No. 11-2235

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED FARM WORKERS, *et al.*,
Defendant Intervenors-Appellants.

v.

NORTH CAROLINA GROWERS' ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

On Appeal from the United States District Court
for the Middle District of North Carolina
Before the Honorable William L. Osteen

BRIEF FOR *AMICI CURIAE*
REPRESENTATIVES HOWARD BERMAN, JUDY CHU, GEORGE MILLER, AND LYNN WOOLSEY SUPPORTING REVERSAL

JONATHAN G. CEDARBAUM
LILLIAN HOWARD POTTER
ANNIE L. OWENS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

March 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

ADMINISTRATIVE AGENCY MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae Howard Berman, Judy Chu, George Miller, and Lynn Woolsey represent the 28th, 32nd, 7th, and 6th California congressional districts in the U.S. House of Representatives. Representative Berman is the Ranking Member on the House Committee on Foreign Affairs. He has been a Member of Congress since 1983 and was instrumental in the creation of the H-2A provisions enacted in 1986 as part of the Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603 § 301, 100 Stat. 3359, 3411 (1986), to protect workers' rights.[2] Over the course of IRCA's 25-year history, Representative Berman has participated in numerous legislative hearings to ensure that the law is effectively implemented.

Representative Chu was first elected to Congress in July 2009, taking over the seat

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] *Review of the Early Implementation of the Immigration Reform and Control Act of 1986: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 100th Cong. 89 (1987) (statement of Senator Simpson) ("The H(2) program was the creation of Howard Berman, for whom I came to have a great deal of respect. The H(2)(a) provisions were the package put together by Congressmen Boucher and Berman[.]"). Senator Simpson was IRCA's principal sponsor in the Senate.

While not "controlling," remarks of a bill's sponsor are an "an authoritative guide to [a] statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982).

The IRCA amended the Immigration and Nationality Act ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (1952).

previously held by Secretary of Labor Hilda Solis. She is a member of the House Small Business Committee. Representative Miller has served in Congress since 1974. Thus, he participated in the debates over adoption of the H-2A provisions of IRCA. He is presently the Ranking Member on the House Education and Workforce Committee. Representative Woolsey is in her tenth term in Congress. She is the Ranking Member of the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce. *Amici* have an interest in the implementation of the H-2A provisions of IRCA and the protection of workers' rights. They urge this Court to reverse the district court and grant or reinstate the counterclaims for back wages.

SUMMARY OF ARGUMENT

This case presents the issue of whether and how the Department of Labor is permitted to act to protect farmworkers' wages during a time of national economic crisis. The H-2A provisions, which were enacted in 1986 as part of the Immigration Reform and Control Act ("IRCA"), allow foreign agricultural guestworkers to come to the United States so long as their presence does not "adversely affect"—*i.e.*, drive down—the wages of domestic workers. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *id.* § 1188(a)(1). The Department of Labor ("DOL"), both prior to and following the passage of IRCA, issued regulations setting what is known as the "Adverse Effect Wage Rate" ("AEWR") in order to protect U.S. workers' wages from the effects of an influx of foreign guestworkers.

In December 2008, just weeks before the George W. Bush Administration ended, DOL issued new regulations that abandoned the methodology that had been used to calculate the AEWR for decades. Although the stated purpose of the December 2008 regulations was to improve the accuracy of the AEWR calculations, the net effect of the new regulations was to lower farmworkers' wages nationwide by a staggering ten percent.

In May 2009, faced with this precipitous drop in farmworkers' wages during a massive national recession, Secretary of Labor Solis temporarily suspended the 2008 regulations and reinstated the prior regulations, which had been in place since 1987 and which relied on USDA data. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25,972 (May 29, 2009). Appellees sued Secretary Solis to enjoin the 2009 suspension as violating the Administrative Procedure Act ("APA"). Appellants United Farm Workers, et al. intervened and interposed counterclaims for back wages. During the pendency of that litigation, in February 2010, DOL promulgated new regulations following a full period of notice and comment. For that reason, the district court in March 2010 dismissed the claims against Secretary Solis as moot. The court then granted Appellees' motion for summary judgment and dismissed the counterclaims, and Appellants appealed.

The two core principles of the H-2A statute are (i) workers—domestic and foreign alike—should be paid fair wages that account for the potentially wage-depressing effect of foreign labor and (ii) workers should be protected from exploitation by employers. The December 2008 regulations had the effect of lowering farmworker wages and making it easier for growers to hire foreign labor—at a time when U.S. workers were facing record unemployment. As such, Secretary Solis' suspension was necessary to effectuate the legislative purposes of the H-2A statute. Furthermore, under the H-2A statute, DOL possesses the discretion to set wage rates in order to avoid wage depression, and historically has done so temporarily pending periods of notice and comment. It was thus within Secretary Solis' discretion to issue a temporary suspension.

ARGUMENT

I. THE DECEMBER 2008 WAGE METHODOLOGY DEPRESSED WAGES TO UNACCEPTABLY LOW LEVELS AND WAS CONTRARY TO THE PURPOSES OF THE H-2A STATUTE

The legislative history of the H-2A statute demonstrates that Congress intended both to protect farmworkers' wages and to avoid the abuses of past guestworker programs, which had proven harmful for farmworkers.

Some historical context helps clarify the purposes of the H-2A program. In the midst of World War II, guestworker initiatives temporarily brought foreign citizens to the United States to compensate for the shortage of American farmworkers.[3] These initiatives were collectively known as the *bracero* program. Under this program, hundreds of thousands of workers came to the United States each year, primarily from Mexico, to work during the growing season.[4] However, legal protections that were rarely, if ever, enforced—combined with the workers' lack of English-language skills—left the *braceros* susceptible to exploitation and inhumane treatment. This resulted in what Lee G. Williams, the DOL official supervising the program at the time, described as "legalized slavery."[5] The *bracero* program harmed not only foreign workers, but also U.S. workers, whose wages in the agricultural sector plummeted.[6]

Ultimately, the poor living and working conditions and the low wages of farmworkers—brought to the nation's attention by journalists such as Edward R. Murrow and labor organizers such as César Chávez and Dolores Huerta—led to public outrage and prompted Congress to end the *bracero* program in 1964.[7] Guestworker programs continued in smaller form under the H-2 program, which

---

3 Mooney & Majka, *Farmers' and Farmworkers' Movements: Social Protest in American Agriculture* 151-152 (1995).

4 *See* Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* 3-4 (2007), *available at* http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf.

5 Mooney & Majka, *supra* note 3, at 152; Southern Poverty Law Center, *supra* note 4, at 3.

6 Mooney & Majka, *supra* note 3, at 152.

7 *Id.*

had been established in 1952 and continued after the 1964 termination of the *bracero* program.[8]

In 1986, as part of the Immigration Reform and Control Act ("IRCA"), Congress divided the H-2 program into two parts: the H-2A program, for agricultural workers, and the H-2B program, for non-agricultural workers. *Compare* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) *with id.* at § 1101(a)(15)(H)(ii)(b).

In enacting the H-2A provisions of IRCA, Congress was aware of the serious flaws in the *bracero* program. The House Report on IRCA noted that the *bracero* program had been likened even by grower groups "to indentured slavery where employer exploitation was rampant and inhumane." H.R. Rep. No. 99-682, at 83, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5687. According to the Report, growers themselves stated flatly "[t]his is something [they] envision[ed] being avoided in [their] proposal." *Id*. "Ever mindful of the reports of abuses that occurred during the old *[b]racero* program," Congress "had no intention of creating an environment conducive to the violation of worker rights." *Id.* (italics

---

[8] Levine, Cong. Research Serv. (CRS), 95-712 Report for Congress, *The Effects on U.S. Farm Workers of an Agricultural Guest Worker Program* 4 (2009) ("Its effect was found to be consistent with economic theory: the *Bracero* program increased total farm employment, reduced employment of domestic farm workers, and lowered the farm wage rate. Morgan and Gardner concluded that the wage loss to all *nonbracero* farm workers was 6% to 7% of total wages paid to farm workers in the *bracero*-using states between 1953 and 1964, or some $139 million per year (in 1977 dollars)." (emphasis added)).

added).[9] Representatives also stated in public hearings that they envisioned the statute as protecting "basic human rights." 132 Cong. Rec. H9729 (daily ed. Oct. 9, 1986) (statement of Rep. Richardson).

The concept of "adverse effect"—which IRCA codified—had first been conceived of by DOL in 1942 in response to the downward pressure exerted on wages by the presence of the *bracero* laborers.[10] In 1960, surveys demonstrated that U.S. employers who employed Mexican nationals paid much lower wages than those who did not.[11] The results of these surveys were confirmed by DOL over the years, as additional surveys repeatedly found that "the presence of alien workers in agriculture depresses the wages of similarly employed U.S. workers." Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 20,496, 20,502 (June 1, 1987). These findings led DOL to create an AEWR in order "to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers … [and thus] avoid[] wage deflation." *Williams v. Usery*, 531 F.2d 304, 306 (5th Cir. 1976); *see also AFL-*

[9] Consistent with this understanding, the House Report later commented that the H-2A program was designed to remedy "the inadequacy of current protections for farmworkers," and to "protect the rights and welfare of all workers." *See* The Legal Services Corporation, *The Erlenborn Commission Report*, 15 Geo. Immigr. L.J. 99, 102 n. 406 (2000) (quoting *Erlenborn Commission: Comments on "Presence Requirement" (Supplement)* 56, (Apr. 10, 1999)).

[10] *See* Dellon, *Foreign Agricultural Workers and the Prevention of Adverse Effect*, 17 Labor L.J. 739, 740 (1966) (describing history of adverse effect).

[11] *Id.* at 741.

CIO v. Dole, 923 F.2d 182, 184 (D.C. Cir. 1991) ("The wage floor is obviously designed to prevent cheaper foreign labor from undercutting domestic wages in the future."); 52 Fed. Reg. at 20,504 (citing *Williams*, 531 F.2d at 306).

Toward that end, IRCA codified the requirement of "adverse effect" and strengthened the enforcement mechanisms behind the AEWR. The "adverse effect" provision reads:

> A petition to import an alien as an H–2A worker (as defined in subsection (i)(2) of this section) may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that—(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (B) *the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed*.

8 U.S.C. § 1188(a)(1) (emphasis added); *see* 8 C.F.R. § 214.2(h)(3) (1986) (prior regulation). In so doing, Congress endorsed DOL's continuing practice of setting AEWRs and put its legislative imprimatur on the agency's broad discretion to act to protect workers' rights, as DOL recognized in promulgating the regulations. *See* Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 16,770, 16,776 (May 5, 1987) (noting that Congress endorsed DOL's practice of "establishing AEWRs at or above hourly wages").

Following the passage of IRCA, DOL promulgated regulations in 1987 that laid out in detail the methodology for calculating the AEWR, a methodology that DOL had already been using for years. The 1987 regulations provided that the adverse effect rates for all agricultural employment should be computed using wage data from USDA's average hourly wage rates for field and livestock workers based on the USDA Quarterly Wage Survey. *See* 20 C.F.R. § 655.207 (1987). The USDA data sampled approximately 12,000 farms in order to determine these rates.[12] These 1987 AEWR regulations stood essentially unchanged until December 2008.[13]

The December 2008 regulations completely altered the methodology for calculating the AEWR. *See* 20 C.F.R. § 655.108(e) (2009). Instead of using USDA data, as the previous regulations had done, the new regulations relied on the Bureau of Labor Statistics' ("BLS") Occupational Employment Statistics ("OES")

---

12 *See* Nat'l Agricultural Statistics Serv., U.S. Dep't of Agriculture, *Surveys: Farm Labor*, *available at* http://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/index.asp (last modified Dec. 1, 2009).

13 One change occurred in 1989, which mandated that instead of automatically paying workers the AEWR, "the employer shall pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest." 20 C.F.R. § 655.102(b)(9)(i) (1989).

survey.[14] The OES survey sampled entirely *non-farm* employers, with the result that the only farmworkers covered by the OES survey were those who were employed by third-party "farm labor contractors," middlemen who in turn contracted with growers.[15] Farmworkers employed by such contractors generally are paid less than workers directly employed by growers,[16] and represent a minority of farmworkers. *See* Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,100, 77,174 (Dec. 18, 2008). Approximately seventy percent of farmworkers are employed directly by growers, as DOL noted in its Preamble to the December 2008 Rule. *Id.* But the higher wages paid to these farmworkers simply are not captured by the OES survey.

Substituting the OES survey data for the USDA data was especially problematic with regard to farmworkers because farmworkers as a group share certain characteristics that make them different from unskilled workers in other

---

14 *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Employment Statistics: Overview*, *available at* http://www.bls.gov/oes/oes_emp .htm#scope (last modified May 17, 2011).

15 *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *BLS Handbook of Methods: Occupational Employment Statistics*, ch. 3, at 3, *available at* http://www .bls.gov/opub/hom/homch3.htm (last modified Dec. 10, 2009).

16 *See* U.S. Dep't of Labor, *Findings from the Nat'l Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of U.S. Farmworkers*, Research Rep. No. 8, at 33 (March 2000), *available at* http://www .doleta.gov/agworker/report_8.pdf.

sectors. For this reason, the OES data are especially unrepresentative of farmworkers in particular. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6896 (Feb. 12, 2010). For example, U.S. citizens generally earn higher wages than non-U.S. citizens. A much higher percentage of farmworkers employed by third-party farm labor contractors, those reflected in the OES survey data—as opposed to those employed by growers—are non-U.S. citizens. *Id.* Furthermore, education is a key determinant of wages. Farmworkers employed by contractors tend to be less educated than workers employed by growers—with forty-one percent of the former having completed ninth grade as compared to sixty percent of the latter. *Id.* And, indeed, these differences are reflected in the average wages earned by farmworkers who work for growers and those who work for middlemen. According to DOL, "[o]n average over the 2004-2008 period, persons who were employed directly by farm establishments earned on average $10.87 per hour (median $8.33 per hour), compared to a mean of $9.32 per hour (median $7.15 per hour) for those employed by support service establishments." *Id.*

In addition, rather than setting a single AEWR, as had been DOL's practice for decades, the 2008 regulations established four tiered rates that ostensibly corresponded to skill level. 73 Fed. Reg. 77,176-77,177. The tiers were not based on data mirroring actual wages paid to workers at different skill levels, however, but were based on certain—often arbitrary—assumptions about allotment of wages.[17] Setting wage tiers may be appropriate in skilled occupations—for example, in the H-1B program where foreign specialized workers such as architects, engineers, or scientists are admitted to the United States to perform work temporarily and may have different substantive skills that justify different wage rates. Agricultural work, however, is inherently unskilled labor and although a farmworker's speed and precision at his or her task may increase over time, this does not make the farmworker a "skilled" laborer—nor would it change the farmworker's wage level under the 2008 Regulations. Specifically, workers in the OES survey are disproportionately unskilled, with seventy-three percent of the applicants to the H-2A program falling into the lowest skill level. 75 Fed. Reg. at 6898. As applied to farmworkers, then, the use of tiers in the 2008 regulations also contributed to significant wage deflation. *Id.*[18]

---

[17] Letter Comment from Michael D. Gempler, Nat'l Council of Agricultural Employers, to Thomas Dowd, Administrator, Employment and Training Admin. 59-60 (Apr. 14, 2008) (ETA 2008-0001-0847.1) ("[t]he division of the wage data into 'skill levels' is entirely an artificial construct … which has no foundation whatsoever in the real world or in labor market data. The wages for different 'skill levels' are arbitrary manipulations of the OES data for which not even the BLSmakes a claim of validity.").

[18] *See also* Comment of Sylvia Allegretto (ETA 2008-0001-0930.1) (noting that OES data for Tier 1 is "quite far from the average wage" differing by as much as 32%).

The effect of these two changes to the regulations proved devastating for farmworkers. As the Preamble to the 2010 regulations explained, while the purported intent of the 2008 regulations was to "simplify the wage determination process," their effect was "to produce a substantial and across-the-board reduction in the level of wage protection provided by the AEWR." 75 Fed. Reg. at 6896. "[A]verage wage levels certified under the H-2A program [] declined by over [ten] percent nationwide," with "average certified wage for H-2A workers decreasing nationwide to $8.02 per hour, an 11.2 percent decrease compared to the $9.04 per hour average for FY 2009 applications that were received before January 19, 2009 and processed under the prior rules, and a 10.8 percent decrease compared to the $9.00 per hour average wage rate for FY 2008 applications, for all of which the wage determination was made under the prior rule." *Id.* DOL's analysis indicated that the decline was caused by the changes in AEWR methodology adopted in the 2008 regulations. Only seven states did not experience a decline, and they accounted for only "1,252 H-2A workers, less than 2.4 percent of the 52,420 total number of H-2A workers certified under the 2008 Final Rule in FY 2009." *Id.* at 6897.

Concerned that these lower wage rates—coupled with the severe economic conditions facing the country—placed farmworkers in an increasingly vulnerable position, Secretary Solis in May 2009 suspended the 2008 regulations. 74 Fed.

Reg. at 25,972. Such suspension was justified by the H-2A statute, which DOL stated shortly after its passage had for "over two decades establish[ed] AEWRs at or above average hourly wages in agriculture." 52 Fed. Reg. at 16,776. DOL correctly observed that "Congress endorsed this basic concept in its passage of IRCA." *Id*. These contemporaneous statements from the agency that administers the statute are normally treated as strong indicators of Congress's intent, *see, e.g.*, *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 611 (1987) (examining contemporaneous evidence of the definition of the word "race" to determine the intent of the statute), and in this instance they most certainly reflect that intent.

As DOL noted, farmworkers—domestic and foreign alike—are "one of the most vulnerable sectors" of the U.S. society, both economically and socially. 74 Fed. Reg. at 25,977 (citing Econ. Research Serv., U.S. Dep't of Agriculture, *Profile of Hired Farmworkers, A 2008 Update* iii (July 2008). The 2009 suspension of the wage-deflating 2008 AEWR regulations was designed to ensure that the H-2A statute was implemented in accord with its fundamental purpose of ensuring decent wages for farmworkers.

II. UNDER THE H-2A STATUTE, THE DEPARTMENT OF LABOR HAS BROAD DISCRETION TO SET THE ADVERSE EFFECT WAGE RATE FOR FARMWORKERS

The legislative history of IRCA indicates that both prior to and following passage of the Act, DOL was endowed with broad authority to set the methodology for calculation of the AEWR, so long as notice and an opportunity for comment are provided prior to the issuance of final regulations. Secretary Solis's decision in 2009 to revert temporarily to the 1987 regulations—prior to the issuance of the final 2010 regulations—was in accord with this legislative understanding.

Again, some historical context helps elucidate Congress' intent. In 1961, before the *bracero* program was discontinued, Congress specifically contemplated that the Secretary of Labor would have the power to certify that the employment of Mexican workers would not "adversely affect the wages and working conditions of domestic agricultural workers similarly employed." 107 Cong. Rec. 20,777 (1961). Similarly, in the Senate debates on H.R. 2010, enacted as Pub. L. No. 87-345, a bill that amended the Agricultural Act, Senator Morse read into the record portions of a report that stated the Department of Labor was requiring employers to pay the locally "'prevailing wage' to protect domestic wage standards while preventing exploitation of foreign workers," a concept separate from the AEWR, but one that suggests that DOL already was in the business of regulating wages informally. 107 Cong. Rec. 20,777 (statement of Senator Morse); *see also* 107 Cong. Rec. 20,649 (1961) (statement of Senator McCarthy) ("The Secretary has an obligation to determine the prevailing wage, to require payment of the prevailing wage for employment in similar work, and to require employers of Mexicans to pay at least the prevailing wage.").

Congress later considered numerous amendments that would have given the Department of Labor the power to set AEWRs for farmworkers.[19] These amendments foundered because many legislators concluded DOL *already* possessed this authority even without legislative authorization.[20] In signing the extension of the *bracero* program, for example, President Kennedy made a statement that DOL had broad powers to regulate the influx and efflux of Mexican nationals, powers which were recognized during legislative hearing.[21] Pursuant to

---

[19] Dellon, 17 Labor L.J. at 742-743 (describing the testimony of then-Secretary of Labor Goldberg before the Agricultural Research and General Legislation Subcommittee of the Senate Committee on Agriculture and Forestry in which he proposed various Administration-supported changes to wages).

[20] *Id.* at 743-744.

[21] *See id.* at 744 ("Present law, however, provides broad authority to regulate the conditions under which Mexican workers are to be employed. In particular, existing law authorizes, and indeed requires, the Secretary of Labor to permit the employment of Mexican workers only when he can determine that their admission will not adversely affect the wages and working conditions of domestic agricultural workers. This comprehensive *general authority* was not changed by H.R. 2010 and its availability was clearly recognized during the legislative consideration of the bill." (emphasis added) (internal quotation marks omitted)).

These statements are relevant to the interpretation of the later-enacted H-2A provisions in IRCA because, as the Supreme Court has held, there is an assumption that Congress does not create discontinuities in legal rights and obligations without some clear statement. *See, e.g.*, *Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." (internal quotation marks omitted)).

this authority, DOL determined and implemented minimum wage rates for states across the country using a complex, multi-factor formula. In various lawsuits challenging these rates, the main thrust of which was that DOL had overstepped its statutory mandate, courts upheld DOL's authority to set wage rates in this way. For example, in *Dona Ana County Farm & Livestock Bureau v. Goldberg*, 200 F. Supp. 210, 216 (D.D.C. 1961), the court held:

> Congress gave to the Secretary the power to determine what will or will not "adversely effect" the wages of domestic workers without specifying how he should conduct the survey, what formulas to apply, etc. While the survey could have been conducted at a different time and by employing different methods, the Court, in the light of the statute, cannot say that it was so erroneous, unauthorized, or arbitrary as to be illegal.

Similarly, in *Limoneira Co. v. Wirtz*, the court held that the Secretary of Labor did not exceed his statutory authority in fixing the minimum wage rate to be paid to Mexican agricultural workers. 225 F. Supp. 961, 964-965 (S.D. Cal. 1963), *aff'd*, 327 F.2d 499 (9th Cir. 1964). The upshot of these regulations, and the decisions

---

Furthermore, when Congress borrows statutory language—as it did here in importing the term "adverse effect"—it adopts by implication the interpretations placed on that statute absent an express statement to the contrary. *Molzof v. United States*, 502 U.S. 301, 307 (1992) ("A cardinal rule of statutory construction holds that: Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." (internal quotations omitted)).

rejecting challenges to them, is that the Secretary of Labor has broad authority to protect worker's rights and to ensure safe working conditions. *See id.*; 52 Fed. Reg. at 20,503.

Over time, establishment of AEWRs became more formalized "and AEWRs were computed and set for the H-2 agricultural worker program … after public notice and comment." 52 Fed. Reg. 20,503 (citing 29 Fed. Reg. 19,101, 19,102 (Dec. 30, 1964); 32 Fed. Reg. 4569, 4571 (Mar. 28, 1967); and 35 Fed. Reg. 12,394, 12,395 (Aug. 4, 1970)). According to DOL, IRCA "[did] not change the role and effect of [its] policies to protect the wages of similarly employed U.S. agricultural workers from the adverse effect which may result from the employment of alien workers." *Id*. at 20,502. DOL retains its "broad discretion" to set AEWRs using "any number of reasonable formulas." *Id*. at 20,503 (internal quotation marks omitted) (collecting cases from circuits around the country); *see also AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987) ("[C]alculating AEWRs has been left entirely to the Department's discretion."). Such discretion is, of course, not boundless. The underlying assumption in the congressional debates referenced above is that DOL would use its discretion to protect both workers and growers alike. 52 Fed. Reg. 20,503. However, in the event of a conflict between the two, "wide leeway favoring domestic workers is given the U.S. Secretary [of Labor]." *Id.* (alteration in original).[22]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

[22] Importantly, this discretion has been exercised to effect a temporary suspension of the methodology used to calculate AEWRs. In 1981—prior to the passage of IRCA but well after the use of the USDA data by DOL to calculate wage rates—the USDA "reduced its number of surveys and ceased compiling annual average field and livestock worker wage rates as well as the survey data which would have been used." 52 Fed. Reg. 20,503; *see also Production Farm Mgmt. v. Brock*, 767 F.2d 1368, 1370 (9th Cir. 1985) (describing history of USDA methodology in place from 1968 to 1981). Concerned that these changes would mean that USDA would no longer provide data that was appropriate for DOL to use in calculating the AEWR, DOL issued a temporary notice of suspension that reverted to the 1980 data. United States Employment Service; Labor Certification Process for the Temporary Employment of Aliens in Agriculture: 1981 Adverse Effect Wage Rates, 46 Fed. Reg. 19,110 (Mar. 27, 1981); Notice of Deferral of Effective Date of Regulations, 46 Fed. Reg. 11,253 (Feb. 6, 1981) (postponing the rule for sixty days after the election of President Reagan). Following the 1981 suspension, various interim methodologies were used until the USDA reestablished its surveys following notice and comment. *See* 52 Fed. Reg. at 20,503 (collecting references to the Federal Register).

Respectfully submitted.

/s/ Annie L. Owens
JONATHAN G. CEDARBAUM
LILLIAN HOWARD POTTER
ANNIE L. OWENS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6561

March 19, 2012

ADDENDUM 1

CCH

LABOR LAW JOURNAL

A COMMERCE CLEARING HOUSE PUBLICATION

DECEMBER • 1966

Foreign Agricultural Workers and the Prevention of Adverse Effect

By HOWARD N. DELLON*

This article, by an economist on the staff of the Farm Labor Service, Bureau of Employment Security, United States Department of Labor, discusses the development and implementation of the policy that the use of foreign workers in seasonal agricultural activities should not be at the expense of United States citizens. This policy of preventing adverse effect has been a major factor in shaping the farm labor programs of the Department of Labor, particularly in the past few years.

