe that raising the surety bond amounts in the fashion proposed by the Department is justified. We also understand that pursuant to the proposal, sureties may be unwilling to issue surety bonds to H-2ALC's in the manner contemplated by the Department. The undersigned urges the Department to reconsider this proposal pending a study to understand the market forces at play in surety bond market.

Emergency Situations

We have no objection to the proposed rule changes relative to the waiver of time period for filing applications in emergency situations. Nor do we have any objection to the Department's proposal to eliminate the requirement that an employer requesting an emergency situation application waiver, submit a copy of the job order concurrently to submit the required documentation to the NPC, as opposed to both the NPC and the SWA. We also support the Department's proposal to relocate the "unforeseeable changes in market conditions" language to paragraph (b), but encourage the Department to maintain the existing wording of "unforeseen" as opposed to the proposed wording of "unforeseeable."

Positive Recruitment

The undersigned vehemently opposes the Department's proposal to require employers to contact the employees of Farm Labor Contractors (FLCs) that were contracted to perform services for the employer in the previous year, and to notify them of current year job opportunities. The employees of a farm labor contractor are not the employees of a farmer hiring the FLC. The proposal will blur the distinct line that exists between a farmer and his or her farm labor contractor and undermines trust and respect between farmers, FLCs, and employees. The employer who hires an FLC has no control or other authority over the employees of the FLC. Moreover, the proposal would likely compel growers to violate the express contractual agreements with their FLC. The proposal for mandatory solicitation also disregards the privacy of employees, who retain the ability to voluntarily apply for the job opportunities if they are ready, willing, and able.

We also strongly oppose the Department's proposal of forcing employers to solicit the return of workers terminated for cause or who abandoned employment merely because the employer did not timely notify the Department of the worker's change of status. We strongly urge the Department to reconsider this provision as employers should not be compelled to contact a worker who is not eligible for rehire under such circumstances.

We have no objection to the proposed requirement that OFLC must conduct an analysis of out-of-state referrals before finding that a state is a "labor supply" state.

Appeals

The undersigned is strongly opposed to the Department's proposal putting the onus on the employer to specifically identify whether an administrative review or a *de novo* hearing is being requested. We see no justification of eliminating the concurrent briefing process that exists now. We believe the proposed briefing schedule for employers relative to the allowable briefing schedule for the CO provides the CO with a procedural advantage while failing to . balance the interests of the employer seeking review. This is creates a fundamental procedural unfairness for the employer.

The Department's proposal to shift the *de novo* hearing date for appeals from five business days after the ALJ's receipt of the administrative file to fourteen days also creates an undue burden on the employer seeking review, as review of a denial for certification demands expediency in its resolution due to the perishable nature of the agricultural crops that are imperiled by the lack of a timely certification. We urge the Department to maintain the existing schedule for *de novo* hearings.

Post Certification Amendments

The undersigned supports the Department's proposal that would permit an employer to request minor amendments to the places of employment listed in an approved certification under certain limited conditions. We also support the proposed associated procedures for post-certification amendments and timeframe for the CO to render a decision, provided that the proposed rule and any heightened scrutiny does not result in processing delays.

Enforcement

The undersigned opposes the Department's proposal for coordinated enforcement with shared authority between WHD and OFLC, as well as referrals to other agencies for enforcement, given the lack of subject matter expertise some agencies have in matters in which they would be vested with enforcement authority.

We are supportive of the provisions relative to civil money penalties and debarment, however we recommend the Department consider giving the Secretary discretion to consider permitting an exception for *de minimis* or incidental infractions related to work on activities not listed in the job order, work outside the area of intended employment, or work outside the validity period based on the specific facts and circumstances.

CONCLUSION

We appreciate the Department's and Administration' s efforts to modernize and streamline the H-2A program in order to make it more efficient and economical for users, while preserving the integrity of the program. We respectfully ask that DOL consider these comments with respect to the proposed rule changes.

Respectfully submitted,

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