THE IMMIGRATION AND NATIONALITY ACT OF 1952 as amended (hereinafter referred to as Public Law 414) governs the entry of nationals of foreign countries into the United States. In the case of aliens seeking visas for permanent entry (that is, immigrants) for the purpose of performing skilled or unskilled labor, the Secretary of Labor is required to determine and certify to the Secretary of State and the Attorney General that sufficient numbers of domestic workers who are able, willing and qualified are not available and that the employment of such aliens will not adversely affect the wages and working conditions of domestic workers similarly employed.[1]

In the case of workers seeking entry for temporary employment, P. L. 414 grants the authority for determining admissibility to the Attorney General, "after consultation with appropriate agencies of the Government, upon petition of the importing employer."[2] In fulfilling these obligations, the Attorney General has designated the Department of Labor as an agency which is consulted to assist him in deciding whether temporary aliens should be admitted. The Immigration and Naturalization Service, the Justice Department agency which administers the Act, requires that an employer seeking to import temporary workers attach to his petition a certification from

* The views expressed herein are those of the author and not necessarily those of the Department of Labor.

[1] Section 212(a)(14) of the Immigration and Nationality Act of 1952, as amended by P. L. 89-236 (1965). Prior to 1965, the language in Section 212(a)(14) provided that foreign workers were excludable if the Secretary of Labor had determined and certified that there were sufficient workers in the United States or that the admission of the foreign workers would adversely affect the wages and working conditions of domestic workers.

[2] P. L. 414, Secs. 101(a)(15)(H) and 214(c).

the United States Employment Service stating that United States workers are not available to fill the jobs for which foreign workers have been requested and that employment service policies have been observed.

The Regulations of the Department of Labor which implement the Department's responsibilities under this provision of P. L. 414 (first issued in 1952 and revised most recently at the end of 1964) require a showing that the employment of foreign labor "will not adversely affect the wages or working conditions of domestic workers similarly employed."[3]

Background

This concept of protecting the position of domestic workers was first enunciated in an agreement entered into with the Mexican government in 1942.[4] Under this agreement, Mexican nationals were to be admitted to the United States to alleviate the wartime shortages in farm labor provided certain conditions were met. One of these conditions was that Mexican workers could not be employed to displace other workers or for the purpose of reducing previously established rates of pay.[5] It was spelled out more specifically by P. L. 78 of the 82nd Congress, as amended,[6] the law which governed the admission of Mexican nationals into the United States for temporary employment in agriculture from 1951 to 1964, and by the Migrant Labor Agreement of 1951, as amended,[7] which was negotiated with the government of the Republic of Mexico by the United States to implement P. L. 78. Section 503(2) of P. L. 78 required the Secretary of Labor, as a condition for permitting the contracting of Mexican nationals, to determine and certify that the employment of Mexican nationals would not "adversely affect the wages and working conditions of domestic agricultural workers similarly employed." Article 9 of the Agreement prohibited the employment of Mexican nationals in any job "where the employment of Mexican workers would adversely affect the wages and working conditions of domestic agricultural workers in the United States."

This article is devoted to a discussion of the manner in which the adverse effect policy was developed, beginning with the passage of P. L. 78 in 1951. It also discusses the implementation of the adverse effect policy with respect to temporary employment in agriculture after the termination of P. L. 78 at the end of 1964 and the effects of this policy on agricultural employment and wages in 1965 and 1966.

Adverse Effect Policy Development

Action to implement the adverse effect authority under P. L. 78 was taken as early as 1953 when employers seeking to use Mexican nationals for picking cotton in Cochise, Arizona, were required to pay not less than $3.00 per cwt. In 1956 (and again in 1958), the Bureau of Employment Security enunciated the policy that

[3] Code of Federal Regulations, Chapter 20, Sec. 602.10.

[4] Agreement with Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, August 4, 1942, 56 Stat. 1759; EAS 278.

[5] See U. S. Department of Labor, "Admission of Aliens into the United States for Temporary Employment," a presentation by the Department of Labor before the Committee on the Judiciary (Subcommittee No. 1), House of Representatives, Study of Population and Immigration Problems, Administrative Presentations (III), Special Series No. 11, U. S. Government Printing Office, Washington, D. C., 1963, p. 28.

[6] Act of July 12, 1951. The Act was in the form of an amendment to the Agricultural Act of 1949 (Act of October 31, 1949) and added a new Title V to the Act.

[7] 2 UST 1940, TIAS 2331, 162 UNTS 103.

the payment by users of Mexican nationals of wage rates which were significantly lower than those paid by nonusers would be considered as an indication of adverse effect.[8] Also in 1958, the policy was established that Mexican nationals were to be paid hourly rates of not less than 50 cents an hour or, if paid piece rates, to have average earnings of not less than 50 cents an hour during any biweekly payroll period. In implementing the piece rate policy, the Department established the "90-10" rule which provided that at least 90 per cent of the Mexican nationals were required to earn not less than the hourly standard, unless the employer could demonstrate that more than 10 per cent either did not apply themselves diligently or otherwise did not meet the requirements of the work contract. If this could not be done, then the employer had to adjust his wage rates to meet the standard or face the possibility of having his foreign workers withdrawn.[9]

In 1959, the Secretary of Labor appointed a committee of consultants to advise him on the operations of the Mexican Farm Labor Program.[10] In a report issued in October 1959, the Consultants made a number of recommendations regarding changes in the program. With respect to the problem of preventing adverse effect, they said:

"The test of adverse effect on wages and employment should be made more specific. The Secretary should be directed to establish specific criteria for judging adverse effect including but not limited to: (a) failure of wages and earnings in activities and areas using Mexicans to advance with wage increases generally; (b) the relationship between Mexican employment trends and wage trends in areas using Mexican workers; (c) differences in wage and earnings levels of workers on farms using Mexican labor compared with nonusers."

The recommendations of the Consultants were followed by the establishment on July 13, 1960 of the policy and procedure for taking adverse effect action when wage surveys disclosed the existence of differentials in wage rates paid by employers using Mexican nationals and by those who did not[11] (thus implementing the policy originally enunciated in 1956).[12] The procedure established by BES required state agencies to provide specific data to guide the Director of BES in determining whether adverse effect existed and, if he so determined, in taking action to remedy the situation.

This standard, plus the application of the "90-10" rule, formed the basis for a widespread adverse effect program during 1960 and 1961. In this two-year period, 18 adverse effect actions were taken under the "user-nonuser differential" criterion and 5 under the "90-10" rule. In most instances, these actions required the payment of higher rates for specific crop activities in a given area. However, in widespread areas of Texas, minimum contract rates necessary to prevent adverse effect were established for cotton harvesting, and a statewide determination was issued for the cotton harvest in Arkansas on the basis of the failure of wage rates in 1960

[8] Employment Service Program Letter (ESPL) 679, issued April 4, 1956 and ESPL 892, issued June 6, 1958.

[9] ESPL 885, issued May 21, 1958 and ESPL 916, issued August 15, 1958.

[10] The Consultants were Glenn E. Garret, the Very Reverend Monsignor George E. Higgins, Edward J. Thye, and Dr. Rufus B. von Kleinsmid. William Mirengoff of the Bureau of Employment Security was Executive Secretary.

[11] Commonly known as the "user-nonuser differential."

[12] ESPL 1093 and Research and Analysis Letter (RAL) 346.

to rise in season from $2.50 to $3.00 per cwt. In Maricopa and Yuma Counties in Arizona, and in the Imperial Valley and East Riverside areas of California, determinations were issued requiring the payment of piece rates for lettuce harvesting, based on data indicating that the prevailing hourly rates (paid primarily by users of Mexican nationals) were lower than the earnings of domestic workers employed at piece rates by nonusers.

Of particular interest was a determination issued in the Spring of 1961 which required employers in New Mexico using Mexican nationals as general farm hands, irrigators and tractor operators to pay not less than the amounts found to be prevailing after a wage survey conducted jointly by the Bureau of Employment Security and the New Mexico Employment Security Commission. This determination was contested by New Mexico farmers who brought suits on various grounds, one of which was that this action was an illegal "fixing" of wages by the Secretary of Labor.[13] The court ruled that P. L. 78 gave the Secretary wide authority to determine the prevailing rate and that growers were required to accept the determination of the Secretary by the finality provisions of Article 32 of the Migrant Labor Agreement.[14]

This decision was of particular importance because of the timing—just prior to the adverse effect determinations in the Spring of 1962 which established wage rates on a statewide basis which employers were required to pay Mexican nationals as a minimum requirement for obtaining such workers. It gave support in this circumstance to the position taken by the Department that P. L. 78 gave the Secretary wide authority to act as he deemed necessary to prevent adverse effect.

1961 Amendments to P. L. 78

When P. L. 78 was originally enacted, it had an expiration date of December 31, 1953, but the Act was periodically extended until the Mexican Labor Program was finally terminated at the end of 1964. In 1961, when Congress was considering extending the program to December 31, 1963, a strong effort was made to amend the Act to provide additional protections to domestic workers. As summarized by then Labor Secretary Goldberg in his testimony before the Agricultural Research and General Legislation Subcommittee of the Senate Committee on Agriculture and Forestry on June 13, 1961, the administration-supported changes in the Act were as follows:

(1) The Secretary would have been authorized to limit the number of Mexican nationals to be employed by any one grower to the extent necessary to assure active competition on the part of employers for domestic workers;

(2) Growers would have been required to offer conditions of employment to domestic workers comparable to those they were required to provide for Mexican workers;

(3) The employment of Mexican workers in other than temporary or seasonal work, or in work involving the operation of power-driven ma-

[13] *Dona Ana County Farm and Livestock Bureau, et al. v. Goldberg, et al.*, 200 F. Supp. 210, 44 LC ¶ 17,342 (DC D. of C. 1961). See *A Federal Court Looks at the Mexican Program* by William Haltigan, *Employment Security Review*, Vol. 29, No. 5, pp. 19-21 for a discussion of the issues involved in the case.

[14] Paragraph (d) of Article 32 of the Migrant Labor Agreement of 1951, as amended, provided that "the employment of any Mexican workers by a member of an association shall constitute acceptance by such member of the obligations provided under the terms and conditions of the Agreement.

chinery would have been prohibited; and

(4) Employers using Mexican workers would have been required to pay wages at least equivalent to the statewide or national average rate for hourly paid farm labor (whichever was the lower), subject to the limitation that the maximum increase in any one year would be no greater than 10 cents an hour.[15]

During Congressional consideration of action on the proposed amendments, it was made clear that they were offered at least in part to afford the Congress an opportunity to participate in the setting of wage standards designed to avoid adverse effect.

Much of the debate over the Administration's proposal to enact a wage standard into law was over the question of whether statutory authority was needed or whether it was already there. Thus, the report of the House Committee on Agriculture which accompanied H. R. 2010, the bill to extend P. L. 78 for two years with no amendment, stated:

"The Department (of Labor) now has this authority, although it would be desirable that it be spelled out in more specific statutory form. For example, the Department on occasion has required an increase in wage rates paid Mexican nationals to avoid adverse effect on domestic workers."[16]

Secretary Goldberg in his testimony before the Senate Subcommittee on June 13, 1961, stated:

"We are of the view that we presently have the authority under existing legislation to require this; that the adoption of this (wage) formula by the Department would be a reasonable exercise of the Secretary of Labor's statutory responsibility under Title V of the Agricultural Act of 1949 (P. L. 78) not to make Mexican workers available unless he can certify that their employment will not adversely affect the wages and working conditions of domestic workers similarly employed. We believe that this is a fair and appropriate standard by which to test such adverse effect.

"The simple fact is that whenever the Department of Labor has adopted any measure to give meaning and effect to this statutory requirement, the authority of the Secretary of Labor has been vigorously contested, in and out of Court. In fact, in the most significant cases in which such restraining orders have been issued, even though set aside at a later date, it has been due only to the action of the Mexican government in withholding their nationals that the adverse effect has not been greater. Because we have been subjected to restraining orders and to other litigation that vitiates that authority, we believe that the time has come to remove any doubt as to the validity of the Secretary's actions through a specific legislative standard."

Senator Mansfield, the Majority Leader of the Senate, stated during the debate on the wage amendment:

"If this amendment is not adopted, let there be no future criticism of the Secretary of Labor if he prescribes similar tests administratively. The Secretary of Labor has advised the Congress that he has found clear indications of adverse effect and will feel constrained in carrying out his statutory responsibilities to take steps beyond those already taken."

The extension of P. L. 78 enacted in 1961 did not contain the wage amendment proposed by the administration,

[15] Commonly known as the "McCarthy Amendment" because of its sponsorship by Senator Eugene McCarthy of Minnesota. S. 1945 and H. R. 6032 were the bills introduced in the first session of the 87th Congress (1961) embodying the administration proposals listed above.

[16] *U. S. House of Representatives, Continuation of Mexican Labor Program,* (Report No. 274, 87th Congress, 1st Sess., 1961, p. 9).

although it did include the limitation on the use of Mexican nationals to seasonal temporary jobs and prohibited their employment in the use of mechanical equipment, except (in both instances) in cases of exceptional hardship. President Kennedy, in signing the extension of P. L. 78 into law, expressed his disappointment with the failure to include the provisions which he believed were necessary to protect domestic farm workers. He stated:

"The adverse effect of the Mexican farm labor program as it has operated in recent years on the wage and employment conditions of domestic workers is clear and is cumulative in its impact. We cannot afford to disregard it. We do not condone it. Therefore, I sign this bill with the assurance that the Secretary of Labor will, by every means at his disposal, use the authority vested in him under the law to prescribe the standards and to make the determinations essential for the protection of the wages and working conditions of domestic agricultural workers. . . . Present law, however, provides broad authority to regulate the conditions under which Mexican workers are to be employed. In particular, existing law authorizes, and indeed requires, the Secretary of Labor to permit the employment of Mexican workers only when he can determine that their admission will not adversely affect the wages and working conditions of domestic agricultural workers. This comprehensive general authority was not changed by H. R. 2010 and its availability was clearly recognized during the legislative consideration of the bill."

Statewide Adverse Effect Rates

Armed with this recognized legislative authority and the Presidential mandate, a more determined attack was made on the problem of preventing adverse effect. In the Spring of 1962, after public hearings, the Secretary issued a determination establishing the lowest rates on a statewide basis which could be paid by growers employing or seeking to employ Mexican nationals. Rates ranging from 60 cents to $1.00 an hour were established for 24 states in which Mexican nationals had been employed in agricultural jobs during 1961.

State	*Rate*
Arizona	$ .95
Arkansas	.60
California	1.00
Colorado	.90
Georgia	.75
Illinois	1.00
Iowa	1.00
Kansas	1.00
Kentucky	.80
Michigan	1.00
Minnesota	1.00
Montana	1.00
Nebraska	1.00
Nevada	1.00
New Mexico	.75
North Dakota	1.00
Oregon	1.00
South Dakota	1.00
Tennessee	.65
Texas	.70
Utah	1.00
Wisconsin	1.00
Wyoming	1.00

The determinations also provided that piece rates paid to Mexican nationals were to be designed to yield earnings at least equivalent to the prescribed hourly rates, with the further proviso that no Mexican national was to be paid less than the prescribed rate.[17]

The "designed to yield" proviso of the determination proved to be a significant factor in the adverse effect

[17] ESPL 1281, issued March 29, 1962, and ESPL 1283, issued April 16, 1962. The authority of the Secretary of Labor to issue statewide adverse effect rates was challenged in the U. S. District Court for the District of California, Southern Division, in the

program during the balance of 1962 and in 1963. In those crop activities compensated on a piece rate basis in which earnings of Mexican nationals consistently fell below the applicable adverse effect rate, individual determinations were issued requiring the payment of higher piece rates which were designed to yield earnings equivalent to the target rate.

Of particular note in this respect was a determination issued on November 4, 1962, for lettuce harvesting in all areas of Arizona, California, Colorado, Kansas, New Mexico and Texas. The determination provided that Mexican workers hired for lettuce harvest work in these areas were to be paid:

(1) Not less than a crew piece rate of 24 cents per carton, or the prevailing piece rate, whichever is the higher, with guaranteed hourly earnings no less than the hourly adverse effect rate for the state, or

(2) An hourly rate not less than the adverse effect wage rate for the state, or the prevailing hourly rate for lettuce harvest work, whichever is the higher.

Furthermore, all workers, domestic and foreign, were to have the option of choosing whether they were to be employed at piece rates or on an hourly basis. This provision for worker option was, however, subject to an escape clause whereby an individual employer who could demonstrate to the satisfaction of the Department of Labor that the lettuce crop was defective to the extent that special handling was required would have the option of paying piece or hourly rates, without regard to the worker option.

The Regulations of the Department have always required employers seeking foreign nationals for temporary employment in United States agriculture to make reasonable efforts to attract domestic workers by offering wage rates, hours of work and working conditions comparable to those offered to the foreign workers. In May 1962, it was made clear that employers would be expected to offer domestic workers not less than the minimum adverse effect rates set forth in the Secretary's determinations of March 29 and April 16, 1962.[18] In addition, when the wage rates of Mexican nationals were increased as a result of a prevailing wage determination, then domestic workers employed by users of foreign labor were also to receive such increases. Finally, the adverse effect standards applicable to the recruitment of Mexican nationals under P. L. 78 were made applicable to the recruitment of foreign agricultural workers from any country pursuant to Section 214 of the Immigration and Nationality Act (P. L. 414).

The determinations issued in the Spring of 1962 were applicable only to the states in which Mexican nationals had been employed in agricultural activities in 1961. However, other foreign workers—British West Indians, Bahamians and Canadians — were employed in seasonal agricultural activities in states other than those covered by the 1962 determinations, principally along the East Coast. In July 1963, again after public hearings, adverse effect determinations were issued specifying the minimum contract rates

(*Footnote 17 continued.*) case of *Limoneira v. Wirtz*, 225 F. Supp. 961, 47 LC ¶ 18,382 (1963). In this case it was argued that the setting of adverse effect rates constituted the fixing of a minimum wage for agriculture and that no such authority had been conferred by the Congress on the Department. The decision of the court held that while the Secretary's action (in establishing a minimum) might have had the indirect effect of fixing wages, the action was not inconsistent with the intent of Congress and was within the authority conferred upon the Secretary with respect to establishing standards designed to avoid adverse effect.

[18] ESPL 1303, issued May 22, 1962.

applicable to the recruitment and employment of foreign workers in 11 East Coast states. Rates of $1.00 an hour were specified for all but 3 of these states.

State	*Rate*
Connecticut	$1.00
Florida	.95
Maine	1.00
Massachusetts	1.00
New Hampshire	1.00
New Jersey	1.00
New York	1.00
Rhode Island	1.00
Vermont	1.00
Virginia	.75
West Virginia	.80

In Florida, the determination, which required a minimum rate of 95 cents an hour, was suspended on October 3, 1963, in response to employer requests for reconsideration because of additional information. Subsequently, after another public hearing, the Secretary issued a determination on April 1, 1964, reinstating the adverse effect rate, effective April 15, 1964.

Termination of the Bracero Program

P. L. 78 expired on December 31, 1964. Thereafter, foreign workers could be brought into the United States for temporary employment in agriculture only in accordance with the provisions of the Immigration and Nationality Act. On December 19, 1964, after public hearings, the Secretary of Labor amended the Regulations governing applications by employers for such workers. The amended Regulations provided that before certification of need for foreign workers would be made, it would be necessary for employers to show that they had made and would continue to make reasonable efforts (as specified in the Regulations) to recruit domestic workers and that employment of foreign workers would not adversely affect the wages and working conditions of domestic workers. In addition, effective April 1, 1965, employers seeking to employ foreign workers were required to offer and pay domestic workers not less than the rates specified in the Regulations, ranging from $1.15 to $1.40 an hour.

State	*Rate*[19]
Arizona	$1.25
Arkansas	1.15
California	1.40
Colorado	1.30
Connecticut	1.40
Florida	1.15
Indiana	1.25
Kansas	1.40
Maine	1.25
Massachusetts	1.30
Michigan	1.25
Minnesota	1.40
Montana	1.40
Nebraska	1.40
New Hampshire	1.30
New Jersey	1.30
New Mexico	1.15
New York	1.30
Oregon	1.30
Rhode Island	1.30
South Dakota	1.40
Texas	1.15
Utah	1.40
Vermont	1.30
Virginia	1.15
West Virginia	1.15
Wisconsin	1.30
Wyoming	1.25

[19] The above rates were effective April 1, 1965. For the following states the rates listed below were in effect between January 1 and April 1, 1965:

State	*Wage Rate*
Arizona	$1.05
California	1.25
Connecticut	1.25
Florida	.95
Massachusetts	1.25
New Mexico	.90
Texas	.90

Employers were also required to offer all of the terms and conditions of employment formerly offered to Mexican nationals under the Migrant Labor Agreement of 1951, including a written contract embodying those conditions; to provide family housing where feasible and necessary; and to pay the reasonable costs of transportation to and from the place of employment.

The amended Regulations also continued the requirement that piece rates must be designed to yield earnings at least equivalent to the prescribed hourly rates as well as the proviso that in no event was the worker to be paid less than the prescribed hourly rate.

Two modifications have been made in the adverse effect rates. On February 5, 1965, the Secretary announced a $1.50 an hour adverse effect rate for off-ground work in California dates. This was 10 cents higher than the rate established for California by the December 19, 1964 determination. Growers first attempted to recruit domestic workers, without offering the higher rate, but on March 19 agreed to meet the Secretary's criteria. On September 21, 1965, the Secretary accepted a grower proposal that the $1.15 adverse effect rate for Florida be suspended for the 1965-66 citrus harvest (retroactive to September 1) on condition that employers pay piece rates designed to yield average hourly earnings of $1.50 an hour to all workers employed by the same employer in a payroll period. Should earnings fall below this target, make-up was to be paid proportionately in sufficient amounts to raise average earnings to the $1.50 level.

Summary

As we have seen, adverse effect evolved over a period of years from broad statements of general policy and action in individual cases to the establishment of specific criteria, both in terms of wages and other terms and conditions of employment, which employers seeking to use foreign workers had met. For the period prior to 1965, it is difficult to measure the effects of this development. It is clear that some drop in foreign worker employment would probably have occurred without any implementation of the policy as farmers substituted machines and fertilizer and pesticides for labor. However, it is questionable whether this would have been as great as the actual decline—about 200,000 foreign workers entered the United States for temporary employment in United States agriculture in 1964 as compared with more than 400,000 annually between 1955 and 1959—if the adverse effect policy had not, in fact, been implemented. As an example, the use of Mexican nationals in the cotton harvest in the Lower Rio Grande Valley of Texas declined sharply between 1960 and 1961 largely as a result of an adverse effect determination raising the Mexican contract rate from $2.05 to $2.50 per cwt. Some of the slack was picked up by domestic workers and some by an increase in the use of machines.

The effects of the policy are clearer for 1965 and 1966. In the earlier year, only about 36,000 foreign nationals were admitted for seasonal employment in United States agriculture. In general, the employment of these workers was limited to relatively brief periods of time at the peak of the harvest; in other words, they were used to supplement the domestic workforce. So far as the overall effect on domestic workers is concerned, the data indicate that about 100,000 more were employed as *seasonal* workers in 1965 than in 1964. This increase, it should be noted, ran counter to the long-term decline in the total number of hired farm workers. The 1965 trend continued into 1966, with the use of foreign workers limited to those few instances in which extreme shortages of workers existed even after employers had made reasonable efforts to attract and hold domestic workers.

In addition to the effects of the policy upon employment, there is evidence of a rise in farm wage rates to which the policy has contributed. Wages of farm workers have long been the lowest in the United States. During most of the postwar era, they lagged further and further behind those of workers in other industries. Between 1951 and 1964—the period of the bracero program—the average hourly rate in manufacturing occupations in the United States rose more than 60 per cent, while the average for farm workers rose only 40 per cent. To put it another way, in 1951, the average farm wage of 77 cents was 79 cents lower than the manufacturing rate of $1.56 an hour. By 1964, the gap had widened to $1.46—$1.08 as against $2.54. In 1965, a reversal of this trend occurred. Agricultural wages rose six cents to $1.14 an hour (figured without room or board)—the greatest single year increase since the Korean War—while manufacturing earnings rose by 5 cents. Although wage data are available only for the first half of 1966, the data suggest that the rise in farm wage rates will be even greater.

Obviously, not all of the increase can be attributed to the effects of the December 19, 1964 Regulations. However, it is clear that in many activities, wages have risen as a direct effect of the policy. The most striking example of this has occurred in the Florida citrus harvest. Foreign workers—British West Indians—have accomplished the bulk of this harvest for many years. However, in the 1965-66 season just ended, the employers made a concerted effort to obtain domestic workers. The principal inducement was a restructuring of the wage system. They offered a crew average of $1.50 an hour, with make-up payments to be made across the board in such amounts to bring earnings up to that level. This system worked so well that only a small number of foreign workers were required after frost damage in the Spring of 1966. Workers averaged over $2.00 an hour and only one employer was required to pay make-up, and that for only a single payroll period.

The Secretary's criteria have had other effects which are noteworthy. One of the major problems in the past has been the absence of adequate housing. In part, this was due to the employment of foreign workers who were single male adults and required only barracks-type housing. Domestic workers frequently travel in family groups and need a different type of housing. While still in short supply in some areas, much progress has been made toward providing this sort of housing. Other "fringe benefits" which are designed to make farm work more attractive to domestic workers are day care centers and school programs for the children of migrants.

On the basis of the experience of the past two years, it would seem clear that sufficient numbers of United States citizens are available in all but a few special cases to perform whatever work needs to be done in agriculture in this country. However, until the policy that the employment of foreign workers should not "adversely affect the wages and working conditions" of domestic workers was fully implemented, it was not possible to demonstrate this. It would appear too safe to conclude that the day of the bracero has finally passed.

[The End]

ADDENDUM 2

A comment to the proposed rule change submitted to the Department of Labor, Wage and Hour Division regarding the switch from USDA Farm Labor Survey to BLS Occupational Employment Statistics data to calculate the AEWR.

By Sylvia A. Allegretto, PhD
Economist
Institute for Research on Labor & Employment
University of California, Berkeley
(510) 643-7080

Introduction

These comments are in reference to the Department of Labor's February 2008 document titled "Modernizing the Labor Certification Process and Enforcement for Temporary Agricultural Employment of H-2A Aliens in the United States". Specifically, these comments pertain to the adverse effect wage rate (AEWR) that is set for H-2A certified employers to pay their domestic and immigrant agricultural workers that have H-2A visas. The Immigration and Nationality Act (INA) defines an H-2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. The adverse effect wage rate (AEWR) is a wage rate set by the U.S. Department of Labor such that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed" (P.43 DOL). To this goal, "agricultural employers wishing to utilize the H-2A program have traditionally been required to offer and pay their covered U.S. workers and H-2A workers the higher of the applicable hourly Adverse Effect Wage Rate, as determined by the Federal government; the applicable prevailing wage, as determined by the States; or the Federal or State statutory minimum wage" (DOL 43). I first present a few general comments on the H-2A program as it relates to employment of U.S. and/or H-2A workers. Second, I review and discuss the methodology and data utilized in calculating the AEWR and the implementation of this wage.

The Adverse Effect Wage Rate and Undocumented Workers

In the February 2008 DOL announcement it was stated that approximately 75,000 workers—which is about 6% of the agriculture workforce—participate in the H-2A program and that there are an estimated 600,000 to 800,000 illegal immigrants working on American's farms (DOL news release 2/6/2008). It should be noted, first and foremost, that the H-2A program and subsequently the AEWR apply to and affect only a very small fraction of agricultural workers—even with the DOLs estimates of undocumented workers which may be significantly underestimated. This is not to say that the AEWR is not important, it is. But, the H-2A program and the AEWR are severely undermined by the employment of hundreds of thousands of undocumented immigrant workers. These workers are hired illegally by U.S. farm owners and/or contractors, and as such, also confound the spirit and calculation of the AEWR which I address below.

It may be convenient to think that the hiring of so many undocumented agricultural workers is done to circumvent the AEWR, but I do not think that is the case. If it were the case one would have to believe that absent the AEWR large numbers of undocumented workers would not be hired illegally in the agricultural sector and this seems highly unlikely. When employers replace documented workers with undocumented workers in low wage jobs they are not doing so to necessarily evade unduly high wages but to pay a wage that is illegally low. There are other reasons that employers in the U.S. hire undocumented workers over U.S. workers. Undocumented workers—afraid of deportation—are perceived to be less demanding in terms of non-pecuniary benefits and are less likely to form unions or make demands upon employers, as well as accept pay below legal standards. If it is actually the case that the agricultural sector needs this many immigrant workers, it is in the best interest of U.S. and H-2A workers to bring them into the fold of U.S. labor standards and laws.

At this time, given the extremely large share of illegal immigrants working in agriculture, it is unknowable, absent them, how many U.S. workers would be willing to and at what price work in the agriculture sector. As the DOLs own language states: "Thus, based on data collected during more than 20 years of experience in administering the H-2A program, the Department has concluded that one of the most significant actions it can take to protect the wages and working conditions of U.S. workers is to render the H-2A program sufficiently functional such that, rather than resorting to the employment of workers illegally present in the U.S. to make up for shortages in the number of U.S. workers who are willing and available to perform agricultural work, agricultural employers will instead use the H-2A program, with all of its accompanying legal requirements and protections" (p.43). That so many farmers and contractors hire so few U.S. and H-2A workers is inherently complicated by the undocumented workforce. In their statement the DOL seem to, for the most part, ignore the effects of so many undocumented farm workers regarding the H-2A discussion. The DOL explains that employers will hire undocumented workers if the AEWR is set too high. But, any wage higher than the going rate for undocumented workers, give all else equal—would be too high. They state: "These system failures have contributed to the large number of undocumented workers in agricultural positions in the U.S., which has in turn adversely impacted U.S. workers by eroding agricultural employment opportunities and wages." I'm not exactly sure what system failures they refer to—an AEWR that is too high or the large share of undocumented workers.

System failure is certainly associated with the lack of effective enforcement of the laws against hiring unauthorized immigrants. The use of the H-2A program would very likely increase if the government increased immigration law enforcement and reduced evasions of the prohibition against hiring unauthorized immigrants. Stricter enforcement of existing laws that lead to a reduction in the supply of unauthorized workers may result in significantly greater use of the H-2A program regardless of the wage rate.

The idea of an AEWR is important and theoretically it is easy to grasp. However, in practice it is a difficult concept to implement. Conceptually, the AEWR insures that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." (DOL p. 43). To this goal, some measure of market wages of 'similiarly' employed workers has to be taken into account to set the appropriate AEWR if the wage is to protect U.S. workers. The DOL stresses that "the greater the total cost to employers of the AEWR plus all other attendant H-2A program costs as compared to the market rate for labor, the greater the likelihood is that employers will risk hiring undocumented foreign labor" (p. 45). But, this is a bit perplexing and is vague regarding which 'market rate for labor' they refer to. If the agricultural sector were to find equilibrium without the presence of undocumented immigrant workers wages rates would increase above current AEWR levels. If, however, the DOL refers to a market that includes the undocumented workers that dominate the agricultural workforce the wage rate is depressed. Given the large share of undocumented workers in this industry, current wage levels are influenced by these workers and few U.S. workers are willing to work at wage rates that are, in part, set by undocumented workers. All agricultural workers, U.S. citizens, authorized immigrant workers and unauthorized workers are hurt by wage rates that are set artificially low due to the disproportional share of undocumented workers.

It may be that the AEWR is a minimum wage for employers who hire H-2A workers and it is a maximum wage for U.S. workers. The DOL continues by saying that the greater the total cost to employers of the AEWR plus all other attendant H-2A program costs as compared to the market rate for labor, the greater the likelihood is that employers will risk hiring undocumented foreign labor—this would theoretically set the AEWR at the wage rate of undocumented workers if the goal is to make H2-A workers more attractive. The goal of the AEWR to not adversely affect U.S. workers is in direct contrast to the effect that the large share of undocumented workers has on the setting of the AEWR and the overall H-2A program.

The AEWR Calculation

The AEWR is currently set by using data from the USDA Farm Labor Survey (FLS) but in the "Modernizing" document the DOL has proposed a switch to the Occupational Employment Statistics (OES) survey. Therefore, these comments will focus on the validity of the method to calculate the AEWR in general and the use of the FLS, OES or other possible data sources that may be utilized.

The AEWR has been calculated using the FLS since 1988—despite litigation over the 1987 announcement that continued for a few years, it took effect in 1988—and rates are determined for 15 regions and three states that comprise their own regions. The FLS is a quarterly employer survey and data are reported on total wages paid and total hours worked during the survey reference week of which an hourly wage is calculated. The AEWR is calculated by using weighted regional data for field and livestock workers combined. Since the FLS is a survey targeted to farm labor it has many positive aspects. The National Agricultural Statistics Service (NASS) which administers the FLS uses sampling procedures to ensure every employer of agricultural workers has a chance of being selected into the sample. A second sample consists of segments of land scientifically selected from an area sampling frame. Each June, highly trained interviewers locate each selected land segment and identify every farm operating land within the sample segment's boundaries. The names of farms found in these area segments are matched against the NASS list of farms; those not found on the list are included in the labor survey sample to represent all farms.

The FLS also has some limitations regarding its use to calculate AEWRs. Hourly wages are constructed from a total wage bill and aggregate hours worked. Data on the actual pay of workers would be useful—such data can be found in the employment based National Agricultural Workers Survey (NAWS) that randomly surveys a sample of hired crop workers. The NAWS is administered by the DOL and could possibly assist in the setting of AEWRs. The NAWS is an employment based random sample of hired crop workers with detailed demographics on race, nationality, place of birth, job description, and legal status.

A second limitation regarding the FLS is that undocumented workers are no doubt in the survey and their wage is used in the calculation of AEWRs. This seems perplexing given the goal of the AEWR to not adversely affect U.S. workers in similar work. It is unclear if the goal is to set an AEWR that does not adversely affect the wage of U.S. workers or if the AEWR is being set to compete with the wage levels received by undocumented workers. To utilize the wages of workers who are undocumented to set the AEWR is contrary to purpose. It would seem that the data utilized in the calculation of the AEWR would be limited to wages of documented and U.S. workers in relevant agricultural employment. It may also want to take into consideration the wages of other 'similarly' employed persons outside of agriculture. Here, again, perhaps the NAWS employee based study may be useful given that it has information on legal status and job description. One caveat regarding these data is that it is likely that authorized workers' wages in the NAWS are depression due to the presence of a large share of undocumented workers on U.S. farms and hence in the data. But, valuable information may still be derived from the unique information found in the NAWS—which potentially may supplement data from the FLS in the calculation of the AEWR.

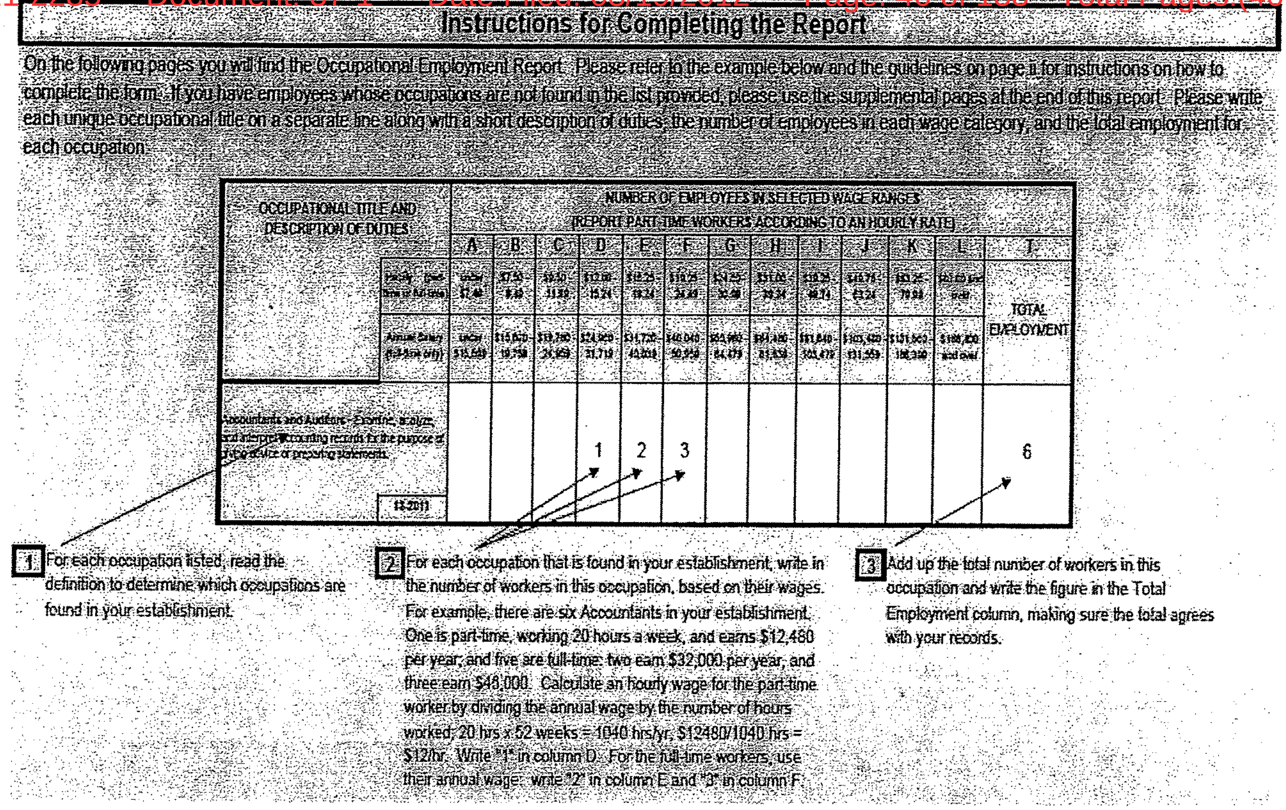
The DOL stated that improving the geographic precision of the AEWR is essential to ensuring that the AEWR meets its statutory objective which is why they want to switch to the OES. They state that it is critical that the AEWRs be accurate and reflect market conditions for each geographic location and for specific occupation, and skill or experience levels

The stipulation that H-2A workers are to be paid the higher of the applicable hourly AEWR, the applicable prevailing wage, as determined by the States; or the Federal or State statutory minimum wage is a bit perplexing. It is unclear to me how the AEWR could be below the applicable minimum wage. If the data used in determining the AEWR produces a rate below legal standards it signals that something is amiss; such as the presence of undocumented workers paid below regulated rates are in the data utilized to set the AEWR—it is the case that the FLS data includes wage information for undocumented workers. Data used to set the AEWR also lags behind their implementation date by at least a year which may be a problem given that so many states are experiencing minimum wage changes. Also noteworthy regarding this lag is the instance, as we are in now, with relatively rapid increases in inflation that won't be accounted for in the lagged nature of the AEWR calculation.

Use of the Occupational Employment Statistics

The Occupational Employment Statistics is a survey Federal-State cooperative program between the Bureau of Labor Statistics and State Workforce Agencies. The OES program collects data on wage and salary workers and produces wage estimates for about 800 occupations from surveys of approximately 200,000 establishments every six months. Importantly, the OES survey is not a survey that targets farms or agriculture workers as does the FLS or NAWS. In fact, the OES does not include farm establishments at all—it only covers wage and salary workers in nonfarm industries. Therefore, the OES is not representative because direct hires on farms are not included in the survey. Hence, agricultural workers hired only through labor contractors—no direct hires—are represented the survey. This exclusion further exacerbates the hiring of undocumented workers as labor contractors, who are used by farmers to outsource hiring, leads to undocumented workers being hired. Also potentially problematic is that the OES estimates are benchmarked for the survey months of May and November, which may not be the best approach if one is interested in farm workers.

The OES survcy collects data on wages via the form below that is from the actual survey. As the instructions show, there are wage ranges that the respondent must choose. These wage ranges are fairly large especially with respect to low wage workers. For instance, the 'B' hourly range is from $7.50 to $9.49 per hour—a almost $2.00 an hour dispersion. The wage ranges get wider as the wage level increases. I'm not sure how the significant wage dispersions within each wage category are handled in the AEWR calculations. If the actual wage range within an occupation is small this method would introduce some significant error even as researchers try to mitigate this problem via statistical assumptions.



Instructions for Completing the Report

On the following pages you will find the Occupational Employment Report. Please refer to the example below and the guidelines on page ii for instructions on how to complete the form. If you have employees whose occupations are not found in the list provided, please use the supplemental pages at the end of this report. Please write each unique occupational title on a separate line along with a short description of duties, the number of employees in each wage category, and the total employment for each occupation.

OCCUPATIONAL TITLE AND DESCRIPTION OF DUTIES		NUMBER OF EMPLOYEES IN SELECTED WAGE RANGES (REPORT PART-TIME WORKERS ACCORDING TO AN HOURLY RATE)												
		A	B	C	D	E	F	G	H	I	J	K	L	T
	Hourly Wage (part-time or full-time)	under $7.50	$7.50 - 9.49	$9.50 - 11.99	$12.00 - 15.24	$15.25 - 19.24	$19.25 - 24.49	$24.50 - 30.99	$31.00 - 39.24	$39.25 - 49.74	$49.75 - 63.24	$63.25 - 79.99	$80.00 and over	TOTAL EMPLOYMENT
	Annual Salary (full-time only)	under $15,600	$15,600 - 19,759	$19,760 - 24,959	$24,960 - 31,719	$31,720 - 40,039	$40,040 - 50,959	$50,960 - 64,479	$64,480 - 81,639	$81,640 - 103,479	$103,480 - 131,559	$131,560 - 166,399	$166,400 and over	
Accountants and Auditors - Examine, analyze, and interpret accounting records for the purpose of giving advice or preparing statements. 13-2011					1	2	3							6

1 For each occupation listed, read the definition to determine which occupations are found in your establishment.

2 For each occupation that is found in your establishment, write in the number of workers in this occupation, based on their wages. For example, there are six Accountants in your establishment. One is part-time, working 20 hours a week, and earns $12,480 per year; and five are full-time: two earn $32,000 per year, and three earn $48,000. Calculate an hourly wage for the part-time worker by dividing the annual wage by the number of hours worked: 20 hrs x 52 weeks = 1040 hrs/yr. $12480/1040 hrs = $12/hr. Write "1" in column D. For the full-time workers, use their annual wage: write "2" in column E and "3" in column F.

3 Add up the total number of workers in this occupation and write the figure in the Total Employment column, making sure the total agrees with your records.

Source: http://www.bls.gov/respondents/oes/pdf/forms/113000.pdf

The DOLs prefers the OES program, in part, because it produces occupational estimates by geographic area and by industry. Estimates based on geographic areas are available at the national, state, and metropolitan area levels. Industry estimates are available for over 450 industry classifications at the national level. The table below shows some OES data for the occupation of 'Farmworkers, and Laborers, Crop, Nursery, and Greenhouse' (SOC code #452092) which would be the major category used in the calculation of the AEWR.

For illustrative purposed I pulled data from the OES for several different states for this single occupational category. The first thing to notice is that employment numbers for this occupation of *farmworkers* can be very small for some states—see Kentucky (200) or West Virginia (190) as compared to California (146,220). As expected, the subsequent 'relative standard errors' as reported in the table for states with few observations is relatively high—meaning that the reliability of the wage statistics is relatively low. For example, compare the RSE of California (0.6) to Montana (6.8). In general states with few observations will have data that are not precisely measured. Take for example a 90% confidence interval for the $8.28 hourly mean wage for California—

which is from $8.20 to $8.36 compared to a 90% confidence interval for the $11.52 hourly mean wage for Montana which is from $10.24 to $12.80.

Occupation: Farmworkers and Laborers, Crop, Nursery, and Greenhouse (SOC code 452092) Period: May 2006 Area name	Employment(1)	Employment percent relative standard error(3)	Hourly mean wage	Annual mean wage(2)	Wage percent relative standard error(3)	Hourly 10th percentile wage	Hourly 25th percentile wage	Hourly median wage	Hourly 75th percentile wage	Hourly 90th percentile wage	Annual 10th percentile wage(2)	Annual 25th percentile wage(2)	Annual median wage(2)	Annual 75th percentile wage(2)	Annual 90th percentile wage(2)
Arizona	10340	8.7	7.45	15500	2.0	5.81	6.44	7.45	8.37	8.97	12080	13400	15490	17400	18660
California	146220	2.1	8.28	17210	0.6	7.08	7.35	7.92	8.65	10.09	14730	15280	16460	17990	20980
Colorado	940	14.6	9.99	20790	4.0	6.29	7.50	8.94	12.18	14.74	13080	15590	18600	25340	30660
Illinois	1940	19.1	10.42	21670	3.2	7.24	8.01	9.20	11.12	14.70	15050	16660	19130	23140	30570
Iowa	640	18.3	10.54	21910	3.8	6.70	8.02	10.10	12.57	14.90	13940	16690	21010	26150	31000
Kentucky	200	21.4	8.91	18520	2.9	6.25	7.39	8.46	10.32	12.19	12990	15360	17600	21470	25360
Montana	370	18.5	11.52	23960	6.8	6.01	7.13	11.49	14.58	17.74	12500	14840	23900	30320	36900
Pennsylvania	1690	11.8	10.10	21000	3.0	6.19	7.34	8.70	11.37	17.22	12880	15270	18090	23650	35830
West Virginia	190	44.0	9.71	20200	4.5	6.52	7.81	9.55	11.22	13.45	13570	16240	19850	23340	27980

Footnotes:
(1) Estimates for detailed occupations do not sum to the totals because the totals include occupations not shown separately. Estimates do not include self-employed workers.
(2) Annual wages have been calculated by multiplying the hourly mean wage by 2,080 hours; where an hourly mean wage is not published, the annual wage has been directly calculated from the reported survey data.
(3) The relative standard error (RSE) is a measure of the reliability of a survey statistic. The smaller the relative standard error, the more precise the estimate.

SOC code: Standard Occupational Classification code -- see http://www.bls.gov/soc/home.htm

Data extracted on March 24, 2008

A Second appealing aspect of the OES program as discussed by the DOL is that it provides data at the sub-state level in addition to the state level. Data is compiled for each metropolitan statistical area (MSA) and for additional non-MSA areas (50) that completely cover the balance of each State. Data are available for 573 distinct areas comprehensively covering the U.S. The DOL asserts that this level of detail will enable AEWRs to be defined for H-2A applicant occupations that are specific to a relevant sub-state labor market area which would greatly improve the ability of the Department to tailor certification decisions and parameters to relevant local labor market conditions. By contrast, the current AEWR provides wage data for just 15 multi-state regions and 3 stand-alone States across the U.S.

The table below shows a sample of OES data by metro and non-metro areas. Employment in some of these areas is very small (and, not reported in some areas) and the relative standards errors, as expected, blow up. Therefore, there are serious questions of reliability.

Occupation: Farmworkers and Laborers, Crop, Nursery, and Greenhouse (SOC code 452092) Period: May 2006 Area name	Employment(1)	Employment percent relative standard error(3)	Hourly mean wage	Annual mean wage(2)	Wage percent relative standard error(3)	Hourly 10th percentile wage	Hourly 25th percentile wage	Hourly median wage	Hourly 75th percentile wage	Hourly 90th percentile wage	Annual 10th percentile wage(2)	Annual 25th percentile wage(2)	Annual median wage(2)	Annual 75th percentile wage(2)	Annual 90th percentile wage(2)
Birmingham-Hoover, AL	40	32.0	11.76	24460	8.8	7.93	9.22	12.16	13.57	15.41	16490	19180	25300	28220	32060
Southwest Alabama nonmetropolitan area	70	29.1	9.11	18960	10.6	5.89	6.78	8.16	12.05	13.48	12240	14100	16980	25070	28040
El Centro, CA	6540	1.1	8.13	16910	2.1	7.07	7.33	7.90	8.59	9.58	14700	15240	16420	17860	19920
Santa Ana-Anaheim-Irvine, CA Metropolitan Division	1170	13.4	8.93	18570	3.3	7.44	7.96	8.81	9.88	10.77	15480	16560	18320	20550	22390
Northern Mountains Region of California nonmetropolitan area	(8)-	(8)-	8.75	18190	4.1	7.37	7.78	8.42	9.08	10.61	15330	16180	17510	18890	22080

Footnotes:
(1) Estimates for detailed occupations do not sum to the totals because the totals include occupations not shown separately. Estimates do not include self-employed workers.
(2) Annual wages have been calculated by multiplying the hourly mean wage by 2,080 hours; where an hourly mean wage is not published, the annual wage has been directly calculated from the reported survey data.
(3) The relative standard error (RSE) is a measure of the reliability of a survey statistic. The smaller the relative standard error, the more precise the estimate.
(8) Estimate not released.

SOC code: Standard Occupational Classification code -- see http://www.bls.gov/soc/home.htm

Data extracted on March 24, 2008

The DOL would like the data used to calculate AEWRs to be analyzed and aggregated in such a way that would capture actual local labor markets—but this may not be possible given that the OES data are merely geographic designations. It may be possible to capture some local labor markets through some type of aggregation of the data but this may prove difficult in practice especially give the small observations for some areas. Noteworthy, in the past, DOL said that the USDA FLS was better because a larger geographic area being studied would help to reduced the impact of depression in wage rates in some local areas where there were very high concentrations of undocumented workers and, hence, wage depression. It may be that a broader measure may reduce the impact of undocumented workers.

According to the DOL document, another advantage of the OES survey is that it offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty variations within each occupation. Per DOL, the four skill levels for each occupation afford the employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES occupational category and skill level. Skill level distinctions are not available in the USDA Farm Labor Survey. While a distinction between skill levels would be a great improvement and make a lot of sense it is not possible to achieve this distinction with the OES data.

For example, below are data on the Vineland, NJ area from the Foreign Labor Certification Data Center (http://www.flcdatacenter.com). The FLCDC uses unpublished OES data to determine the wage levels. The four wage levels, as discussed by the DOL, represent skill distinctions.

Area Code:	47220
Area Title:	VINELAND-MILLVILLE-BRIDGETON, NJ
OES/SOC Code:	45-2092
OES/SOC Title:	Farmworkers and Laborers, Crop, Nursery, and Greenhouse
Level 1 Wage:	$6.65 hour - $13,832 year
Level 2 Wage:	$8.23 hour - $17,118 year
Level 3 Wage:	$9.81 hour - $20,405 year
Level 4 Wage:	$11.39 hour - $23,691 year
GeoLevel:	2

As the DOL states: "Another advantage of OES is that it offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty variations within each occupation. The four skill levels for each occupation afford the employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES occupational category and skill level. (p. 51). But, there is no defined link between the OES data as collected and published and the skill levels constructed by the FLCDC. This would require that the data collection process used by OES surveyors delve into questions that would help to determine skill level for each occupation.

This type of exercise is done in another Bureau of Labor Statistics survey—the National Compensation Survey (NCS). As part of the NCS, the BLS collects specific occupational skill information for a sample of occupations within each surveyed establishment. Each occupation studied in an establishment is rated for the level of skill required along 10 different dimensions or what the BLS refers to as 'generic leveling factors'. Each factor (knowledge, complexity, supervision received, physical demands, guidelines, scope and effect, personal contacts, purpose of contacts, work environment and supervisory duties) has its own ratings scale. Furthermore, because work within a particular occupation will differ across establishment (e.g. requiring more or less 'knowledge' or 'complexity'), each occupation, at the national aggregate, has a distribution of skills under each generic leveling factor. Levels within each criterion are defined quite specifically so that occupations can be accurately scored by BLS analysts. The important survey does offer skill ratings within and across occupations. It should be noted that the NCS is also a non-farm survey. The also have extensive data on wages and, therefore, occupational wage premiums within and across skill factors are determined.

In contrast, the wage levels formulated by the FLCDC are as follows: Level 1 is the average wage among the lowest-paid one-third of workers in the survey. Level 4 is the average wage of the highest-paid two-thirds. To get the other levels, subtract level 1 from 4 and divide by 3 to get the quotient. Add the quotient to Level 1 to get level 2. Subtract the quotient from level 4 to get 3. Level 3 is the average wage which is the only statistic that can be directly linked to published OES data. Therefore, the Level 1 pay is the 16.5th percentile on the BLS OES range of wages which is quite far from the average wage—in the case of Vineland the Level 1 wage is 32% less than the average wage for that area. It seems that the very concept of an adverse effect wage rate should entail looking at the average wage and certainly be higher than the 16.5th percentile. In all likelihood, to actually accomplish the goal set forth by the adoption of the AEWR, it may be argued that the wage should in fact be something higher than the average—especially given that even the average is depressed by the presence of so many undocumented workers in the agriculture sector.

There are five OES categories of occupations that would most likely be identified with H-2A job classifications. The Department expects that the "farm workers and laborers, crop, nursery and greenhouse" (used above) occupational category would encompass the majority of the jobs that employers would seek to fill under the H-2A program. The survey does, however, contain other categories, such as "sorters and graders" and "farmworkers, farm and ranch animals," that may enable employers and the Department to more closely match the job opportunity to the relevant OES job category and, in turn, the appropriate AEWR. I am not sure if the DOL is proposing to have AEWRs for all MSAs along with a compendium of rural calculations and for various agriculture occupations but it seems that these data, when disaggregated to this degree, may not be sufficient to construct a multitude of AEWRs in this manner.

The OES survey is conducted by the Department's Bureau of Labor Statistics. The DOL states that because the BLS is in charge of the OES it will enable continuity and coordination between those who gather the wage data and those who utilize it. They further state that this will help ensure the data needs of the H-2A program and AEWR calculation are consistently met. I learned, through personal discussions with BLS staff who work with the OES, that the BLS is not involved in how the OES is utilized by individuals or other organizations but that they are only responsible for the administration of and the OES and purveyor of guidance to those who use it. Just because the OES is a cooperative program between the DOL and State Workforce Agencies in no way assures that it will not at some point be discontinued or interrupted. Other DOL surveys have recently been slated for termination such as the Survey of Income and Participation Program (SIPP).

Conclusion

The theory behind the implementation of the AEWR—that the employment of immigrant workers should not adversely affect the wages and working conditions of similarly employed workers in the United States—is an important one. The utilization of immigrant workers is an important labor resource for the U.S. agricultural industry, but the use of such legal-immigrant labor should not threaten domestic agricultural workers. Unfortunately, the entire concept is severely undermined give that an estimated 600,000 to 800,000 undocumented workers are toiling on U.S. farms. First and foremost, it is in the best interest of U.S. domestic and H-2A workers to mitigate the effects that such a large share of illegal workers has on wages and employment conditions in the agricultural industry.

The large share of undocumented workers aside, the DOL believes that to achieve a more accurate and effective AEWR, the proposed methodology must include data concerning occupational category, skill level, and geographical distinctions, at a state or substate level. Hence, they have proposed a switch from utilizing data from the USDA Farm Labor Survey to the BLS Occupational Employment Statistics survey.

This report discusses many of the problems associated with this proposed data switch. To this point, the FLS has been used since 1988. While this survey has its limitations it is a survey which has a single purpose to analyze farm workers. Generally, while the OES is a large survey, it is a survey of non-farm establishments, and as such is not as suited as the FLS to construct AEWRs. The OES only captures agricultural workers who are indirect or contract hires. This may exacerbate the problem of contagion of wages due to undocumented workers if contractors hire them at a higher rate than direct hires of agricultural employers. Further, the proposed use of these data to compute local labor market level AEWRs is problematic. The more these data are disaggregated the more variability in the wage data. Also, the geographic areas in the OES do not, as such, capture any local labor markets for agriculture.

ADDENDUM 3

NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

April 14, 2008

BY ELECTRONIC SUBMISSION

Mr. Thomas Dowd
Administrator
Office of Policy Development and Research
Employment and Training Administration
Room N-5641
200 Constitution Avenue, NW
Washington, DC 20210

RE: Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Proposed Rule (FR 73:30, p. 8538); RIN 1205-AB55

Ladies and Gentlemen:

This letter constitutes the comments of the National Council of Agricultural Employers (NCAE) on the above referenced rule making.

The National Council of Agricultural Employers (hereafter "NCAE") is the only national association exclusively representing agricultural employers and agricultural employer associations, and is the principal voice for agricultural employers in the United States. NCAE's members employ and pay approximately 75 percent of all of the agricultural labor and agricultural payroll in the United States. NCAE was founded more than 30 years ago by agricultural associations and agricultural employers who utilized the H-2 temporary agricultural worker program of the Immigration and Nationality Act (INA) of 1952. NCAE and its members were intimately involved throughout the consideration and enactment of the Immigration Reform and Control Act of 1986 (IRCA), and the creation of the H-2A visa category. A substantial majority of the employers currently utilizing the H-2A temporary agricultural worker program are members of NCAE or of NCAE-member associations. NCAE and its members have decades of experience and expertise in the operational and regulatory aspects of the program. NCAE has a long history of advocating for H-2A employers and improvement in the H-2A program as a means of addressing the needs of agricultural employers for legal labor, and has been one of the principal groups advocating for legislative reform of the H-2A program for the past decade. This comment letter was prepared by NCAE based upon input from its many members that use the H-2A program.

Introduction and Setting for the Rulemaking

The United States faces a serious economic, labor market and security challenge. The demographics of the U.S. population are such that we are barely replacing the existing work force through native born workers. The U.S. is not coming close to producing enough native born workers to meet the labor requirements of our growing economy. This has been true for more than a decade. Yet our legal immigration policies have been largely blind to the labor force needs of the economy. As a consequence, we now have millions of persons living and working in the U.S. illegally. Although this has been a public policy failure and a security threat, it has been an economic boon! Our economic growth over the past decade has been sustained and nourished by our failed immigration policies.

Agriculture has been particularly affected by the shortage of legal native born and immigrant workers, for reasons that seem obvious on their face. With millions more jobs in the U.S. economy than there are legal workers to fill them, legal workers have migrated to the more skilled, non-seasonal, more pleasant, urban, higher paying jobs. This is not an indictment of U.S. agricultural jobs. It is a reflection of the reality that when there are more jobs than workers, the less attractive jobs are more likely to go unfilled. This is also not an indictment of U.S. agricultural employers. They have not encouraged, sought out or preferred aliens or illegal workers over legal ones. They have simply hired the workers who were available in the labor market. The fact that it is impossible to tell the difference between those who are work authorized and those who are not is also a function of our failed immigration policies. But the resulting fact is that the U.S. agricultural work force is overwhelmingly foreign born and majority illegal. If these jobs were not critical to our national economy and security, this might not necessarily pose a problem. But when they are in an industry as critical as the food and fiber sector, it poses potentially serious problems.

It is clear that the market for labor intensive agricultural commodities is a global market, and that U.S. producers are losing market share in this global market, even as U.S. farm wages rise, U. S. farm labor productivity increases, and the proportion of the agricultural work force which is working illegally in the U.S. skyrockets. Whether this set of circumstances constitutes evidence of a "farm labor shortage" or not may be an interesting point for economists to debate, but it is beside the point. The important public policy question is what to do about it. Certainly mechanization and all the other mechanisms for continuing to improve agricultural labor productivity need to be supported. Certainly the wages, benefits and working conditions of U.S. farm workers need to continue to be protected, and improved to the extent possible consistent with maintaining economic competitiveness. But to suggest that these mechanisms will eliminate the need for foreign agricultural workers is a pipe dream, and to rule out a responsible, workable agricultural guest worker program, and thus consign the U.S. to growing dependence on foreign producers for its food and fiber, we believe is irresponsible.

This rulemaking grew out of the current Administration's efforts to control illegal immigration and provide viable sources of legal labor to American agriculture as a result of the Congress's failure to address this problem legislatively. We commend the Administration for understanding the enormous reliance of the U.S. agricultural industry on a foreign born work force, and its efforts to provide as much relief as possible to U.S. farm employers from the potentially devastating impacts of effective controlling illegal immigration. In August, 2007 President George Bush directed the Departments of Labor and Homeland Security to study their regulations governing the H-2A temporary agricultural worker program and make whatever changes could be made within their statutory limitations to improve the program as a viable and economic source of legal workers.

We express our gratitude to the President and to the policymakers in the Departments of Homeland Security for a rapid, thorough and sincere effort to reform the H-2A program regulations. We believe many important improvements have been made. As with any rulemaking, particularly the instant case of the H-2A regulations, which represent a wholesale restructuring of the program, there are problems and shortcomings to the proposed rules. This letter represents a sincere effort at constructive criticism and suggestions for furthering the administration's goals of creating an improved program which is a viable source of legal workers for America agriculture.

Overview of the NCAE's Comments

Because of the shortage of time and the necessity to focus on needed improvements, the bulk of this letter explains what we view as problems with the proposed regulations and suggested remedies. This should not obscure the fact that there are many significant and welcome improvements in the proposal.

- **Expanded definition of agriculture and allowance for incidental non-agricultural work**

The proposed regulations expand the definition of "agriculture" and therefore the job opportunities that qualify for H-2A employment, in the following ways: (1) by including logging employment; (2) by including duties typically performed on a farm that are incidental to the agricultural labor or services for which the worker was sought; and (3) by including the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for transportation to market, in its unmanufactured state, of any agricultural or horticultural commodity while in the employ of the operator of a farm.

Item (2) above will permit H-2A workers to performance certain activities which might fall outside the definition of agricultural employment, if they are typically performed on a farm and are incidental in nature. Presumably the provision will cover a farm worker who engages in incidental employment in the farm's roadside retail stand, a farm worker who assists in managing "pick your own" activities, and a farm worker who occasionally drives a tractor pulling a hay wagon for a hay ride, to cite a few examples of incidental activities customarily performed by farm workers that have been disallowed in the past.

Item (3) above modifies the definition of "agriculture" to specify clearly that labor incidental to agriculture still falls within the definition.

NCAE views these expansions in the definition of agriculture as positive changes for two reasons. First, they will provide more flexibility for employers to include duties in H-2A certified job opportunities that reflect the actual duties performed by farm workers. Second, by classifying these activities as "agriculture" this will enable (and require) H-2A workers to be employed in performing these activities rather than H-2B workers. Under the circumstances where the H-2B program has been rendered virtually useless because of unrealistic cap limitations, inclusion of these activities in agriculture at least provides an option for obtaining legal workers, even though it will entail complying with the requirements and bureaucratic procedures of the H-2A program.

- **Verification of employment eligibility.**

The proposed regulations at require that State Workforce Agencies (SWAs) refer to H-2A employers only those individuals whom they have *verified* are eligible U.S. employers. ("Eligible" is defined as employment authorized.) Thus, SWA's will no longer be permitted to refer workers without regard to their employment authorization status and leave it up to the employer to determine employment eligibility.

This is a very positive provision which has long been sought by the H-2A user community, and is required by the clear language of the H-2A provisions of the INA. Obviously, it makes no sense to operate a temporary worker program is a manner that permits undocumented workers to be referred for employment by SWA's to potentially displace legal alien workers.

While we support the requirement for the SWA's to verify employment eligibility, we stress that it will be important that the verification be an *affirmative process*, not merely a passive process such as that currently in use by most SWA's. Currently most SWA's, at most, tell referred workers they will have to present documents evidencing employment eligibility to the employer, but to fail to examine, must less verify, the authenticity of the documents before referral.

- **Allowing some flexibility in piece rates**

The proposed regulations at § 655.104(l)(ii) eliminate the requirement that employers who pay by piece rates can not require productivity standards exceeding those they required in 1977. This is a positive and long overdue change.

The proposed regulations continue the requirement that if a productivity standard is to be required in a piece rate paid activity it "shall be no more than those normally required by other employers for the activity in the area of intended employment". We recommend that the DOL take a more flexible approach in administering this requirement than has occurred on some occasions in the past, where it has been asserted that if a majority of employers respond in surveys that they do not have a fixed minimum productivity standard, no minimum productivity standard at all can be required by an H-2A employer. The procedures should allow reasonable performance standards that reflect, in fact, the normal requirements of the occupation, whether or not non-H-2A users have documented and articulated policies to that effect. Furthermore, the regulations should in all cases allow for employers to apply policies and standards that are required by business necessity.

- **Provision of worker housing through a voucher**

The proposed regulations at § 655.102(1)(iii) permit H-2A employers to meet the obligation to provide housing for H-2A workers who cannot reasonably return to their usual place of residence each day through a housing voucher mechanism if the governor of the state has not certified that there is inadequate housing in the area of intended employment for migrant farm workers and H-2A workers.

We note that the H-2A program is the only employment-based immigrant or non-immigrant worker program, temporary or permanent, that makes provision of worker housing the responsibility of the employer. We do not believe that imposing this exceptional requirement only on agriculture is warranted. However, given that it is, we applaud the Department for attempting to give employers the greatest possible degree of flexibility in obtaining housing. The cost and availability of housing is one of the most serious impediments to expansion of the H-2A program. Adding the option of providing housing through a voucher mechanism will provide added flexibility.

How effective the voucher option will turn out to be will depend heavily on how it is administered by the DOL. We strongly urge the DOL to adopt policies which assure that it is administered with a view to making it work wherever reasonably possible rather than seeking to limit its use. The addition of rental and public accommodation housing in the 1986 Immigration Reform and Control Act H-2A reforms was, and continues to be, strongly opposed by some opponents of the H-2A program, and in some jurisdictions SWA personnel have clearly tried to create impediments to the use of rental and public accommodation housing. We urge the DOL to carefully monitor the implementation of the voucher option to make sure that policies and procedures for its use do not have the intent or effect of discouraging its use.

- **Early housing inspection and occupancy of housing if a timely inspection has not occurred.**

The proposed regulations at § 655.104(d)(5) require H-2A applicants to request a housing inspection no earlier than 75 days nor later than 60 days before the employer's date of need. This section also provides that if the housing inspection has not taken place by the statutory deadline for H-2A certification of 30 days before the date of need, the certification will not be withheld. In such cases the SWA will inspect the housing prior to or during occupancy.

Untimely housing inspections are a common reason for delays in making labor certification determinations. Therefore, the provision in the proposed regulations for making a pre-application housing inspection, and the provision that certification will not be delayed if a timely housing inspection is not made, and that occupancy of the housing is permitted, are important improvements in the program. We strongly support the intent of these provisions.

One of the problems with this provision is that as currently written, if the housing inspection does not take place until after occupancy and a violation is found, the employer will be held liable for the violation, and a panoply of penalties will potentially come into play, up to and including revocation of the temporary labor certification and/or debarment. We urge the Department to include a provision that if the housing inspection does not take place until after certification or occupancy, the employer be given a specific and reasonable period of time to correct any violations, and that penalties will apply only if the employer fails to correct the violation within the specified time frame.

- **Substitution of housing in emergency situations**

The proposed regulations at § 655.102(d)(6) provides that if the housing that an employer lists on an approved labor certification application becomes unavailable for reasons outside the control of the employer, the employer may substitute rental or public accommodation housing which meets the applicable standards (i.e. the local or state standards applicable to rental or public accommodation housing) and notify the SWA of the change in writing. Substitution of housing is a per se violation under the current regulations. This provision is a significant program improvement.

There are also provisions of the proposed regulations that we strongly urge be withdrawn or modified. These are discussed in the body of this letter and are summarized here.

- **Additional advertising requirements**

The proposed regulation (at § 655.102(d) and (j) and § 655.103) substantially expands H-2A employers' advertising requirements.

The expansion of the advertising requirement contradicts the stated purpose of streamlining the H-2A program, and is wasteful, burdensome and unproductive. Even the advertising required under the current regulations, which occurs close to the date when seasonal job opportunities are available, is notoriously unproductive. The advertisements often cost hundreds to in excess of a thousand dollars, given the extensive required content, and routinely result in no responses. Increasing the advertising requirement, and requiring that the advertising be placed several months in advance of the time when the seasonal job opportunities are available, as required in the proposed rule, make no sense.

- **Precertification recruitment**

The proposed DOL H-2A regulations at § 655.102 require that H-2A applicants begin recruitment of U.S. workers not later than 75 days, nor earlier than 120 days, before the date workers are needed, and prior to the filing of a labor certification application and prior to the DOL's review and approval of the employer's job offer. In contrast, the current H-2A program regulations require filing a labor certification application not more than 45 days before the date of need, and do not require the employer to conduct positive recruitment until the terms of the employer's job offer have been accepted by the DOL.

In effect, the proposed regulations advance the minimum start date of the H-2A application process from 45 days in advance of the date of need to more than 80 days before the date of need. This change overturns more than 20 years of effort by agricultural employers and the Congress to reduce the advance application deadline. In 1987, in an attempt to reform the H-2A program Congress reduced the advance application deadline from 80 to 60 days before the date of need. More recently Congress further reduced the advance application period to 45 days before the date of need.

There are substantive reasons for not requiring the application process to start long before the date of need. Employers may not know that far in advance whether they will need to apply for H-2A certification and undertake the increased costs and obligations of the program. In many cases employers will not know critical details of their production plans that far in advance, such as the specific crops they will be producing, likely starting and ending dates of employment, and the number of workers needed. Finally, recruiting of seasonal agricultural workers that far in advance of the actual start of employment is notoriously unproductive, and when it does result in work commitments by prospective workers, these commitments are notoriously unreliable.

The advance application process in the proposed regulations also has a serious problem in that it establishes requirements for acceptable job offers that are subjective and subject to DOL discretion, but requires the employer to conduct the required recruitment before the terms and conditions of the employer's job offer are approved by the DOL. The rule is silent on what happens if, after the employer conducts the pre-employment recruitment, the DOL fails to approve the employer's job offer. Current program practice would suggest that the recruitment would be considered invalid, and would have to be repeated. This circumstance introduces an unacceptable degree of uncertainty into the process.

The proposed regulation provides that the employer's obligation to employ qualified domestic workers ends on the date the employer's foreign workers begin traveling to the place of employment, or three days before the employer's date of need, whichever is later. The requirement to continue employing qualified domestic workers who apply through the first 50 percent of the employment period on the application (the so-called "50-percent rule") is not included in the proposed regulation, although the preamble to the proposed rule leaves the door open to reinsert the 50-percent rule in the final regulation.

Many H-2A users have long considered the 50-percent rule as unfair and unreasonable. No other temporary or permanent worker program has even a remotely corresponding requirement. However, to the extent that the pre-application recruitment requirements are a trade-off for eliminating the 50-percent rule, it is not at all clear that this represents an improvement. We suggest that employers be provided the option of performing advance recruitment, or to file 45 days in advance of the date of need and extend their employment obligation beyond the date the H-2A aliens begin traveling to the worksite. We suggest a continued obligation of 50 percent of the work period or 30 days, whichever is longer.

- **Expansion of debarment.**

In the proposed regulations the DOL gives itself significantly expanded authority for enforcement of compliance with H-2A requirements and penalties for non-compliance. While monitoring and enforcing compliance with program requirements is necessary to assure the integrity of the program, the expansion in enforcement options in the proposed regulation borders on harassment and overkill. With respect to the proposed regulations for debarment of violators from future participation in the H-2A program, it appears to exceed the authority granted the Department in the INA.

The proposed regulations provide that both the Employment and Training Administration and the Wage and Hour Administration can make debarment determinations. Further, they interpret the word "determination" to mean merely the assertion of a violation, not a determination after notice and an opportunity for a hearing, as specified in the INA. The proposed regulations therefore provide that only the allegation of a violation, not a final determination, must be made within 2 years of the alleged occurrence of the violation.

Certainty and prompt closure are important to program users. DOL's regulations cannot change statutory language. A determination of a violation can only be made after notice and an opportunity for a hearing, and the determination must be made with respect to a violation that occurred during the previous two years to serve as a basis for future debarment.

In addition, NCAE will strongly object to expanding debarment authority to the Wage and Hour Division. One of the major ongoing problems with the administration of the H-2A program is inconsistency between the Wage and Hour Division and the Employment and Training Administration in the interpretation of the requirements of the H-2A regulations. Authority for exercising the debarment tool should remain solely with the agency that makes decisions with respect to labor certifications, namely the ETA.

- **Addition of "revocation of certification" and the denial of effective due process in the revocation process.**

The proposed regulations at § 655.117 set up a new scheme for "revocation" of labor certification determinations. Under the current regulations (§ 655.114) revocation of a labor certification occurs only upon revocation of an admission petition by the DHS pursuant to 8 C.F.R. § 214.2(h)(5)(xi). However, the proposed DOL H-2A regulations set forth a process independent of DHS action for revoking labor certifications, and the DHS proposed regulations add a provision for automatic revocation of a DHS petition if a labor certification is revoked. The effect of the revocation of a petition is to immediately terminate the employment authorization of the aliens that have been accorded status pursuant to that petition, in effect leaving the employer without a legal work force.

The justification offered for adding a process for revoking labor certifications is that this process provides the DOL with an additional tool for assuring compliance and penalizing non-compliers. It is hard to make the case that such an additional tool is necessary. DOL has already substantially increased both the penalties for non-compliance and the bases upon which non-compliance can be asserted. It has added an entirely new document retention and compliance audit process. It has expanded its authority for debarring non-compliers from future labor certifications. The revocation process also denies employers effective due process by denying the employer access to legal workers even during the pendancy of an appeal.

- **Increased certification fees**

The proposed regulations increase the fee for issuance of a labor certification (proposed § 655.109(g)) from $100 to $200 per application plus from $10 to $100 per worker. It also eliminates the current $1000 cap. Even ignoring the elimination of the

$1,000 cap, this is a 7-fold increase in the certification fee based on FY 2007 program usage.

It is useful to note that the DHS, which undertakes extensive accounting to justify increases in petition costs and provides the basis for its fees in the Federal Register, can manage to adjudicate an H-2A petition for $320 regardless of the number of workers requested. Under DOL's new fee structure, the average fee for an H-2A labor certification, based on FY2007 usage data, will exceed $1800, nearly 6 times the cost of adjudicating an H-2A petition at the DHS.

The NCAE believes the fee increase is excessive. Before DOL increase its fees it should do as the DHS does and provide detailed information in the Federal Register as to what activities it is including in the "costs of processing" an H-2A application, and what these costs are. If the cost of processing an application under the new "streamlined" procedure really is 7 times the cost of adjudicating a petition, perhaps the DOL should consider this as evidence that it has not effectively streamlined the process.

- **New Adverse Effect Wage Rate methodology**

The proposed regulations retain the requirement that H-2A employers pay the highest of three wage standards: (1) the applicable federal, state or local statutory minimum wage, (2) the prevailing wage for the occupation in the area of intended employment, if such a prevailing wage has been determined by the SWA, or (3) an administratively established "Adverse Effect Wage Rate" (AEWR).

In the preamble to the proposed rule the DOL fails to explain why an AEWR, in addition to a prevailing wage, is required to avoid the employment of H-2A workers from depressing the wages of domestic agricultural workers, but no such adverse effect wage rate is necessary to prevent wage depression by H-2B and H-1B aliens or immigrants permanently admitted for employment. All these categories of aliens are admitted subject only to the prevailing wage. All categories of aliens are subject to the same statutory criterion -- that their employment not depress the wages and working conditions of U.S. workers.

Having concluded that an AEWR is necessary, the DOL attempts to make a case that it should change the methodology for establishing the AEWR by replacing the United States Department of Agriculture's Quarterly Farm Wage Survey data with wage data derived from the Bureau of Labor Statistics' Occupational Employment Survey (OES).

The NCAE believes that there is no substantive rationale for the AEWR, and therefore at a fundamental level the discussion of which data source is superior for the purpose of establishing an AEWR is beside the point. As a reflection of actual market wages for specific activities in specific areas of intended employment, neither the OES nor USDA data source as presently constituted is fully adequate. However the NCAE believes that the wage setting procedure in the proposed rule, based on the OES data, will present many H-2A users with serious administrative problems. Taken as a whole, the minimum wages likely to result from the methodology in the proposed regulations, based on the OES survey data, will be as harmful to the future viability of U.S. agriculture as those set by the current methodology based on USDA farm wage data.

The threshold question that DOL must adequately address is whether, under current labor market conditions (not those that prevailed decades ago when an AEWR was first instituted and when the legal precedents the Department now cites were written), a separate adverse effect wage rate standard, in addition to the prevailing wage and applicable statutory minimum wage, is necessary to effect the statutory requirement that the employment of H-2A aliens not adversely affect the wages and working conditions of similarly employed domestic workers. The NCAE believes that there is no valid economic justification for a separate AEWR standard in addition to the prevailing and statutory minimum wage. The NCAE believes that the employment of H-2A workers should be subject only to a prevailing wage standard. Further, the NCAE believes that the prevailing wage finding methodology currently in use by the DOL as set forth in ETA Handbook 385, when correctly applied, results in the determination of correct prevailing wages for specific agricultural activities in specific areas of intended employment. The NCAE does not believe the OES data system accurately reflects prevailing wages in specific agricultural activities.

NCAE urges the DOL to withdraw its AEWR proposal and replace it with a prevailing wage requirement, determining prevailing wages in a manner consistent with DOL's current prevailing wage determination procedures. The NCAE strongly urges the DOL to further study the question of an appropriate wage standard for H-2A certified occupations, including consultation with experts, stakeholders and the U.S. Department of Agriculture, including ways in which the USDA farm wage survey may better provide wage data to meet DOL's stated goal of appropriately reflecting farm labor market realities and labor costs. If the DOL does not immediately eliminate the AEWR requirement, the NCAE urges the Department to allow employers to pay either an AEWR based on the current USDA methodology or request a wage determination from the DOL based on the proposed new OES data system.

- **Elimination of process for emergency applications**

The current regulations (§ 655.101(f)) include provisions for acceptance of "emergency" applications filed after the filing deadline when sufficient U.S. workers are not available in emergency situations. The proposed regulations eliminate such a provision. A provision allowing the filing of applications after the filing deadline will be even more necessary under the proposed regulations, because the *de facto* deadline for meeting application requirements is much further in advance of the date of need than at present.

It is critically important that the proposed regulations include an effective and workable provision for the acceptance and consideration of emergency applications filed after the deadline. If an emergency application is filed in an area of intended employment and for a job opportunity for which employers have already been certified within the same time frame, such applications should be certified immediately, as there is already evidence that U.S. workers are not available. A reasonable condition for the certification of such applications might be an extended post-application recruitment, so that the availability of the emergency procedure does not create an incentive to avoid preseason recruitment.

- **Elimination of provisions for "master applications".**

One of the most important streamlining measures adopted when the current H-2A regulations were written in 1987 was the provision for an association acting as an agent for its farmer members to file "master applications" where associations were filing applications for their members covering virtually identical job opportunities. *See* Federal Register 52:104, p. 20498. The procedures for processing such master applications are set forth in the current ETA H-2A Handbook, ETA Handbook No. 398. *See*, *e.g.*, ETA Handbook No. 398, p. I-9. These master application procedures are utilized by associations acting as agents for their grower members requiring workers in virtually identical applications. The association files a single "master application" together with a list of the individual grower members who are associated with that application, the number of workers requested by each member, and other member-specific information. The master application significantly reduces the paperwork and bureaucratic burden for both the associations and its members, and the DOL.

Over the years since the master application procedures were promulgated the DOL bureaucracy and SWA's have degraded the efficacy of the master application provision by mandating more individual treatment of each application. Recently the DOL National Processing Centers further significantly reduced the efficacy of the master application by requiring associations to list the names and addresses of each individual member associated with a master application in the required advertising for the application, rather than merely listing the association. This hugely expanded the size and cost of the required advertisements, as master applications can have several dozen to more than a hundred individual members associated with a single application.

The proposed regulations appear to terminate the master application process, rather than continuing and improving it, as the stated intention of streamlining the regulations would suggest is appropriate. The degrading of the master application process which has occurred in recent years, and its complete omission from the proposed amended regulations, is a retrogression that will make the program significantly more difficult and expensive for small growers to use, and is contrary to the stated purpose for the regulatory changes.

Most users of the H-2A program are small growers with a small work force who depend on the assistance of a grower's association acting as their agent. For example, the average number of job opportunities certified per employer was 10.25 in FY 2007. Given that there were a number of very large labor certifications for hundreds of workers per employer, this means that the *typical* employer among the 7,491 H-2A certified employers had far fewer than 10 workers. Many of these were employers in the same area of intended employment seeking workers for virtually identical job opportunities.

DOL should retain and improve the master application process and fully incorporate it into the H-2A regulatory structure, rather than merely into the administrative guidance documents. This streamlining should include the essential components of the original master application process, which included the filing of one application on behalf of multiple employers seeking workers in virtually the same occupation, permitting the association to place the required advertisements and conduct the required positive recruitment on behalf of all participants in the master application (without the exorbitant and unnecessary expense of listing every individual employer in required advertising), permit referral of workers to the association for all job opportunities covered by the master application, and allow the association to place workers in the job opportunities covered by a master application.

The master application process must apply to applications filed by associations *acting as agents for their individual members.* Associations acting as joint employers with their individual members already have the benefits of the master application process by virtue of being joint employers. The provisions of the proposed regulations applying to applications by joint employer associations are separate and distinct from the master application process described here, and one *does not* replace the need for the other.

- **Absence of allowance for diversity of operations and business necessity in job qualifications.**

The proposed regulations in several places require that H-2A job opportunities include only duties, requirements, and/or standards of performance normally or typically required in such occupations. *See, e.g.*, proposed §655.104(b), § 655.105(i), § 655.109(b)(4) and (4)(vi)). Similar language in the current H-2A regulations has been the basis for frequent disputes between applicants and the DOL by employers producing specialized products, utilizing unusual production techniques or otherwise seeking to distinguish their products in the marketplace.

Job requirements, combinations of duties, or other factors that may make a specific application unique must be acceptable if justified by business necessity. Elements of a job order clearly contrived for the purpose of disqualifying domestic workers should not be acceptable, but nothing in the INA requires that a specific employer perform any job in exactly the same way as other employers may perform that job to qualify for alien labor.

- **Requiring employers to bear costs of recruiting and facilitation of admission of aliens**

The proposed regulations at § 655.105(o) require H-2A applicants to attest, in part, the following: "In connection with this attestation, the employer is required to contractually forbid any foreign labor contractor whom they engage in international recruitment of H-2A workers to seek or receive payments from prospective employees." The proposed regulations do not define the term "recruitment", so it is unclear whether the activities of facilitators who contact workers requested by employers to determine their availability and willingness to come to the United States to work, and/or who assist foreign workers to secure necessary documentation and apply for H-2A visas to work as H-2A workers, would be encompassed within this prohibition. The DHS proposed regulations (at proposed § 214.2(h)(5)(xi)) specifically prohibit facilitators as well as recruiters from receiving payments from workers.

Recruitment of alien workers and facilitation of the process for visa application and admission, are a necessary part of the process for most aliens to secure employment in the United States. Facilitation of the visa application process by foreign agents, compensated by the alien beneficiaries, is a well known, legal, and longstanding practice. The procedures for efficient processing of large number of non-immigrant alien visa applicants through the U.S. consulates have, in fact, become dependent on these facilitators. The Department describes this provision in the preamble to the proposed rule as a prohibition against "cost-shifting". In fact, it is a provision which will have the sole purpose and effect of shifting the cost of this function from visa applicants to U.S. employers.

It is not possible to justify this proposal as streamlining the program or making it more usable to employers. Further, there is no basis in the INA for requiring U.S. employers to pay the costs associated with assisting foreign workers to secure documents to gain admission and work authorization in the United States. This provision will add costs and bureaucratic burdens for employers, and expose them to penalties and litigation. This proposal constitutes DOL buy-in to a highly questionable and controversial legal theory advanced by opponents of the H-2A and other foreign worker programs that even Secretaries of Labor under previous Democratic administrations have been unwilling to embrace. It should be removed from the proposed regulations. Instead, the DOL should clarify that the costs of recruitment, facilitation, and transportation and subsistence to the U.S. place of employment are costs that benefit both workers and employers, and therefore are not the exclusive responsibility of either party.

- **Elimination of provision for redetermination of need**

The current H-2A regulations at § 655.106(h) include provisions for requesting a "redetermination of need" if a labor certification is denied in whole or in part based on the availability of U.S. workers and then the workers fail to report for work or fail to perform the work and are terminated for cause. The proposed regulations delete this provision. An employer has no apparent recourse under the proposed regulations for filling job opportunities that are vacant because an applicant failed to report or was terminated for cause. Given the greatly extended pre-application recruitment period in the proposed regulations, and the fact that workers may be making "commitments" to H-2A jobs up to 120 days before the job starts, provisions for quickly filing vacancies when workers fail to report or are terminated for cause will be even more important, not less so. The amended regulations must include provisions for rapid certification of job opportunities that are vacant or become vacant because applicant or employee failed to report for work, absconded, or were terminated for cause.

- **Language of the labor dispute attestation**

The proposed regulations include inconsistent language with respect to labor disputes. This conflicting language could potentially be harmful to the program. In the proposed § 655.105(c) the employer is required to attest that "there is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment." The proposed § 655.109, which sets forth the circumstances under which a labor certification will be granted, requires that "the job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute." The later statement corresponds with the language of the labor dispute assurance in the current H-2A regulations (at § 655.103(a)).

The problem with the labor dispute language in the proposed attestation statement is that because agricultural employment is not covered by the National Labor Relations Act there is no official process for determining the existence of a labor dispute in an agricultural employment setting. Even a single worker who applies for the job can then walk off the job and potentially create a "labor dispute" which blocks the employer's entire labor certification. In 1987 the language of the current regulation was carefully crafted to make clear that if a worker walks off the job claiming a labor dispute, only the job opportunity vacated by that worker, and not the entire application, is barred from certification. The language of the existing labor dispute assurance, which is reiterated in the proposed § 655.109, be substituted for the labor dispute language in the proposed § 655.105(c), so that a single worker claiming a labor dispute will not be able to block an entire occupation from receiving H-2A certification.

General Comments

In this section, NCAE offers general comments pertaining to the proposed rule as well as comments on those specific subjects on which the USDOL requested commenter input in the preamble to the rule. The following section provides comments on the specific provisions of the proposed rule.

Document retention (29 C.F.R. §§ 655.101(a)(2), (b), (k)(4)(5); 655.104(e), (j); 655.114(b))

Various provisions throughout the proposed regulations require H-2A applicants to retain documents. We believe the document retention requirements are overly complex, overly burdensome, and overly long. Not only will they increase the administrative burden of program users, but they will expose employers to unnecessary liability.

The regulations would require an employer to retain the following broad array of documents for an unspecified period of "not less than five years:"

- Copy of the job order listed on the SWA's internet site and downloaded on the first day of posting, a copy of the job order provided by the SWA, or other proof of posting from the SWA that contains the text of the job order;
- Correspondence signed and dated by the employer showing that previous workers were contacted and either declined the offer or were non-responsive;
- Proof of publication of newspaper advertisements;
- Retain written recruitment report submitted at least 60 days before the date of need;
- Updated, supplemental recruitment report prepared at the time the H-2A workers depart from their homes or 3 days before the date of need, whichever is later;
- Resumes (if available) and evidence of contact with each U.S. worker who applied for, or was referred to, the work opportunity;

The following records would be required to be retained for "at least" five years after the completion of the work contract:

- Field tally records;
- Supporting summary payroll records;
- Records showing the nature and amount of the work performed;
- The number of hours offered each day by the employer (broken out by hours offered both in accordance with and over and above the ¾ guarantee);
- The hours actually worked each day by the worker;
- The time the worker began and ended the work day;
- The rate of pay (both piece rate and hourly, if applicable);
- The worker's earnings per pay period;
- The worker's home address;
- The amount of, and reasons for, any deductions from pay; and
- If a worker works less that the number of hours offered in the job order for a particular workday, the reason or reason(s) for having worked fewer hours.

The employer must retain evidence of workers' compensation coverage for five years. 29 C.F.R. § 655.104(e). In addition, the employer must retain for "one year" the following records for a "representative pay period:"

- The cost of goods and services directly related to the preparation and serving of meals;
- The number of workers fed;
- The number of meals served;
- The number of days meals were provided;
- Receipts for at least the following items: food, kitchen supplies other than food, labor costs that have a direct relation to food service operations; fuel, water, electricity, other utilities, and other costs directly related to the food service operation.

29 C.F.R. § 655.114(b).

Finally, an association would be required to retain "documentation substantiating its "employer or agency status" indefinitely. 29 C.F.R. § 655.101(a)(2). Section 655.101(a)(2) does not indicate whether the relevant status is at the time of application or at some other time.

NCAE recommends that the DOL consider several modifications of these record retention requirements. First, NCAE suggests that the final rule contain a single section containing all record retention requirements and periods. A single section would facilitate compliance because it would allow an employer to identify all of its record retention requirements in one place.

Second, NCAE suggests that the five year record retention period(s) be changed to three years from the date than an application is certified. The retention period under the FLSA is currently 3 years. *See* 29 C.F.R. § 516.5(a). Many of the records required to be retained are payroll-related records. By using the FLSA record retention period, DOL would allow employers to merge the additional recordkeeping requirements that would be imposed by the proposed regulation into their current payroll system. This would be more efficient and facilitate use of the program. Moreover, the preamble to the proposed regulation does not contain a rationale for the selection of a five year period and it would appear that three years would provide a sufficient time for any enforcement audit to take place.

Third, NCAE recommends that the retention period(s) be defined specifically for each category. As written, the proposed rule would require most records to be retained for "no less than five years." If DOL decides to retain this requirement, we suggest that any ambiguity as to the precise retention requirement be eliminated by clarifying that an employer does not violate its record retention obligations if the documents are eliminated after five years.

Fourth, DOL should articulate the criteria that it will use to identify a "representative pay period" in § 655.104(e). These criteria would be useful in guiding an employer's determination of what a representative pay period is and lessen the likelihood of a dispute in the context of an audit.

Finally, NCAE suggests that DOL eliminate the obligation of an employer to provide certain records for inspection and copying "upon reasonable notice" to "representatives designated by the worker." Any person designated by an H-2A worker could demand to inspect and copy the retained records *for any purpose*. The term "representative" should be defined to avoid misuse of this process. Otherwise, a competitor of an H-2A employer would then have access to sensitive labor cost data as would a private party engaged in a "fishing expedition" in order to find a basis upon which to file a legal action. This provision would require employers to violate employee privacy rights by providing social security numbers, aliens numbers, medical information and workers' compensation information, all of which involve sensitive employee privacy considerations. If the final rule retains this broad delegation of authority to private parties, DOL should specify that its use is limited to DOL administrative proceedings designed to protect employee rights provided under the H-2A program.

Prohibition on "Cost Sharing" (29 C.F.R. § 655.115(o))

The proposed regulation contains two provisions relating to the payment of costs incurred in the process of filing an application and of costs related to transportation. One regulatory requirement is found in the form of an attestation in 29 C.F.R. § 655.105(o). This requirement has two parts. The first prohibits the employer from seeking "payment of any kind" related to "obtaining labor certification." This includes costs of recruitment, attorneys' fees, and the like. The second part prohibits, through the mechanism of a contractual obligation, a "foreign labor contractor" from "seek[ing] or receive[ing] payments from prospective employees." The other regulatory requirement relating to reimbursement of costs generally covers transportation and daily subsistence expenses. *See* 29 C.F.R. § 655.107(a)(6)(ii).

Ambiguities as to the Application of the Rule Should Be Removed

NCAE believes that the proposed regulation is ambiguous in some areas and would benefit from further clarification. It is not clear what the regulation means when it refers to "received payment . . . as an incentive or inducement to file" as H-2A application. No explanation for this language appears in the preamble to the regulation leaving it unclear as to how DOL intends to interpret this assurance. Clarity is especially important since this is an attestation that employers will be making under the penalty of perjury.

Another potential ambiguity as to which clarification would be welcome is the intended scope of the phrase "from the employee or any other party." Although the term employee is clear, the intended meaning of "any other party" is not. It appears that the reference to "established business relationship" would permit a customer to reimburse an agent, agricultural association or farm labor contractor for services provided since they would benefit by the work performed by an H-2A worker, but it is unclear whether that would be true if the customer is a new one. It also appears that the phrase "other party" would include parents, subsidiaries, and related corporate (or other business) entities. But, beyond these obvious examples, clarification of the intended scope of this definition would be appreciated.

A Defense for Contractual Compliance Must Be Provided

In addition to the general prohibition on reimbursement, the proposed regulation at § 655.105(o) requires employers to "contractually forbid" any foreign labor recruiter with whom they work from "seek[ing] or receive[ing] payments from prospective employees." NCAE supports a prohibition on "kickbacks, bribes, or tributes" and the like. However, NCAE believes that the rule should be modified to clarify that payment of transportation and subsistence costs to be reimbursed pursuant to 29 C.F.R. § 655.104(h) will not be contractually prohibited.

As a preliminary matter, the proposed rule should be expanded to make clear that if an employer contractually forbids a foreign labor recruiter from receiving prohibited payments from prospective employees, that the existence of the contract will provide a defense to the employer from any sanctions should the contractor violate the contractual prohibition. It is nearly impossible for an employer in the U.S. to monitor the day to day activities of a foreign recruiter in another country and determine whether the contractual prohibition is being violated. It would be patently unfair to subject an employer to the extreme sanctions provided for violation of this proposed rule if it had no knowledge of nor approved of the prohibited conduct. Recent legislative proposals that would govern the conduct of foreign labor contractors would impose a strict liability standard, or make employers liable for the acts of foreign recruiters based upon agency theory. NCAE strongly urges DOL to include a defense to employers who satisfy the contract obligation and for which there is no clear evidence that the employer had knowledge of or approved of the prohibited conduct.

MSPA Should Not Be Applicable to Foreign Labor Recruiters

NCAE also recommends that the proposed rule clarify that the definitions of the terms "farm labor contractor" and "farm labor contracting activities" borrowed from MSPA do not apply to foreign labor recruiters. Otherwise, all of the obligations under MSPA that are applicable to FLCs and their activities would be imposed upon foreign labor recruiters and employers would face liability for conduct over which there would be little control in a foreign country. This is critically important, as many recent legislative proposals have literally borrowed language from MSPA related to disclosure of information, misleading information and similar obligations, and applied them to foreign labor recruiters. Application of the FLC obligations of MSPA to foreign recruiters would be a clear violation of MSPA, as it is statutorily inapplicable to alien H-2A workers. For all of the reasons stated above, is would be impractical and unfair to impose MSPA's legal obligations upon employers for acts or omissions of foreign labor recruiters that necessarily must occur in a foreign country. Moreover, H-2A workers have strong labor protections provided independently under the H-2A program. To eliminate any ambiguity, NCAE urges DOL to clarify that the provisions of MSPA are inapplicable to foreign labor recruiters.

The Rule Should Affirm the Existing Right of Employers to Reimburse Transportation and Subsistence Costs Once the Worker Completes 50 Percent of the Contract Period and Expressly Reject the *Arriaga* and Similar Court Decisions

If § 655.105(o) is read as a blanket prohibition of all "payments," an employer would, as a practical matter, be required to pay for transportation upfront, effectively negating the authorization under current program rules to reimburse transportation and subsistence costs at the halfway point of the contract.

Moreover, NCAE believes that the Department should apply the rule that it follows with respect to H-1B non-immigrants. Generally speaking, NCAE agrees with the Department's determination in that context that "the various legal obligations of the worker under the laws of the U.S. and the country of origin that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker." 65 Fed. Reg. 80110, 80199 (Dec. 20, 2000). For example, "H-1B non-immigrants are permitted to pay the expenses of functions which by law are required to be performed by the nonimmigrant, such as translation fees and other costs related to the visa application and processing." The Department's rationale for its position with respect to H-1B workers – that expenses incurred to meet a worker's legal obligations, including any promise to appear for the first day of work are personal expenses – seems to apply in full force to H-2A workers. DOL should affirm this position with respect to the H-2A regulations.

Finally, NCAE strongly recommends that the proposed rule reaffirm the current H-2A program requirement and the Department's longstanding position that an employer of H-2A workers reimburse them for in-bound transportation and subsistence expenses when the work contract is 50% completed. The policy supporting this requirement is to delay the reimbursement for a short time so that the worker has an incentive to remain with the employer and to complete at least 50% of the work contract. NCAE supports this rule because it properly balances the worker's and the employer's respective interests.

This policy, however, is threatened as a result of the decision of the United States Court of Appeals for the Eleventh Circuit in *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002). DOL should therefore state explicitly that an employer of H-2A workers does not have an obligation under the INA, the Fair Labor Standards Act ("FLSA"), or DOL regulations to reimburse a worker's in-bound transportation expense until the 50% point of the work contract and that if a worker's payment of inbound transportation and subsistence costs reduces his/her first week's wage below the minimum wage, such reduction does not result in a violation of the FLSA.

The tension between the H-2A program and the FLSA arises because some courts, including *Arriaga*, have construed the FLSA to require reimbursement of in-bound transportation expenses at the end of the worker's first week of employment if he or she would otherwise earn less than the minimum wage. These courts reason that the payment of transportation expenses by the employee constitutes a *de facto* deduction from the employee's pay for the sole or primary benefit of the employer. The H-2A program, however, permits employers to await the halfway point of the work contract before reimbursement.

The Department of Labor has long taken the position it will not enforce FLSA claims demanding immediate reimbursement of transportation and subsistence expenses. In 1994, subsequent to the dates of issuance of the DOL opinion letters cited by appellants, DOL took a non-enforcement posture with respect to the *Arriaga* interpretation of the FLSA. *See* Letter from Secretary of Labor Robert Reich to Rep. Martin Lancaster (May 11, 1994); Letter from Wage and Hour Administrator Maria Echaveste to Stan Eury, President of the North Carolina Growers Association (June 30, 1994). DOL's current policy was articulated in 1994 by then-Secretary of Labor Robert Reich. In response to congressional inquiries regarding DOL's efforts to apply the *Arriaga* theory (then known as the *Glassboro* theory, after another case that discussed this interpretation of the FLSA), Secretary Reich wrote to Rep. Martin Lancaster of North Carolina that the appropriate application of the FLSA minimum wage provisions to transportation expenses was still under consideration by the Wage and Hour Administrator. Specifically, according to Reich, DOL was evaluating whether to issue an opinion letter with DOL's view or whether to promulgate the policy through a formal rulemaking. Because this review was not complete, Reich wrote:

> Accordingly, pending resolution of the policy and procedural issues relating to the treatment of transportation expenses, we are not prepared to assert violations in this area under the FLSA.

Letter from Reich to Lancaster (May 11, 1994). To date, DOL has neither issued an opinion letter nor begun rulemaking about the *Arriaga theory*, and this non-enforcement posture remains DOL's official position. A month after Mr. Reich sent his letter to Representative Lancaster, then-Wage and Hour Administrator Maria Echaveste sent a letter on the same subject to Stan Eury, the President of the North Carolina Growers Association. The letter was a near-verbatim repetition of Reich's letter to Rep. Lancaster. Letter from Wage and Hour Administrator Maria Echaveste to Stan Eury, President of the North Carolina Growers Association, (June 30, 1994).

Requiring a worker to work at least to the halfway point of the work contract is a critical protection for the H-2A employer. In return for securing a legally-authorized work force for a season, the H-2A employer agrees (through its participation in the program) to provide a wide variety of expensive benefits. One large expense is in-bound transportation. Acquiescing in the *Arriaga* decision's flawed interpretation of the FLSA[1]

---

[1] Even if the recent judicial interpretations of the FLSA were correct, the Department is not bound to them in this context since the INA is the more specific statute and would control. Many courts have

in connection with the H-2A program would leave employers in essentially the same position as they were without participating: employing a work force with few incentives to remain working for the entire season (or, at least, most of it) and then finding itself without labor since the worker found a more attractive job elsewhere.[2]

It is important that this rule clearly repudiate *Arriaga* and similar decisions. While DOL's retention of the longstanding requirement of reimbursement of transportation and subsistence costs at the completion of 50% of the contract period at the same time that this proposal prohibits cost-sharing in other areas implies its rejection of *Arriaga*, the rule should leave nothing to doubt given the liability exposure that exists. Failure to provide clarity is an unacceptable outcome as it will leave employers outside of the 11th Circuit with uncertainty as to the state of the law and as to whether they should pay such costs. Because the Department has jurisdiction over both the FLSA and H-2A program, this rule provides a timely and appropriate opportunity for the Department to resolve the issues addressed in *Arriaga*. Typically, courts will defer to the Department's interpretation of the statutes under its jurisdiction if they are reasonable, and in this circumstance, DOL's promulgation of the H-2A transportation reimbursement regulation subsequent to its FLSA deduction regulations considered in *Arriaga*, provides ample basis for reasonable clarification and rejection of the *Arriaga* decision.

Specific Comments on the Proposed Rule

§ 655.100 Overview of subpart B and definition of terms

ETA and ESA Lack Authority To Incorporate The Substantive Provisions Of The Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 *et seq.*, Into the H-2A Program and Applicable Definitions

Many provisions of the proposed rule explicitly or implicitly introduce the substantive policies and legal requirements of the Migrant and Seasonal Agricultural

---

acknowledged that if it were impossible to comply with both statutes, the more specific would control. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). In this instance, the more specific statute is the INA and its regulations because, in pertinent part, they address only the H-2A program and not the economy generally.

[2] The reimbursement rule of the H-2A does not conflict with the underlying FLSA minimum wage policy. The FLSA was designed to avoid penury. Logically, the weekly payment requirement helps to avoid this because it means that an employee will have money to his or her weekly living expenses. The H-2A program achieves this objective by requiring the employer to provide a number of those benefits to the employee, such as free housing. Because many of these daily living expenses are shifted from the employee to the employer and the H-2A employee receives an hourly wage well above the FLSA minimum, the H-2A program achieves the FLSA policy while balancing the employer's interest in employing a stable, legal work force.

Worker Protection Act ("MSPA"),[3] 29 U.S.C. §§ 1801 *et seq.* into the H-2A program. While MSPA applies to domestic migrant and seasonal agricultural workers, it does not apply to alien migrant and seasonal workers brought into the U.S. as H-2A workers. NCAE respectfully submits that DOL has exceeded its authority under MSPA in proposing to utilize a number of its concepts and definitions to regulate the H-2A program. As detailed in the following analysis, NCAE suggests that all MSPA-derived substantive standards be removed from or modified in the final rule, to the extent they expressly or implicitly applies to H-2A workers.

Congress unmistakably excluded H-2A aliens and their employers from MSPA's substantive standards. MSPA states:

> The term "migrant agricultural worker" does not include . . . any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) and 1184(c) of Title 8.

29 U.S.C. § 1802(8)(B)(ii). To the extent that the proposed rules introduce substantive policies derived from MSPA into the H-2A program, they directly conflict with, and must yield to, Congress' contrary command to keep the H-2A program separate from MSPA.

The proposed rule is suffused with MSPA policies. For example, it includes definitions for "farm labor contracting activity" and "farm labor contractor," for which there are no comparable definitions in the current regulations. The term "farm labor contracting activity" in turn is explicitly defined by reference to MSPA. Other examples of MSPA definitions include the definitions of "employ" borrowed from the FLSA and incorporated into MSPA, and "on a temporary and seasonal nature." By combining, or risking a judicial determination that combines two separate statutes, the proposal undermines Congress' decision to treat the migrant and seasonal agricultural workers covered by MSPA separately from the temporary and seasonal workers covered by the H-2A program with its distinct set of worker protections. The experience of NCAE members is that MSPA has generated many frivolous and costly lawsuits and its express or implicit application to alien migrant and seasonal farm workers will discourage agricultural employers from using the H-2A program.

Definition of Farm Labor Contracting Activity and Farm Labor Contractor (29 CFR § 501.10(t) and (u)

While the definitions of farm labor contracting activity and farm labor contractor (FLC) provided by MSPA are applicable to FLCs engaged in the recruitment, referral and employment of domestic migrant and seasonal workers in the U.S., along with the

---

[3] Although sometimes abbreviated differently, the abbreviation given in the regulations is MSPA. *See* 29 C.F.R. 500.0.

various legal requirements that contracting activities impose upon FLCs, they do not apply to alien workers recruited under the provisions of the H-2A program. Thus, the experience of NCAE members under MSPA leads to the reasonable expectation that worker advocates will argue that the many legal requirements that MSPA imposes upon FLCs for domestic recruitment should be extended to recruitment of aliens.

To eliminate ambiguity and prevent the inappropriate extension of MSPA to H-2A workers, NCAE suggests that its definitions of farm labor contracting activity and farm labor contractor be clarified to limit their application domestic workers, consistent with the limitations of MSPA. This will eliminate any argument that the substantive obligations imposed upon FLCs are applicable to alien workers. This also is especially important with respect to the application of MSPA to foreign labor recruiters, as noted elsewhere in these comments.

Definition of Agricultural Associations (§ 655.100(b) and § 501.10(g))

The term "agricultural association" fails to acknowledge that such associations may be joint employers. It simply states that such associations may act as agents of an employer for filing an H-2A application. This deletion may cause unnecessary confusion, as other parts of the rule acknowledge joint employer status. Small agricultural producers are major users of the H-2A program. One barrier to greater participation by these smaller producers is the complexity and liability risks that attend use of the program. One way they have attempted to reduce these risks is through joint employer associations. These associations file a single master H-2A application for their members and take care of the attendant legal obligations. The associations serve as joint employers thereby spreading the risk in the event of a lawsuit or other enforcement actions. They thereby make the H-2A program available to small producers that would not otherwise use the program.

Although the proposed regulation uses the term "joint employer association" in other contexts, such as the payment of fees, it does not provide a definition of it nor define the scope and limitation of liability for violations of program requirements by the association and its members. NCAE recommends that the definition of agricultural association clarify that such entities may serve as agents or joint employers of their members and define the circumstances under which joint employer arrangements may be utilized.

Definitions of Agent, Attorney and Representative (§ 655.100(b) and § 501.10(f) and (bb))

The definitions of and references to the terms "agent, "attorney" and "representative" are somewhat confusing. The definitions of agent and representative are duplicative and the distinctions between the two terms that both encompass the authority to act on behalf of an employer are unclear. The definition of "attorney" is self-evident and appears to be a vehicle for permitting attorneys to act as “agents” or “representatives.”

The term “representative” is also problematic and DOL should consider revising it or eliminating it entirely. It appears that the main purpose of the definition is to deem the person who makes the attestations on behalf of the employer a “representative.” While it is unclear if the intent of the definition of “representative” is to make the representative liable for any misrepresentations made in an attestation on behalf of an employer, then the rule should make the intent clear. Because of the definitional overlap, the proposed rule should also make clear if, and under what circumstances, an agent will be liable for activities undertaken on behalf of an employer.

To the extent that the intent of the rule is to define liability of agents and representatives, it should articulate a clear set of standards for liability. Such standards should not deviate from the current standards where agents, attorneys (and presumably representatives under the new rule) are not liable if they perform the administrative tasks necessary to file labor certification applications and petitions for visas and do not make attestations that are factually based. The same applies to program violations of the employer for which the agent, attorney or representative should not be liable.

The definition of “representative” contains language concerning attorneys who act as “representatives.” It is unclear why DOL singles out for specificity attorneys who act as an employer’s representative and who interview and/or consider U.S. workers for the job offered to the foreign worker(s) and then requires that such persons must be the persons who normally consider applicants for job opportunities. As a matter of policy, there is no apparent rationale justifying why DOL should dictate who and under what circumstances an attorney or any other person should interview U.S. job applicants. There are numerous rules and penalties applicable to hiring of U.S. workers. This provision should be deleted unless a reasonable rationale is provided.

NCAE further recommends that the rule eliminate the reference to attorneys and, should it decide not to, at a minimum clarify that the rule does not reach attorneys who merely advise and guide employers through the H-2A program. Otherwise, this rule may inadvertently make legal services less available to assist employers seeking to participate in this exceedingly complex program, thereby creating another barrier to program utilization.

Definitions of "Employ" and "Employer" (§ 655.100(b) and § 501.10(m), (o))

The proposed regulation defines the term "employ" as "to suffer or permit to work.," which is taken from the definition provided under the Fair Labor Standards Act. 29 U.S.C. § 203. The FLSA definition of "employ" also is used in MSPA. The term "employ" as used in the FLSA and MSPA has been interpreted broadly by the courts, and in MSPA's regulations to include joint employment. The concept of "economic reality" is the central concept of these regulations. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947); 29 C.F.R. § 500.20(h)(4), (5) (MSPA definition of "employ").

The proposed regulations define the term "employer" as a distinct concept from "employ" and defines an employer by use of four criteria: existence of a location within the United States; existence of an "employer relationship as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee;" possession of a valid Federal Employer Identification Number; and indicia of joint employment. In addition, all farm labor contractors are deemed employers whether or not they meet the other criteria.

NCAE suggests that ETA eliminate the definition of "employ" in the regulations and retain the definition of employer than it has proposed. The addition of the FLSA and MSPA definition of "employ" adds nothing that clarifies status or legal obligations under the H-2A program. The status of an employer under the H-2A program is defined by the labor certification and visa petition processes and the broad FLSA and MSPA definitions of employ insinuate broad legal concepts into the process that add unnecessary confusion.

We further recommend that the definition of "employer" set forth in the regulations eliminate the fourth criteria related to joint employment status. While the concept of joint employment in the broad sense is relevant under FLSA and MSPA, joint employer associations are clearly established under the current H-2A program. As suggested above, a separate definition should be provided in the proposed regulations defining joint employer associations and the respective liabilities of the association and its joint employer members.

Definition of "Agricultural Labor or Services" (§ 655.10(b) and § 501.10(j))

The proposed definition of agricultural labor or services is clear and broad. NCAE complements DOL for providing "bright line" definitional guidance as to those activities that qualify as agricultural and are appropriately covered by the H-2A program, as distinct from the H-2B program. Agricultural employers in the past that have grown their crops and also packed them, as well as some crops from other growers, have been advised by DOL representatives and others that their field workers must be admitted under the H-2A program and their packinghouse workers under all circumstances must be admitted under the H-2B program. Growers that have used H-2A workers in their packing operations have been sued by private parties for violations of the H-2A program requirements, as well as under the federal Racketeer Influenced Corrupt Organizations (RICO) statute for intentionally misclassifying workers under these programs.

By making clear in the proposed regulation that the IRS definition of "agricultural labor" applies to growers who produce more than one-half of the commodity which it packs, or in § 501.10(j)(1)(v), to a person who handles, plants, dries, packs, etc., any agricultural commodity "while in the employ of the operator of a farm," the ambiguity that has lead to classification-related litigation will be removed. These definitions make clear that one can produce its own commodities, as well as handle the commodities of others without losing agricultural status.

Definition of "On a Seasonal or Other Temporary Basis" (§ 501.10(j) and § 655.100)

The proposed definitions of seasonal and temporary are borrowed from MSPA. As discussed in other comments related to the incorporation of MSPA's legal principles, this is problematic. It is especially so in the H-2A context where workers are admitted for a maximum period of up to 10 months for a single employer. While MSPA's definition may be instructive as to what is seasonal and temporary agricultural employment, it also would allow one to argue that H-2A worker could be admitted for a period longer than the 10 month limit. Moreover, judicial precedent interpreting the term "seasonal" employment has taken an expansive view of the term, allowing year round employment under certain circumstances. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993).

NCAE recommends that the proposed rule borrow those temporary and seasonal concepts from the MSPA definitions that are appropriate in an H-2A context without incorporating the MSPA regulations and related judicial precedent. This will eliminate potential conflicts with the admission limitations governed by other H-2A regulations.

Definitions of Nursery Activities Generally and Christmas Tree Production (§ 780.205)

NCAE complements DOL for revising its definition of Christmas tree production in the proposed rule, relying upon the decision in *United States Department of Labor v. North Carolina Growers Association, Inc.*, 377 F.3d 345 (4th Cir. 2004). As noted in the preamble and the court decision, modern Christmas tree production generally is labor intensive and satisfies the definition of primary agriculture under FLSA. The production practices of Christmas trees are essentially the same as the production of trees in a nursery operation that may be dug, rather than cut. Yet, historically DOL has treated nursery production as agriculture and Christmas trees as forestry for FLSA purposes. The proposed rule recognizes this fact and provides a consistent and rational basis for agricultural classification of both. Moreover, the change in this rule is consistent with DOL's Interpretive Bulletin that allows it to change its interpretations based upon changed circumstances. The factual record in the *NCGA* decision clearly establishes that Christmas tree production has evolved from trees gathered in the wild to those produced in plantations that are intensively managed agricultural operations.

NCAE suggests that § 780.205(b)(2) and (3) of the proposed rule be modified by eliminating references to specific time periods (approximately 3 years and two or more seasons, respectively). While those time frames may be appropriate in some circumstances, they may not be in others. Modern innovations in cultural practices for different tree varieties, as well as climatic differences in different geographic locations may result in alternative time frames. Elimination of the timeframes will not undermine the requirement that tree production must be intensively managed consistent with the primary definition of agriculture under the FLSA. It will, however, eliminate an unnecessary rigidity that might otherwise disqualify Christmas tree production that appropriately qualifies for agricultural status.

Finally, the proposed rule will eliminate uncertainty as to the status of Christmas tree production in states not located within the jurisdiction of the Fourth Circuit Court of Appeals, subject to the *NCGA* decision. Currently, growers outside of the Fourth Circuit face uncertainty as to whether they are required to offer overtime, even though they have been considered agricultural for H-2A purposes under the IRS Code definition. The proposed rule will provide an even playing field and clarify employer classification and overtime obligations.

§ 655.102 Required pre-filing recruitment

Introductory Comments

The proposed rule imposes detailed pre-application advance recruitment requirements on intending H-2A applicants the will have the effect of greatly expanding the advance application deadline and, we believe, will result in ineffective, cost-escalating paperwork exercises that contradict the intent and stated purpose of streamlining the program. The NCAE recommends that the pre-application requirements be dropped, or at a minimum that employers be given the choice of accepting pre-application or a longer post-certification obligation to continue to hire qualified, eligible U.S. workers who apply for H-2A certified job opportunities.

In summary, the new pre-application recruitment requirements require employers contemplating applying for H-2A certification to begin positive recruitment not more than 120 days or less than 75 days before the date of need the employer shows on its H-2A labor certification application. In order to begin positive recruitment, the employer must first apply for and obtain an “offered wage” determination. To obtain an offered wage the employer will have to apply to the CO, submitting a detailed statement of the job description, job qualifications, and geographic area(s) of intended employment that the employer will use in its pre-application recruitment and on its application for labor certification.[4] The employer must then undertake the required positive recruitment steps, consisting of advertising in the local labor market and in out of state areas of traditional or expected labor supply designated by the Secretary, filing of an Interstate Clearance Order with the local office of the SWA, contacting former U.S. workers, interviewing all applicants and referrals, making hiring commitments to those applicants and referrals who are found to be qualified and eligible, and completing a detailed written report of recruitment enumerating, among other things, all job applicants and referrals and the disposition of each.

The preamble to the proposed rule ignores the greatly increased burden, cost and uncertainty which the pre-application recruitment requirements will place on employers. Instead, it asserts the highly questionable conclusion (at page 8545) that "these proposed changes in the recruitment process will increase the likelihood that U.S. workers will receive advance notice of available job opportunities, as well as provide them with additional information on available positions. In addition, the proposed changes will help avoid recruitment-related processing delays."

As a threshold matter, we note that the pre-application recruitment requirements overturn two of the most important "streamlining" reforms the Congress has made in the H-2A labor certification process in the past 20 years. The proposed rule engages in semantic sophistry by attempting to disengage the domestic worker recruitment process from the rest of the program, and represents it as something other than a part of the application process, thereby claiming that it is continuing to comply with the statutory requirement that applications for H-2A labor certification not be required to be filed more than 45 days before the date of need. By any reasonable definition, the H-2A application process under the proposed regulations must now begin well in advance of 80 days prior to the date of need, rather than the 45 days mandated in the INA and required by the current program.

Prior to the creation of the H-2A temporary agricultural worker program in the IRCA of 1986, all temporary workers, both agricultural and non-agricultural were admitted as H-2 workers. Over the years the DOL created extensive regulations for applying for and granting agricultural H-2 labor certifications, while applying only abbreviated and minimal requirements to non-agricultural labor certifications. Prior to 1986, the H-2 agricultural labor certification program required that applications for labor

---

[4] The proposed regulations merely specify that the employer must apply for an offered wage determination, and do not describe the application process in detail. However, the regulations at § 655.108 specify that H-2A "offered wage" determination will be made by the CO by reference to the Agricultural Online Wage Library (AOWL) and the OES foreign labor certification data base. The determination of the OES-based Adverse Effect Wage Rate (AEWR) must take into account the occupation for which certification is sought, the skill level and geographical area (see § 655.108(e)). This describes essentially the same process and criteria used by the CO's to make prevailing wage determinations from the same data source for the H-2B program. Thus, it is clear that the application process for an H-2A "offered wage" will be essentially the same as the current application process for an H-2B prevailing wage.

certification be filed at least 80 days before the employer's date of need. In attempting to reform the H-2A program in 1986, Congress required that DOL could not require labor certification applications more than 60 days before the date of need. This was done in response to one of the most persistent complaints of agricultural employers about the then-H-2 agricultural program – that it required applications to be filed too early, in some cases even before the preceding season was completed. Despite the reduction to 60 days, many employers complained to Congress that the advance application period was still too long. In 1999, Sen. McConnell sponsored legislation which was enacted by Congress to reduce the advance application period to 45 days. *See* P.L. 106-78, § 748.

Domestic worker recruitment was one of the steps required to be undertaken after an application for H-2A labor certification was filed, reviewed and accepted for consideration when Congress acted to reduce the application deadline to 45 days before the date of need. There can be no argument that Congress was unaware when it set the advance application deadlines that this was the case, and no evidence to suggest that Congress believed that the domestic worker recruitment (which also necessitates accomplishing other steps in the application process) should be separated and not subject to its application deadline. The DOL obviously concluded this as well. In the preamble to the proposed rule (at page 8543) the DOL notes that currently the recruitment activities "must take place in a very narrow 15-day window, as *under the statute* the Department cannot require that applications be filed more than 45 days prior to the date of need for the worker and the Department must approve or deny labor certification no later than 30 days before the employer's date of need." The preamble fails to explain how the DOL has now concluded that the domestic worker recruitment requirements are not part of the application process, and therefore no longer subject to the 45-day deadline.

There are also very sound practical reasons why conducting recruitment so far in advance of the date workers are needed is unsound. The agricultural jobs which H-2A applicants are seeking are, be definition, temporary or seasonal. Decades of experience have shown that workers considering temporary and seasonal jobs do not seek such jobs months in advance of the actual start of the job. Experience has also shown that commitments by workers to take temporary or seasonal jobs elicited and made months in advance are notoriously unreliable. Workers plans change or other jobs become available. Even under the current regulatory process, when positive recruiting is taking place only a matter of weeks before the work will begin, a high proportion of domestic hires change their plans and fail to report for work.

The experience from recruiting workers for temporary and seasonal jobs is that the most productive recruiting is that which is conducted close to the time when the jobs are available. The DOL's assertion that advancing the date for recruitment will result in more workers learning about the jobs and making meaningful job commitments contradicts the entire experience of the H-2A program. The assertion that the advance recruiting requirements will help avoid recruitment-related processing delays is equally invalid. The only significant recruitment-related processing delay in the current program results from employers either failing to file their reports of recruitment timely, or the DOL rejecting the reports and requiring re-filing. Given that the same level of detail is still required in recruitment reports, and under the revised regulations the report must be prepared and submitted with the application, there is no reason to believe there will be any fewer delays resulting from untimely or unacceptable reports under the revised regulations as under the current program.

There are, however, two circumstances created by the pre-application requirement that *are* likely to lead to significant delays, increased administrative costs for employers and the DOL, and late arrival of workers. The first will result from the inherent unreliability of commitments to temporary and seasonal jobs made far in advance of the date of need. This will mean that there will be more workers who fail to show up for work on the date of need, more requests for re-determinations of need to which the DOL must respond on an extremely urgent basis, and more job opportunities for which the arrival of the necessary workers are significantly delayed. We note that when a worker hired during the pre-certification recruitment fails to show up on the date of need and the job opportunity has been denied certification based on the availability of the domestic worker, the time required to process even an expedited re-determination of need, file and adjudicate an additional petition with DHS, and obtain a consular appointment for a replacement worker means that the replacement worker will be, at best, arriving several weeks after the employer's date of need. One of the perverse benefits of the current regulations is that few job commitments are made prior to certification, so that employers are denied certification for few job opportunities for which workers fail to report, their petitions are adjudicated in the normal process, and the alien workers can apply for and obtain their visas. Therefore, in most situations in the current system where a domestic recruit fails to report on the date of need, only the time it takes to physically get the replacement worker from his or her home to the job site is lost. The advance recruitment requirement will negate this benefit.

The second problem created by the pre-application recruitment goes to the question of the validity of the pre-application recruitment if, after completion of the recruitment and submission of the H-2A application, the application is required to be modified. The pre-recruitment will have been undertaken based on the application as it was submitted. Will this recruitment still be considered a valid test of the labor market if the application is modified after submission? Under the current program the employer has a degree of certainty when he or she undertakes domestic recruitment that it will be considered valid, because the underlying application and job order have already been reviewed, modified if necessary, and accepted. So long as the employer accurately recruits against the accepted application the recruitment will be valid. No such certainty exists under the proposed program. If the pre-recruitment process is retained, as a requirement or an option, the DOL should provide in the regulations that so long as the pre-application recruitment was conducted against the job description and terms of employment upon which the "offered wage" determined by the CO was based, and the interstate job order was accepted by the SWA, it will be considered valid irrespective of any subsequent requirement by the CO to modify an application.

Specific Regulatory Comments

The proposed regulation at § 655.102(b) provides that H-2A employers "must continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf and application is made)" for the job opportunity until the H-2A workers depart for the place of work, or 3 days prior to the first date workers are needed, whichever is later.[5] This requirement mirrors current regulations. Two specific issues in interpretation of this requirement have arisen with sufficient frequency that we believe they should be addressed in the regulation.

First, the regulation should clarify that an employer has an obligation to accept applicants and referrals only until the employer has made hiring commitments to the number of U.S. workers requested on the employer's application. At that point the employer's obligation to accept more referrals ceases, even if some of the workers to whom hiring commitments have been made subsequently fail to report for work, abandon the job or are terminated for cause.

Second, the regulation should clarify that it is the date upon which the employer's H-2A workers *first* begin to depart for the place of employment (or three days before the date of need) that terminates the obligation to continue to accept referrals. Not all aliens are likely to depart on the same day.

Document Retention

The proposed regulations at § 655.102(c) set forth requirements for documenting pre-application recruitment and retention of documents. We have commented elsewhere on the timelines for document retention. (See page 16).

Placing a Job Order in Interstate Clearance

The proposed regulations at § 655.102(e) require intending H-2A applicants to post a job order consistent with the requirements of § 653, Subpart F with the local SWA office not less than 75 days before the date workers are needed. The regulations at § 653, Subpart F are the Agricultural Interstate Clearance Order regulations. Therefore, the

---

[5] We understand the term "accept referral" to mean that the employer is obligated to consider the workers, and to make a hiring commitment if they able, willing, qualified and eligible and will be available at the time and place needed. If an employer accepts a referral, and upon interview determines that the worker is not qualified or eligible or otherwise fails to meet the requirements of the employer's job offer, the employer is not required to make a job offer to that worker and has met the employer's obligation to accept the referral.

proposed regulations continue to incorporate all of the Interstate Clearance Order regulations by reference.

The requirement to place the job order with the SWA makes the SWA the relevant decision-making agency with respect to the review and acceptance of Interstate Clearance Orders. This is a significant change from the current program, where applications are filed with the CO, with an information copy to the SWA. In the present program it is the CO which reviews and determines whether the application is acceptable. In the proposed program, it will be personnel in the local SWA offices in the 50 states that do so.

The preamble to the proposed regulations, and the DOL's publicity surrounding the release of its "re-engineered" H-2A program, claims that one of its most significant streamlining measures is the "elimination of unnecessary duplication in the SWAs' role". This claim is based upon the elimination of the requirement that a duplicate copy of the H-2A application be filed with the SWA at the time the application is filed with the CO. The most substantive and voluminous portion of an H-2A application is the Agricultural and Food Processing Clearance Order, or job offer, which must be included with the application. The proposed regulations at § 655.102(e) show that this step has not been eliminated, it has merely been reshuffled to the pre-application recruitment phase. Not only that, but now 50 SWA's will be interpreting and making decisions about acceptance of these job offers, rather one or two DOL CO's. This will inevitably lead to inconsistencies in interpretation of the complex interstate recruitment requirements, and will require substantial retraining of the SWA's, who heretofore have had no meaningful role in evaluating and accepting Interstate Clearance Orders. An even more problematical result will be the potential for inconsistency between what a local SWA official determines to be acceptable at the pre-application stage, and what the CO later finds acceptable at the H-2A application review stage. Under the current program the employer at least has the assurance that when an application is accepted by the CO, it has been accepted. We raise questions elsewhere in these comments about the validity of domestic recruitment conducted pursuant to a job offer accepted by an SWA which later is not approved and required to be modified by a CO.

It is clear that the pre-recruitment process has not reduced duplication, it has added uncertainty. It also has not reduced the role of the SWA's, it has expanded it. The only solution we can offer to this problem is the suggestion at the end of this section that the existing application process be retained as an option for employers who desire certainty that their application is approvable before they conduct domestic recruitment.

If the pre-application process is retained, either as a mandatory or optional requirement, the DOL will need to add regulations assuring timely review of the employer's job order by the SWA and a process for reviewing and settling disputes between applicants and SWA's over the acceptability of Interstate Clearance Orders. Under the proposed program, the employer's obligation is not merely to submit a job order, but to secure its approval. The proposed regulations require that the employer document acceptance and/or posting of the employer's job order by the SWA.

With respect to our comments about the advance application timeline under the proposed program, we note that not only must an "offered wage" determination be secured in advance of 75 days before the date of need, but the employer's job order must be submitted *and approved* by the SWA prior to 75 days before the date of need, because it must be posted not less than 75 days before the date of need. Furthermore, the first of required advertisements is required *to be printed* not less than 75 days before the date of need.

Newspaper advertising

The proposed regulations at § 655.102(g) set forth an intending H-2A employer's pre-application newspaper advertising requirements. The proposal significantly expands the existing advertising requirement, and will significantly increase its cost. Currently employers are typically required to place one advertisement, usually either in a newspaper in the area of intended employment or in a potential labor supply state. The advertisement is typically required to run at least twice. The proposed regulations require the local advertisement to run at least three days, including a Sunday (except under circumstances where the newspaper in the area of intended employment does not have a Sunday edition). In addition, the proposed regulations require that the employer place at least one newspaper advertisement in *each state* designated by the Secretary as a potential labor supply state.

Increasing the number of local insertions from two to three, and requiring that one of those insertions be in the Sunday edition, will alone greatly increase employers' costs. Typically, Sunday advertisements are substantially more expensive than weekdays. The requirement to do additional out-of-state recruitment will add yet more costs. It is likely that in the typical situation an employer's advertising costs will increase by a factor of three to four times under the proposed regulations. For most employers, this will add hundreds to thousands of dollars to the employers' application costs.

The substantial expansion of the advertising requirements in the proposed regulations contradicts the stated purpose of streamlining the H-2A program, and is wasteful, burdensome and unproductive. Even the advertising required under the current regulations, which occurs close to the date when seasonal job opportunities become available, is notoriously unproductive, and routinely results in few or no responses. The wastefulness is often compounded by the fact that numerous virtually identical ads are appearing at the same time in the same publications in some areas of intended employment.

Given that agricultural job opportunities outnumber the legal domestic labor force by a factor of at least 2 to 1, and more likely 4 to 1, domestic farm workers do not have to search the "help wanted" ads to learn about employment opportunities. Furthermore, newspapers are not a usual or even occasional source of labor market information for farm workers. The National Agricultural Worker Survey reports that 95% of seasonal crop workers (both legal and illegal) learn about farm jobs from a friend or relative or already know about the existence of their job. [6] Only 3% learned about their job from a grower, foreman or farm labor contractor. Less than 1% were referred by an employment service, public or private. (Note that H-2A employers' advertisements are required to refer workers to their local SWA office for referral.) The proportion who learned about their jobs from a help wanted advertisement was apparently too small even to warrant reporting.

The current INA, which was written more than 20 years ago, requires H-2A employers to engage in positive recruitment, but does not specify recruitment activities, and in particular does not require advertising. In order to streamline and rationalize the H-2A recruitment process, the proposed regulations could more readily justify eliminating the advertising requirement than increasing it. We recommend that, at a maximum, only local advertising be required and that the current requirement for two insertions, not including a Sunday, be retained. Further, we strongly urge that associations of agricultural producers acting as agents for their members and filing master applications, be permitted to advertise their master applications in lieu of an individual advertisement for each member. Further, such advertisements by associations should be permitted to name the association and not be unnecessarily expanded by requiring every individual employer associated with the application to be listed.

Contact with Former U.S. Workers

The proposed regulations at § 655.102(h) also require that the employer must contact the employer's employees in the subject occupation during the preceding year (unless the worker abandoned the job or was terminated for cause) and solicit their return to work for the following season. The employer must document this contact "by providing copies of official correspondence signed and dated by the employer demonstrating that the workers were contacted and either unable or unwilling to return to the job or non-responsive to the employer's request."

This requirement could reasonably be interpreted to mean that the employer must maintain a copy of its correspondence with *each* former employee demonstrating that it had been mailed. The only practical way to do this would be to send each letter by certified mail or some other means providing evidence of attempt to deliver. Such a requirement would be unnecessarily burdensome and costly. It is also unclear what kind of documentation would demonstrate that the employee "was non-responsive to the employer's request." The language of this requirement should be simplified to require

---

[6] *See* "Findings from the National Agricultural Workers Survey (NAWS) 2001-2002", Research Report No. 9, U.S. Department of Labor, Office of the Assistant Secretary for Policy, March 2005, page 34.

only that the employer keep a copy of the form of the letter sent to employees and a statement attesting to the date on which it was sent and to whom. The employer's recruitment report should be sufficient to document which employees were responsive to the employer's request. Documenting non-responsiveness is an unreasonable requirement.

Additional Positive Recruitment

The proposed regulations at § 655.102(i) requires that the Secretary of Labor make an annual determination for each state "whether there are other states in which there are located a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that state." The regulation implies that such determinations will be made not only with respect to each state, but with respect to agricultural occupations within each state, since the proposed regulation requires that the Secretary shall not designate a State as a State of traditional or expected labor supply with respect to any other state if the State has a significant number of local employers that are recruiting for U.S. workers for the *same types of occupations*. If this requirement is to have any meaning or utility, it must mean that "the same types of occupations" means something more refined than merely agricultural work. The number of states which may be designated as expected labor supply states for any given state is unlimited.

The proposed regulations require that H-2A applicants place at least one newspaper advertisement in *each* labor supply state designated with respect to the applicant's state. This requirement is a significant expansion of H-2A applicants' recruitment obligations that will greatly increase employers' costs for qualifying for H-2A certification, and it imposes a requirement that will be administratively burdensome for the DOL and is demonstratively unproductive. For reasons described in more detail above, we believe it is without value even considered by itself. But considered in the context of a rulemaking with the stated purpose of making the H-2A program more workable, usable and cost effective for employers, it is entirely contradictory to such purpose. There is no H-2A domestic recruitment requirement more demonstrably unproductive and costly than the advertising requirement. DOL should be looking for ways to scale back this requirement, not expand it.

The preamble to the proposed rule argues at length that the H-2A program requirements should be related more closely to market realities. Making blanket requirements that H-2A applicants in a particular state advertise their jobs in some particular other state bears no relationship to market realities. It is patently impossible for the Secretary of Labor to make blanket conclusions that particular states are expected source of H-2A workers for another state. It may make sense for Georgia peach growers to advertise for harvest workers in Florida, but it is unlikely to make much sense for a Georgia poultry producer to do so. Not only is the concept invalid, but there is no data upon which to make such determinations.

Furthermore, interstate recruitment in general is an anachronism that became embedded in the H-2A program requirements decades ago when there was an active domestic migrant agricultural work force in the United States. That era has long since passed. The overall employment of migrant workers in agriculture is diminishing rapidly, and the number of U.S. workers who choose to do migratory farm work is miniscule. Agricultural migrancy is such a rare phenomenon that there are few remaining statistics on migrant workers. Even using the extremely liberal definition of a migrant in the DOL's National Agricultural Worker Survey, which requires only that a worker travel at least 75 miles to an agricultural job to be a migrant, and does not require an overnight stay, the most recent published NAWS data show that only 6% of the seasonal crop work force in the United States were domestic follow-the-crop migrants, who worked at more than one agricultural job during the year, and an additional 6% were what the NAWS calls "shuttle migrants" who traveled at least 75 miles to an agricultural job, but worked only one agricultural job during the year.[7] Both of these percentages had declined nearly one third in less than a decade, and are undoubtedly even lower today. Most "migrants" in the seasonal agricultural work force (31%) were migrants because they were workers who had traveled to their U.S. farm job from outside the United States.

Given the rarity of domestic migrancy, the patently impossible requirement that the Secretary designate states of intended labor supply which are meaningful for particular agricultural occupations in other states, and the high cost and clear evidence of the lack of productivity of advertising as a means of recruiting farm workers, this new requirement cannot be justified and should be eliminated. The Department should rely on the interstate circulation of employer's job orders, also required by the regulations, to provide information about agricultural jobs to the few domestic farm workers likely to be interested in securing migrant farm work, and, if necessary, takes steps to improve the productivity of the interstate clearance system.

Recruitment Report

The proposed regulations at § 655.102(k) require employers to create two recruitment reports, one not more than 60 days before the date of need to be submitted with the labor certification application, and another at the termination of the employer's obligation to accept domestic referrals. This is a doubling of the requirement for recruitment reports, compared to the current regulations, and certainly can not be described as a measure that reduces the employer's administrative burden and cost. The purpose of the recruitment report that accompanies the application is obvious in that it is the basis for making the determination as to a labor shortage. The purpose of the newly added second recruitment report, which only must be submitted if an audit is conducted,

---

[7] *See* "Findings from the National Agricultural Workers Survey (NAWS) 2001-2002", Research Report No. 9, U.S. Department of Labor, Office of the Assistant Secretary for Policy, March 2005, page 7.

apparently is to determine whether the employer has complied with its continuing obligation to accept U.S. referrals. This is a significant burden to impose on all program users when only a small fraction of such reports will ever be audited.

The obligation to continue accepting qualified referrals after certification is not a new requirement. It exists in the current program. Yet only one recruitment report is required at present. Furthermore, the second report will not be determinative with respect to compliance. Program experience indicates that a significant number of cases involving allegations that an employer did not hire an eligible worker referred after certification are, in fact, disputes as to whether the worker was, in fact, referred. They become classic "he said, she said" disputes that will not be enlightened by an employer's recruitment report. We believe the added burden of requiring all employers to complete a second report is not justified by the limited utility such reports will have in resolving compliance questions. Many employers will keep records of post certification referrals as a good management practice, but we do not believe that the additional report should be mandated. The DOL should deal with enforcement of the continuing obligation to accept referrals as it is done in the past.

NCAE Recommendation

For all of the reasons discussed in detail above, we believe the requirement to conduct pre-application recruitment has the potential for negatively impacting many H-2A program users in significant ways. On the other hand, in some circumstances the substitution of an extended pre-application recruitment process for the obligation to continue accepting domestic referrals after the H-2A workers has arrived may be beneficial and result in a more workable program. In short, we believe both options have advantages and disadvantages, and each may be more workable under different labor market conditions. We therefore suggest that the DOL give H-2A applicants both options. If an employer determines that pre-application recruitment is more workable, the employer would be allowed to initiate recruitment in advance and comply with the requirements in the proposed regulations, with the modifications suggested above, and would be relieved of any further obligation to accept domestic referrals when the employer's H-2A workers have begun departing for the employer's work site. On the other hand, employer's should also have the option of filing an application not fewer than 45 days before the date of need, obtaining approval of the application prior to conducting recruitment, and continuing to accept qualified, eligible workers through the first 50 percent of the approved period of employment, or for 30 days after the employer's date of need, whichever occurs first. This would mean that the job opportunities of both groups of employers would have approximately equal exposure to the domestic labor market.

If the DOL accepts this recommendation it will have the opportunity to study the experience under the pre-application recruitment regimen and determine whether such recruitment is indeed as effective as the DOL seems to believe it will be. The DOL will also have an opportunity to determine how H-2A employers value pre-employment recruitment vis a vis a post date of need continued obligation to accept U.S. workers. If few employers opt for one or the other provision, that provision can be dropped from the regulations in a subsequent rulemaking. The NCAE proposal also has the advantage of not contradicting the Congressional action requiring an application deadline not more than 45 days before the data of need as such a deadline will remain an option.

§ 655.106 Assurances and obligations of farm labor contractors

The proposed regulations at § 655.106 set forth additional requirements for H-2A applicants who are required to be licensed as farm labor contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

We offer two threshold comments about farm labor contractors before discussing the specific requirements of the proposed regulations.

First, because of the expansive definition of farm labor contracting in the MSPA, many fixed site businesses that provide essential services to agricultural producers fall under the term "farm labor contractor" and are required to obtain an FLC license pursuant to the MSPA. The proposed regulations adopt the same definition of farm labor contractor used in the MSPA. Farm labor contractors, as defined in the MSPA, include farm management companies, agricultural services providers, custom harvesters, and many other businesses. The proposed regulations seem to contemplate only one type of farm labor contractor, namely an individual who recruits workers and provides them to fixed site employers to perform agricultural work and provides few or no other services and has few or no independent resources. However, as stated above, many employers who meet the technical definition of a farm labor contractor are established firms with substantial assets and a well documented business history, which employ their own employees to provide services on farms, much like a building contractor, plumber, electrician or swimming pool service provider in the H-2B program would provide services to its clients and customers. We note, for example, that the cohort of employers that provide the OES wage survey data the DOL uses to establish AEWRs are virtually all likely to be licensed FLCs, and that DOL's proposed AEWRs are, in fact, restricted to the wages of employees of FLCs, and not farmers.

Employers engaged in the non-agricultural services sector seeking temporary or seasonal employees are not expected to know in advance of the season precisely who all of their clients will be, exactly when they will be providing services to these clients, and exactly what these services will be. For example, a swimming pool service company seeking H-2B workers is not required to submit a list of its customers at the time of filing the application, and its H-2B workers are not restricted to working only for customers whom the employer had contracted with prior to filing its application. If the employer has an established record of a need for employees to perform services for its customers, it is eligible for certification. The same criteria should be applied to H-2A employers, irrespective of their licensing status under the MSPA.

We recognize that there are some farm labor contractors whose only business is delivering workers to fixed site employers and who do not have an established business history and resources. We agree that an individual should not be permitted to obtain H-2A labor certification, recruit a cadre of foreign workers, and then start traveling around the countryside offering these workers to farmers. Therefore we would not object to modest requirements that applicants who are FLCs submit documentary evidence of an established business history and need for seasonal workers, particularly the first time they apply for H-2A certification. However we find the detailed requirements imposed by the proposed regulations on all applicants who happen to be required to obtain an FLC license under the MSPA to be unreasonable, burdensome and unfair.

Secondly, it is important to understand that farm labor contractors, even of the traditional type, provide a valuable and necessary service to farmers and to farm workers in providing needed labor and in helping farm workers combine intermittent seasonal employment into more or less regular continuous jobs. Worker advocates and some at DOL have historically been hostile to farm labor contractors, and legislative initiatives during the past decade often seek to make it difficult for them to operate. NCAE historically has opposed such efforts that would effectively eliminate farm labor contractors. FLCs are essential to the allocation of labor in the agricultural industry, especially for many small employers with limited seasonal labor needs that would not otherwise be able to obtain a workforce.

There are bad farm labor contractors just as there are bad actors in every other business endeavor. However, the experience of NCAE members is that the vast majority of farm labor contractors are conscientious business people who respect their employees, do their best to comply with the law, and seek to provide valuable services to farmers. While we fully support the efforts of the DOL to identify non-law-abiding farm labor contractors and eliminate them, and to prevent persons from abusing the H-2A program, we do not support policies which will have the purpose or effect, whether intended or unintended, of preventing law-abiding business persons from operating, including using the H-2A program.

We have no objection to requiring that H-2A applicants that are farm labor contractors from being required to provide evidence of current registration and identifying the farm labor contracting activities they are authorized to perform as required in the proposed § 655.106(a) and (b).

Providing lists of customers and work itineraries at time of application.

We do not consider it reasonable to require employers that must be licensed as farm labor contractors to identify every customer or client, the dates services will be performed, and the specific services to be performed at the time of application. It is reasonable to require an employer applying for H-2A workers, whether or not a farm labor contractor, to establish through documentary evidence that they have an established business with a need for temporary or seasonal labor, but we believe the requirements of § 655.106(c) go too far in that regard. Among other things we note that temporary labor certification applications are subject to the Freedom of Information Act, and we do not believe employers should have to expose their entire clientele to public scrutiny. Furthermore, we do not believe there is any reason that an employer who can provide evidence of an established business operation with a need for workers must even know, much less disclose, the details of their business in advance.

FLCs should be subject to the same requirements as any other employers with respect to employing workers in more than one area of intended employment, and if an employer will do so it is appropriate to disclose that fact on the application, whether or not the employer is an FLC.

Requirement to Post a Surety Bond

Section 655.106 of the proposed rule sets out certain attestations for FLCs, in addition to those required of other employers. NCAE respectfully suggests that the attestation required by § 655.106(d) be deleted because it would effectively prevent farm labor contractors from participating in the H-2A program. The section in question requires a FLC to attest that it has obtained a surety bond in the amount of $10,000 for labor certification applications in which the FLC will employ fewer than 50 employees and in the amount of $20,000 for labor certification applications involving more than 50 employees. Especially concerning is the provision that would allow the Department the authority to set bonding at any level under certain circumstances without any specific criteria. The bond would be forfeited upon a final decision of the Department that a violation occurred, even if later judicial review reversed the Department's decision.

NCAE's experience has been that bonds in this amount are not obtainable in the market. NCAE had extensive experience working with bonding underwriters during consideration of the legislation that the Department supported in 1995 that was enacted and reversed the so-called *Adams Fruit* decision. *See Adams Fruit Co., Inc. v. Barrett,* 494 U.S. 638 (1990). During the consideration of that legislation, it was proposed that FLCs be subject to bonding requirements. After serious consideration of that approach, companies involved in writing such bonds indicated that it was unlikely that they would be written, especially in elevated amounts. NCAE views bonding as a concept that has superficial appeal but would, in effect, result in the preclusion of all but the largest contractors from being able to operate within or outside of the H-2A program context. In effect, the proposed bonding requirement cannot be met and would drive farm labor contractors from the H-2A program. NCAE suggests that this requirement be eliminated. Alternatively, the provision providing the Department unfettered discretion to set bonding levels should be eliminated and reasonable and objective criteria should be provided.

Recruitment

The proposed regulation at § 655.106(e) require an FLC to attest that it will conduct positive recruitment "in each location in which it has listed a fixed site business" is imprecise. The recruitment requirements of FLCs should be no different than those of other employers. If the FLC operates in more than one area of intended employment (defined as that term is defined for any other employer), then it should have the same positive recruitment obligations as any other employer who will employ its H-2A workers in more than one area of intended employment.

Housing and transportation

Housing provided by H-2A employers who are FLCs should be required to meet the same standards as the housing provided by any other H-2A employer, whether or not an FLC, and no more. All FLCs are responsible for ensuring that the housing they provide and list on their H-2A applications meets applicable standards, irrespective of who owns it. Similarly, transportation provided between the workers' housing and work sites by an H-2A employer who is an FLC should be required to meet the same standards as the transportation required by any other H-2A employer should be required to meet the same standards.

§ 655.107 Receipt and processing of applications

The preamble to the proposed rule (at page 8545) states that the DOL is "reengineering" the H-2A application process as an attestation process. The DOL makes reference to its experience administering other attestation-based programs. The DOL implies that the proposed H-2A attestation- based application process will be materially different than the existing process for reviewing H-2A labor certification applications and making certification determinations. For example, the preamble states that the attestation process will "help to bring the program into compliance with longstanding statutorily required processing timelines and better harmonize the program with the unique needs of the agricultural sector, thereby enabling more employers to utilize the program …." DOL further claims "the revised attestation process will dramatically reduce the number of incomplete applications that currently consume valuable processing time only to then have them returned to the applicant for the inclusion of missing information."

Agricultural employers have long sought replacement of the time consuming, cumbersome labor certification process with a true attestation process. However, the process set forth in the proposed regulations is not such a process. Agricultural employers' understanding of an attestation process is one similar to that used in the H-1B program. An attestation process would consist of the following elements: (1) program requirements are set out unambiguously in regulations; (2) employers agree (attest) on an application, under penalty of perjury and possible subsequent compliance auditing, that they will comply with these program requirements; (3) the attestation document is reviewed for completeness, *i.e.*, to assure that all of the required information and attestations have been completed; and, if so (4) the application is certified. In the H-1B program, the attestation forms are initially computer scanned, and only those that are flagged by the computer even require visual examination. The certified applications are usually returned to the applicant within, at most, a few days.

Rather than an attestation process as described above, the proposed process for processing applications at § 655.107, together with the proposed process for making labor certification determinations at § 655.109, set forth processes and procedures which are indistinguishable from the current labor certification application review and labor certification determination processes, but which introduces additional ambiguities and areas for administrative discretion that we believe will result in more, not less, processing time, more returned applications, more adverse decisions, more late certification determinations, and more appeals. It is impossible to conclude from the proposed process for reviewing applications and making labor certification determinations set forth in the proposed regulations that it will "bring the program into compliance with longstanding statutorily required processing timelines" and "dramatically reduce the number of incomplete applications," nor result in fewer rejections and demands for modifications.

DOL should replace the proposed process for processing labor certification applications and making labor certification determinations with a true attestation process that will, in fact, meet DOL's stated goal of dramatically improving processing time. The following paragraphs discuss specific problems with the proposed language for processing applications and making determinations, but underlying problem is with the process itself.

Section 655.107(a)(2) requires the CO to "substantively review" each application "for compliance with the criteria for certification" (discussed below) and make a determination to certify, deny or issue a Notice of Deficiency. Section 655.107(a)(3) requires that if the CO determines to issue a Notice of Deficiency, the employer be notified within 7 calendar days stating the reasons for the unacceptable application, citing the relevant regulatory standards, and offer the applicant an opportunity for submitting a modified application within 5 business days, state the modifications needed, and offer the employer the opportunity for an expedited or de novo administrative law judge review of the basis for the refusing to accept the application. This is precisely the process followed in the current program, but with substantial new ambiguities introduced.

Section 655.107(a)(2) defines the term "criteria for certification" to "include, *but not be limited to*" whether the job is agriculture, whether it is temporary (seasonal is not mentioned but presumably will be included), all required assurances have been made, the timelines have been met, and there are no keyboarding "or other errors in completing the application prior to submission, which would make the application otherwise non-certifiable." [Emphasis added.] Such ambiguous phrases as "include but not be limited to" and "errors … which would make the application otherwise non-certifiable" essentially leaves the term "criteria for certification" undefined.

Section 655.107(a)(3) states that "if the CO determines the employer has made all necessary attestations and assurances sufficient to reflect compliance with the assurances and obligations related to the recruitment of U.S. workers, *but the application still fails to comply with one or more of the criteria for certification* …" the employer will be notified and given an opportunity to amend or appeal. [Emphasis added.] If the phrase "assurances and obligations related to the recruitment of U.S. workers" is to be narrowly construed to refer only to certain assurances pertaining to recruitment, these assurances should be specifically enumerated. If, however, this language is intended to be construed broadly, to include *all* of the required assurances and obligations, the language of the provision should make this clear. We note that § 218(c)(2) requires that the employer be provided an opportunity to amend an application or appeal the refusal to accept the application for *any* reason other than a determination that sufficient workers are not available. (The appeal of a determination that sufficient workers are not available is made upon a denial of a labor certification on such basis.)

The proposed regulations at § 655.107(a)(3) required that a notice of deficiency be provided to the employer within 7 calendar days, and state the reasons why the application is unacceptable, citing the relevant regulatory standard(s), offer the applicant an opportunity to submit a modified application within 5 business days, and state the modifications needed for the CO to accept the application. We applaud the change in the deadline for submission of a modified application from 5 calendar days to 5 business days. In the current program, many requests for modifications are sent out on a Friday, and not received until Monday, or on occasions when Monday is a holiday, on Tuesday. This affords an employer only two to three business days to respond under the current regulations, which we regard as unreasonable.

If the CO refuses to accept an application and requires modification, the CO is required in both the current and proposed regulations to offer the applicant an opportunity for an expedited administrative judicial review. The notice must state that the employer may submit any legal arguments that the employer believes will rebut the basis for the CO's refusal to accept the application. In the proposed regulations, the deadline for submission of both the modified application or the request for an expedited administrative judicial review is 5 business days from the date of the notice of deficiency. We believe 5 business days is not sufficient time to make a determination as to whether to modify the application or submit a request for an expedited administrative judicial review and prepare the legal arguments for rebutting the CO's action. While we support the 5 business day deadline for submitting a modified application, we believe the deadline for a request for an expedited administrative judicial review should be extended to 7 business days.

Section 655.107(a)(5)(i) provides that if a modified application is not filed within the 5 business days described above, the labor certification will be delayed 1 day for each day after 5 business days before a modified application is filed. Section 655.107(a)(5)(iii) provides that if the amended or modified application is filed, but is not approved, the CO "shall" deny the application. On at least some occasions under the current program an applicant and the CO have engaged in more than one round of modifications in trying to perfect an application without an appeal. We believe that providing such opportunity is consistent with the concept of streamlining the labor certification process, and avoiding unnecessary proliferation of appeals, and should be permitted by the regulations rather than requiring an automatic denial if the initial modification is not acceptable. We would be willing to accept the condition that during such an attempt to achieve an acceptable application the date of certification would continue to be delayed day for day after the initial 5 business days. We also believe that the employer should continue to have recourse to an expedited administrative judicial appeal if an acceptable application is not achieved.

The proposed regulations do not address the question of what effect a determination not to accept an application, and require modification, will have on the validity of any pre-application recruitment. Under the present regulations applications are reviewed, modified if necessary and accepted prior to conducting recruitment, and employers have a reasonable assurance that if the recruitment is conducted on the terms of the accepted application and job order it will be considered valid. Such an expectation is essential to the efficient and effective operation of the program. The proposed regulations should explicitly state that if an application is ultimately accepted, even after modification, that any required modifications to the application will not invalidate any pre-certification recruitment conducted based on the application as originally submitted.

§ 655.108 Offered wage rate

Section 218(a)(1)(B) of the INA requires, as a condition for approval of a petition to employ H-2A workers, that the employer apply to the Secretary of Labor for a certification that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."

As a condition for granting the above referenced certification, the Secretary of Labor has historically required, among other things, that H-2A employers offer and provide to U.S. and alien workers in certified occupations not less than certain minimum wages and working conditions set forth by the Secretary in regulations. With respect to wages, the Secretary has required that workers in certified occupations be paid not less than the highest of three wage standards: (1) any applicable federal, state or local statutory minimum wage, (2) the prevailing wage (which may be a piece rate) for the occupation in the area of intended employment, if one has been determined by the Secretary, or (3) an administratively promulgated "adverse effect wage rate" (AEWR).

Virtually all non-immigrant alien workers programs, including those that require employers to first seek a labor certification from the Secretary of Labor, such as the H-2B program, and those that do not require a labor certification, such as the H-1B and employment based permanent resident immigrant program, nevertheless require as a statutory condition for the admission of an alien under such programs that the wages and working conditions offered to the alien will not adversely affect the wages and working conditions of similarly employed United States workers. Yet none of these other admission categories, even admissions on a permanent basis, have an adverse effect wage rate requirement, separate and distinct from the requirement to pay at least the prevailing wage for the occupation in the area of intended employment. We do not believe there is a basis for imposing such a requirement on agricultural workers. We believe that the requirement for an adverse effect wage rate, separate and distinct from the prevailing wage in the occupation and area of intended employment, should be removed from the program.

The Historical Basis for An AEWR

Historically, the concept of an agricultural adverse effect wage rate came into being because at the time the regulations were first written governing the admission of aliens for employment in agriculture under the predecessor H-2 provisions of the INA, there was no federal minimum wage applicable to agricultural employment. In the absence of a federal agricultural minimum wage, the Secretary of Labor required payment of what was called an "adverse effect wage" for admission and employment of alien agricultural workers. The purpose of the adverse effect wage rate was to set a floor on prevailing wage. This adverse effect wage was set at roughly the equivalent of the federal non-agricultural minimum wage at the time.

Congress subsequently extended federal minimum wages to agricultural employers. Initially, only larger farm employers were covered by the agricultural minimum wage, and the wage rate itself was lower than the non-agricultural minimum wage. Over time, both the coverage and the level of the agricultural minimum wage were brought into conformity with the non-agricultural minimum wage. For more than three decades, the federal agricultural and non-agricultural minimum wage rates have been identical, and agricultural employers are covered by the minimum wage provisions of the Fair Labor Standards Act on virtually the same basis as non-agricultural employers.

Notwithstanding the extension of the minimum wage to agriculture, an AEWR separate and distinct from the prevailing wage in the occupation and area of intended employment, remained a part of the requirements for employing H-2 and then H-2A workers. The rationale for a separate AEWR has changed from a proxy for a statutory minimum wage to a wage that compensated for alleged agricultural wage depression resulting from the employment of aliens in agriculture. Such wage depression was asserted purely as a matter of economic theory. Decades of research by economists have failed to demonstrate wage depression from the employment of aliens in agriculture or any other industry.

We do not believe that there is a rational basis for retaining an AEWR standard, separate and distinct from the prevailing wage in the occupation and area of intended employment as a requirement for effecting the statutory criterion that the employment of H-2A aliens not adversely affect the wages and working conditions of U.S. farm workers. On the contrary, we believe that an AEWR above the prevailing wage, to the extent that it precludes access at a competitive wage, it will adversely affect U.S. farm workers by reducing agricultural job opportunities for domestic workers.

There is No Longer A Rationale for An Adverse Effect Wage Rate

Under current agricultural and labor market conditions there is neither persuasive empirical evidence nor a valid theoretical argument that the employment of alien workers in U.S. agriculture has, or will, adversely affect U.S. farm workers, nor that an adverse effect wage rate, separate and distinct from the prevailing wage for the occupation in the area of intended employment, is needed.

The U.S. agricultural work force is overwhelmingly alien. The National Agricultural Worker Survey (NAWS) reports that at least 78 percent of seasonal crop workers employed in the U.S. are now foreign born, and the vast majority of them are not work authorized. The NAWS reports that from 1990 to 2006 the proportion of season crop workers employed in the U.S. who were not work authorized increased from an official 8 percent to an official 53 percent. Unofficial estimates are much higher. One sixth of the U.S. seasonal hired crop work force each year are new entrants into the hired agricultural work force, and 99 percent of these newcomers now report that they are not work authorized. Thus, for all practical purposes, all new entrants into the U.S. seasonal hired agricultural work force are foreign born, unauthorized new comers.

Notwithstanding the overwhelming presence of aliens, including unauthorized alien workers, in the U.S. agricultural industry, the economic evidence contradicts the theoretical assertion that aliens have adversely affected U.S. farm workers. Since 1990 hourly wages of U.S. farm workers (including illegals) have increased more rapidly than hourly wages of non-farm workers -- 72 % compared to 64 % -- even though the increase in alien employment in agriculture greatly exceeded the increase in the non-agricultural sector. Even with the ready availability of alien labor, U.S. hired farm employment declined by 21 percent. Yet U.S. production of labor intensive agricultural commodities continued to increase. Since 1990, U.S. vegetable production has increased 47 % and fruit production has increased 23 %. This increase in production in the face of declining employment is the result of increased labor productivity. The large influx of alien workers during this period did not dissuade farmers from investing capital and adopting labor productivity improving and output enhancing mechanization and other technologies. Total factor productivity in agriculture has increased approximately 1.7 % annually in recent years.

The theoretical argument for an adverse effect is equally unpersuasive. In a globally competitive economy characterized by open markets, the supply of labor intensive fruits and vegetables and other agricultural commodities to the U.S. market is very price elastic. Therefore, the adjustment to a reduction in the supply of hired labor, for example, as a result of an overly restrictive minimum wage standard or improved effectiveness of immigration control, will not be significantly rising commodity prices or farm wages, but rather reduced market share of agricultural commodities, especially labor intensive commodities, for U.S. producers. The reason for this is that wages make up a substantial portion (by definition) of the production cost of labor intensive agricultural commodities. If the supply of labor is restricted, for example by a “too high” AEWR or a cumbersome, expensive or dysfunctional H-2A process, this will create upward pressure on production costs and cause some U.S. producers to reduce or abandon production. The market share abandoned by these producers will be absorbed by other domestic *and* foreign producers. The net result will be a decrease in the market share of labor intensive commodities from U.S. producers and an increase in foreign market share. This process will continue until domestic production has been reduced to the point where the reduced U.S. farm labor supply at market-competitive wages is once again adequate to produce the remaining domestic production at globally competitive production costs. The result will be modest increases in domestic farm worker wages, (due primarily to lower wage employers abandoning production rather than actual increases in wages by the more profitable domestic producers, since commodity prices are likely to change little), and reductions in the market share of the remaining U.S. producers. The higher the artificially set minimum wage, and the longer it is in place, the greater the displacement will be.

An examination of the data on the share of U.S. fruit and vegetable consumption imported, and the share of U.S. fruit and vegetable production exported for the period 1990 to 2006 documents (1) that U.S. producers are, indeed, in direct competition with foreign producers, and (2) that displacement of market share of U.S. producers is, in fact, occurring.

In 2006 nearly a third of fresh fruit and a fifth of fresh vegetables consumed in the U.S. were imported, double to more than double the proportions in 1990. In 1999 the U.S. became a net importer of fruits and vegetable for the first time in modern history, and the import share of the market has increased steadily since then. Meanwhile, U.S. fruit and vegetable exports have remained at an almost level share of U.S. production during this period. Since global markets have grown significantly, this indicates that U.S. producers are losing global as well as domestic market share.

A few caveats are in order in examining the data. First, the domestic market for fruits and vegetables has grown enormously during this period. An expanding market increases demand for both domestic production and imported products.

Secondly, not all imported fruits and vegetables compete directly with domestic production. In some cases imported products extend and expand the market for a commodity by providing availability during periods of the year when domestic production is low or zero. For example, fresh grapes and asparagus are now available in stores virtually year round, even though domestic production occurs only during certain seasons. In particular, imports of some commodities from the southern hemisphere occur when no U.S. production is available. This complimentarity is, of course, only true for *fresh* commodities which cannot be stored. Imported apples and other storable fruits and vegetables will almost always compete with domestic production. Imported frozen and canned product will also almost always compete directly with domestic production.

From 1990 to 2006, in every category of fruit products, *i.e.*, fresh, frozen and canned, except juice, the share of domestic consumption from imports of fruit has at least doubled to more than tripled. While the percentage of domestic consumption from imports is still relatively small for many commodities, this does not necessarily mean that imports do not play a significant role in capping domestic market price for these commodities. For example, the imported share of fresh market apples is only 7.1 percent (up from 4.7 percent in 1990). However, this clearly indicates that foreign producers can produce and put apples into the domestic market at a competitive price. If domestic producers try to increase prices significantly, for example to offset rising wages for farm workers, this will induce foreign producers to increase production and draw more imported product into the domestic market. The same is true for strawberries. Although domestic production of strawberries has increased, imports of strawberries have increased even more rapidly, now accounting for about 8 percent of the fresh market and one third of the frozen berry market.

Some particular fruit commodities have been especially hard hit by imports. Domestic pineapple production has now all but been supplanted by imports as the agricultural wage rate in Hawaii is the highest in the nation at over $ 11 per hour for field production workers. Other fruits that have seen substantial displacement of market share are pears (23 percent, up from 12 percent), apricots (22 percent, up from 6 percent), plums (22 percent, up from 13 percent), fresh grapes (now at 56 percent imported), and fresh avocados (at 64 percent imported). Domestic olive producers have been nearly displaced, as imports now constitute more than 85 percent of domestic consumption.

Although aggregate data for all vegetables is not available, the same pattern of substantial increases in imported market share of specific vegetable commodities are evident. Again, certain commodities have been hit especially hard, such as artichokes, asparagus, cucumbers, and garlic. Garlic is especially interesting as domestic producers have faced severe competition from Chinese producers. Imports have risen from 17 percent to 54 percent of domestic consumption in just a decade and a half, while the proportion of domestic production which is exported declined from nearly 16 percent to about 5 percent. The imported market share of asparagus has increase from 30 to 76 percent from 1990 to 2006. For artichokes, it has increased from 26 to 67 percent. For cucumbers, it has increased from 34 to 51 percent. Even for *fresh* broccoli, it has increased from 2 percent to more than 10 percent.

The above data demonstrates that both the level of farm wages in the U.S. and the job opportunities for farm workers, both domestic and alien, are determined by the global economy. Setting artificially high wage rates makes U.S. producers uncompetitive and displaces production. This adversely affects not only U.S. farm workers, by reducing their job opportunities, but also U.S. workers in the upstream and downstream occupations that are dependent on U.S. production, such as transportation, packing, and first processing. When an agricultural commodity is imported, there are often other value-added services that are imported with it. For example, we do not import bins of raw processing tomatoes, we import 55-gallon drums of concentrated tomato juice and paste.

The DOL seems to recognize the potential adverse impact of minimum wage rates that are not market related. The preamble to the proposed rule (at page 8549) states the DOL's conclusion "that one of the most significant actions it can take to protect the wages and working conditions of U.S. workers is to render the H-2A program sufficiently functional such that … H-2A employers will … use the program, with all of its accompanying legal requirements and protections."[8] The DOL further concludes that "one of the most important things the Department can do to ensure that the H-2A program is fully functional and protective of the wages and working conditions of U.S. workers is to set AEWRs that appropriately reflect market realities and labor costs." The preamble notes that a wage standard that is set "too low" will force U.S. workers to accept substandard wages in order to obtain agricultural employment. On the other hand a wage standard that is "artificially set too high can also result in harm to U.S. workers." Indeed, as we have seen, wages that are set "too high" will eliminate job opportunities not only for farm workers, but for many other U.S. workers involved in upstream and downstream jobs supported by the U.S. agricultural industry.

Unfortunately, rather than simply eliminating the adverse effect wage rate wage standard, the proposed regulations attempt to moderate the adverse impacts of the AEWR by changing the methodology for setting AEWRs. The proposed alternative methodology, however, is as flawed as the current methodology.

---

[8] The full sentence partially quoted here, however, grossly misrepresents the actions and motivations of U.S agricultural employers.

The current Adverse Effect Wage Rate Methodology

Since the adoption of the current H-2A regulations in 1987, the adverse effect wage rate applicable to H-2A employment in each state has been set by DOL regulation to be equal to the annual average hourly wage for field and livestock workers for the previous year for the state or multi-state region of which the state is a part, as determined and published in the U.S. Department of Agriculture (USDA) Quarterly Farm Labor survey program of the USDA's National Agricultural Statistics Service (NASS). NASS publishes the annual average wage rates in November. They become effective as AEWRs for H-2A employment when promulgated by the DOL in the *Federal Register*, usually approximately the beginning of March of the following year.

The Proposed Adverse Effect Wage Rate Methodology

The proposed regulations continue the requirement to pay the highest of the three wage rates set forth in the current regulations, i.e. the applicable federal or state statutory minimum wage, the prevailing wage for the occupation in the area of intended employment, or an administratively determined AEWR. However, the proposed rule changes the methodology by which the AEWR is set. The proposed rule at §655.108(e) states that "the adverse effect wage rate (AEWR) shall be based on published wage data for the occupation, skill level, and geographical area from the BLS Occupational Employment Statistics (OES) survey. The NPC shall obtain wage information on the AEWR using the Agricultural On-line Wage Library (AOWL) found on the Foreign Labor Certification Data Center Web site (http://www.flcdatacenter.com/)."

Other than the previously quoted sentence, the proposed regulation does not specify how the NPC will use OES data to make a determination as to the applicable AEWR. We note that there is currently no OES wage data in the AOWL. We must assume that the data will be the data for "agricultural" occupations currently in the Online Wage Library (OWL) for non-agricultural occupations. We assume that the process used to determine the applicable AEWR will be similar to the current process for making prevailing wage determinations for non-agricultural occupations from the OWL, which are based on the same data program and database proposed to be used for AEWR determinations in agricultural occupations.

Comparison of the USDA NASS Annual Average Field and Livestock Worker Wage Data and the BLS OES Wage Data for Agricultural Occupations

In the preamble to the proposed rule the DOL describes and evaluates the NASS wage data and the OES wage data which it proposes to use as a substitute for the NASS data in setting AEWRs. The DOL claims the BLS OES data will be superior as an AEWR standard because it reflects more occupational detail, more geographic detail, and more detail with respect to skill and experience requirements. Unfortunately, the discussion omits many critically important considerations in evaluating the two sets of data. These omissions undermine the DOL's conclusion that the OES data more accurately reflect agricultural wages.

As a threshold matter, it is essential to define what the appropriate variable is that should be measured. DOL refers to the AEWR as a minimum *wage rate*, but applies it as a minimum *hourly earnings* standard. All workers must be paid at least the AEWR for all hours worked, regardless of whether they are paid on an hourly basis, a piece rate basis, or some other basis. This is especially important in agriculture, because a significant amount of agricultural work is paid either on a straight piece rate basis, or a combination of an hourly rate and a production-based incentive bonus, or on daily, weekly or monthly basis. The USDA no longer publishes data on the number of hired farm workers by method of pay, but did so for many years through 1995. In 1995 approximately 30 percent of hired farm workers were paid on a basis other than an hourly wage.[9] That proportion had been relatively stable. If anything, it has likely grown in recent years with the rise in employment by farm labor contractors.

Survey Universe

The USDA NASS survey universe includes all operations meeting the USDA/Census of Agriculture definition of a "farm". It also includes any farm-related services performed on a farm or ranch on a contract or fee basis, including activities performed by contract workers on fruit, vegetable or berry operations. The NASS/Census of Agriculture employs a complex and sophisticated process for maintenance and updating a comprehensive list of operations meeting the definition of a farm ("list frame"). This is supplemented by a sampling of the land area of the U.S. to identify agricultural operations which may not be included on the list ("area frame"). A statistical procedure is used to identify and eliminate potential overlap between the list and area frames.

The BLS OES survey universe includes all businesses which file unemployment insurance returns. This is a comprehensive universe of non-agricultural employers, because unemployment insurance coverage is virtually universal in the non-agricultural sector. However, different unemployment insurance coverage provisions apply to agricultural employers such that only large farm employers are included in the universe of unemployment insurance filers.

The universe of unemployment insurance filers is classified by industry according to the North American Industrial Classification System (NAICS) codes. Because the universe list of unemployment insurance filers excludes a significant proportion of farm employers, and the extent of the bias introduced by this incomplete coverage is unknown,

---

[9] See Farm Labor, November 14, 1995, NASS, USDA Sp Sy 8 (11-95).

the OES survey system specifically excludes all operations in NAICS code 11 (*i.e.*, agriculture) except three four-digit categories: 1133 – Logging; 1151 – Support Activities for Crop Production; and 1152 – Support Activities for Animal Production, from its survey universe. Thus the OES survey specifically and systematically excludes all employment by farmers from its survey universe. For this reason, virtually all BLS employment and wage data reported from surveys of this universe are labeled "non-farm".

The impact of the exclusion of farmers from the OES is substantial and material. The USDA also counts the number of agricultural service workers employed on farms, in addition to the number of employees of farmers. In the July and October, 2007 USDA Quarterly Farm Labor Surveys, the two peak quarters for U.S. farm employment, the number of agricultural services employees was 363,000 and 316,000 respectively, while the number of hired workers on farms was 843,000 and 806,000 respectively. In other words, the OES survey universe systematically excludes approximately 70 percent of the employment on farms, namely the employees of farmers, which are arguably precisely the workers that are most similarly employed to H-2A alien workers.

Sample Size

The USDA/NASS draws an independent stratified sample from its survey universe for each quarterly farm labor survey. The sample size is 11,000 in the January, April and October surveys and 13,000 in the July survey. The reason for the larger sample in July is that this survey samples both the list and area frames. The annual average field and livestock worker estimate is based on the four quarterly surveys, so the total sample size would be 45,000.

The OES draws a stratified sample of 1.2 million unemployment insurance filers every three years, and actually surveys one-sixth (200,000) of these filers in each of two surveys a year.

We could not find any data on the size of the OES sample for the three "agricultural" NAICS codes included in the OES survey. A rough measure of the sample size can be imputed. Total estimated employment in the "agricultural" occupations reported in the OES was 3 percent of the total estimated employment in all occupations reported by the OES. Three percent of the OES all-occupation sample would be roughly 6,000 agricultural entities per semi-annual survey or 36,000 over three years.

On an annual basis the NASS farm labor survey collects original data from 45,000 entities, while the OES survey collects original data from approximately 12,000 agricultural entities.

Frequency and Timing of Surveys

The NASS farm labor surveys are conducted quarterly in January, April, July and October. The OES surveys are conducted biannually in May and November. For highly seasonal industries like agriculture more frequent surveys are advantageous as this captures more total employment.

Data Collection Procedures

NASS collects data through a combination of mail questionnaires and telephone and personal interviews conducted by interviewers employed by the state agricultural statisticians' offices and trained by NASS using survey instruments developed and tested by NASS. The OES data is collected by SWA's using a mail survey instrument developed by the BLS.

Data Collected

NASS collects data on number of hired employees of the farm operator and the total gross wages and total hours worked for the pay period including the 12th of the surveyed months. *Only payroll and hours worked data are collected. No actual wage rates are collected.* NASS also collects data on the number of hired employees, gross wages and gross hours worked by contract and agricultural services employees. This data is analyzed separately and is not included in the estimates of employees, hours or wages of employees of farm operators.

OES collects data on the number of employees during the payroll period including the 12th of the surveyed month that are paid within specified pay brackets. *Only data on number of workers by pay intervals are collected. No actual wage rate or payroll data of any kind are collected.* The pay brackets include intervals up to and including "$80 per hour and over". Those within the relevant range for farm workers are:

Under $7.50 per hour
$7.50 to $9.49 per hour
$9.50 to $11.99 per hour
$12.00 to $15.24 per hour
$15.25 to $19.24 per hour

Occupational Classifications for Which Data are Collected

The NASS survey requires data to be reported for the following classifications of employees:

Field workers (subdivided by "work hired to do" classified by the respondent)
Livestock workers (subdivided by "work hired to do" as above)
Supervisors/Managers
Other workers (office workers, bookkeepers, pilots, veterinarians, etc.)

The OES includes with their mailed questionnaires a list of the likely occupational categories employed by employers within the respondent's industry code and respondents are asked to report the number of workers by wage bracket separately for each occupational category. The occupational categories related to agricultural operations include the following:

First-line supervisors/manager of farming, fishing and forestry workers
Farm labor contractors
Agricultural inspectors
Animal breeders
Graders and sorters, agricultural products
Farm workers and laborers, crop, nursery and greenhouse
Farm workers and laborers, farm and ranch animals
Agricultural workers, all other

Wage Rate Calculation

NASS computes the hourly earning of workers in each occupational classification by dividing the total gross wages of workers in the occupational classification by the total hours worked to derive an average hourly earnings (wage rate) figure. The average hourly wage calculations for each occupational category of each respondent are weighted by the appropriate sampling rate to produce a wage rate estimate for each quarterly survey report. The data from all four quarterly reports (unadjusted for elapsed time) are combined to determine the average annual hourly wage rate.

The OES imputes an hourly wage to each wage reporting bracket. The specific hourly wages imputed to wage brackets are derived from other BLS survey data, but we could obtain no documentation of the imputed wage levels used or how they were determined. The imputed wage levels are weighted by the number of workers reported in the wage bracket, and further weighted by the appropriate sampling rate.

In addition to the data from the current survey period described in the preceding paragraph, the imputed wage level for each wage bracket for each of the prior 5 surveys is adjusted by the change in the BLS Employment Cost Index (ECI)wage data. The imputed data from the current survey is then combined with the adjusted imputed data from the 5 preceding surveys to produce an annual average.

Level Of Detail For Which Wage Data Are Published

USDA/NASS

Geographic – small multi-state regions and a few individual states, determined by the size of the universe of farm workers and the NASS protocol for statistical precision of published data.

Occupational – all paid farm workers, crop workers, and crop and livestock workers combined. Wages for agricultural service workers are published only for California and Florida.

Skill/Experience/Competence level – not available.

BLS/OES

Geographic – all metropolitan statistical areas (MSA) in a state and one or more (up to 5 in California) "balance of state" groupings of counties not included in any MSA.

Occupational – approximately 800 groups of 4-digit SOC (Standard Occupational Classification) codes, including the agriculture-related codes listed above.

Skill/Experience/Competence level – four "levels", defined as follows:

Level I (*entry*) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy.

Level II (*qualified*) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation.

Level III (*experienced*) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead', 'senior', 'head', or 'chief' would be indicators that a Level III wage should be considered.

Level IV (*fully competent*) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Level 1 through 4 wages are special tabulations of the OES data performed by the BLS for the Office of Foreign Labor Certification. Level 1 is the mean of the lowest 33% of wages in the occupation and MSA. Level 4 is the mean of the highest 67% of wages. To compute Level 2 and Level 4 wages, the difference between Level 1 and 4 is determined and the difference is divided by 3. The Level 2 wage is the Level 1 wage plus this result. The Level 3 wage is the Level 4 wage minus this result. This is entirely a formulaic calculation. *No actual wage rate data, and no data on skill levels or expected level of performance of workers, is collected in the OES survey.*

Frequency of Publication.

NASS publishes its survey results quarterly in the month following the survey (February, April, August and November). The annual average wage rates are included in the November publication.

The OES publishes its survey results annually in the May following the May in which the survey was conducted (*i.e.* the May, 2007 survey results will be published in May, 2008). Each annual published survey incorporates the actual or adjusted survey results ending with the May survey for the preceding year. For example, the data published in May, 2008 will incorporate the actual or adjusted data from the May and November surveys of 2005, 2006, and 2007.

General Discussion and Evaluation

The NASS survey has clear and significant advantages over the OES survey in (1) sampling and coverage, (2) precision of the data collected, (3) timeliness of the data reported, and (4) statistical precision of estimates. The OES's sole advantages are that it reports data for a larger number of geographical areas, and that the DOL does not have to rely on data collected by another agency.

The NASS survey specifically and comprehensively covers farmers, the overwhelming majority of employers of workers in H-2A certified occupations, while the OES survey specifically excludes farmers. The NASS survey sample size is substantially larger than the OES "agricultural" employer sample. The NASS survey collects data four times during the year, an important advantage in the highly seasonal industry of agriculture, while the OES survey collects data only twice a year. The NASS utilizes trained enumerators, while the OES survey relies exclusively on mail responses.

The NASS survey is overwhelmingly superior in the precision of the data collected for the purpose for which the DOL uses the data. The NASS collects actual payroll and hours data from which it computes hourly earnings.[10] Hourly earnings are precisely the thing that is regulated by the AEWR. The OES data collects neither. It collects data on numbers of workers in very broad wage categories, only five of which even include wages likely to be paid in agriculture. It makes no distinction, for example, between a worker who earns $8.00 per hour and a worker who earns $9.00 per hour. A wage increase from $8.00 to $8.50 or even $9.00 from one year to the next would have no impact on the OES estimate of wages. On the other hand a wage increase from $9.25 to $9.50 per hour would have exactly the same effect on its estimates as a wage increase from $9.25 to $11.00. The fact that only the number of workers are reported within very broad wage intervals makes the OES survey an extremely imprecise measure of agricultural wages and changes in these wages.

The OES data has an advantage reporting wages for more occupational classification within agriculture. There are four occupational classifications in the OES system that are likely to have applicability to the H-2A program, whereas all field and livestock workers are combined in the NASS estimates. We believe more occupational refinement could be introduced into the NASS estimates of annual average wage rates at very little additional cost, given that the NASS has more than twice as much data upon which to make annual average estimates as the OES survey does.

One of the biggest advantages the DOL claims for its OES data is the claim that it accounts for the different skill levels required by agricultural occupations. The DOL fails to reveal, however, that the OES survey collects absolutely no data whatsoever on experience or skill of workers in any of its occupational classifications. The division of the wage data into "skill levels" is entirely an artificial construct of the Division of Foreign Labor Certification which has no foundation whatsoever in the real world or in

---

[10] We find the DOL's evaluation of the two sources particularly disingenuous on this point. At page 8550, the DOL states that "the accuracy of AEWRs based on the USDA Farm Labor Survey data is further diminished because the Farm Labor Survey is not based on reported hourly wage rates. Instead, the USDA's Farm Labor Survey asks employers to report total gross wages and total hours worked. Based on this limited information the survey constructs annual average wages … ." The DOL fails to mention the significant fact that the OES collects no data whatsoever on either wages or hours, and merely collects data on numbers of workers within extremely broad wage brackets. The USDA's data is clearly superior to and more accurate, not less accurate, than the OES wage data in measuring wages and changes in wages.

labor market data. The wages for different "skill levels" are arbitrary manipulations of the OES data for which not even the BLS makes a claim of validity. A casual examination of the differentials in agricultural wages by "skill level" in the OWLS reveals ranges in wage rates that are completely unrealistic in agriculture.

The NASS data is also superior in its currency. Annual averages are published before the end of the year to which they apply. The OES annual data is a year old when it is published.

Finally, we note that the OES data is published for all MSA's and four balance of state regions for each state, whereas the NASS data is published only for small multi-state regions and three individual states.

The OES data has a clear advantage over the NASS data on geographic and occupational specificity. Unfortunately, even these advantages are clouded. They result in no small measure from the fact that the NASS imposes much higher standards of statistical precision on the data they are willing to publish than does the OES data program. If the NASS did not impose such high standards of statistical precision, it could publish more detailed data. We are not criticizing either agency in this regard, we are simply making an observation that there is a clear trade off between detail and precision when it comes to evaluating the accuracy of the two data sources.

We are, however, concerned that the Division of Foreign Labor Certification's OWL seems to regard even the BLS standards of statistical precision as unnecessarily limiting. In comparing the published BLS OES data for metropolitan statistical areas with the data in the OWL (which is further subdivided into four "skill levels"), there are numerous examples where the OES has declined to publish the data because it does not meet their standards for statistical precision, but the OWL nevertheless further subdivides the data and publishes it. For example, in North Carolina the OES does not publish wages for crop workers in the Ashville, Burlington, Durham, Fayetteville, Goldboro, Greenville, Jacksonville, Rocky Mount and Wilmington MSA's. Nonetheless, the OWL includes data for crop workers in all of these jurisdictions, further broken out by "skill levels".

The NCAE's Recommendation

The NCAE believes that there is no valid basis for setting an adverse effect wage rate, separate and distinct from the prevailing wage for the occupation in the area of intended employment, and requiring the payment of such a wage if it is higher than the prevailing wage. We believe the DOL's discussion in the preamble to the proposed regulation makes the case against an AEWR. As the preamble notes, a wage that is set "too low" harms U.S. farm workers by forcing them to accept depressed wages as a condition for taking the certified agricultural job. On the other hand a wage that is set "too high" harms U.S. farm workers because it either results in the displacement of the job opportunities to producers outside the United States, or forces the U.S. employer as a matter of economic survival to forego use of the H-2A program and continue to rely on the domestic labor market with the exceedingly high risk that the majority of the employer's workers are fraudulently documented and are subject to removal. The terms "too low" and "too high" can only have meaning in comparison with the competitively determined market wage, i.e. the prevailing wage. We are disappointed that the DOL did not act on its own analysis and discard the AEWR, and rely instead on the prevailing wage and statutory minimum wage standards, as it does in all other foreign worker programs.

We believe the USDA NASS farm labor survey program utilizes an extremely rigorous statistical methodology which takes into account the unique statistical measurement problems in the U.S. agricultural industry and which results in accurate estimates of average field and livestock worker wages for the geographic areas for which estimates are published. But we do not believe these average field and livestock worker wages are appropriate minimum wages for all H-2A occupations. In particular, they set wages that are "too high" (to adopt the DOL's terminology) to reflect competitive market wages for many agricultural job opportunities.[11]

For all of the methodological reasons described in detail above, we do not believe the BLS OES "agricultural" wage data as contained in the DOL Foreign Labor Certification's On Line Wage Library accurately measure wages of workers employed on farms nor within the small geographic areas for which it is presented, nor meaningfully reflects skill and experience levels required by different employers.

If the DOL determines not to abandon the concept of an AEWR, as separate and distinct from the prevailing wage for the occupation and area of employment, then it should allow H-2A employers to meet either the existing or proposed AEWR standard. Employers should have the option of requesting and paying at least the AEWR determined by the DOL based on the OES program or paying at least the USDA annual average field and livestock worker wage rate for the state or region from the most recently published USDA survey. While either of these standards may set a wage which is "too high", farm workers will still be protected from adverse effects of a "too low" wage by the requirement that the employer offer the prevailing wage for the occupation in the area of intended employment, if higher than the AEWRs described in this paragraph.

We also strongly encourage the DOL to consult with the USDA and the BLS about ways in which one or the other or both of their farm wage data systems can be refined to provide more appropriate wage rates for the H-2A program. We note, for

---

[11] For the same reasons, the USDA data set minimum wages that are "too low" to reflect competitive market wages in about half of U.S. agricultural job opportunities, but this deficiency is offset by the additional H-2A requirement to pay the prevailing wage for the occupation in the area of intended employment if it is higher than the AEWR.

example, that many of the statistical devices used by the BLS could be adopted for the USDA survey at little or no cost. Conversely, it may be possible for the BLS to make use of the USDA's survey sampling frames and some of the other statistical techniques the USDA has devised to accommodate the unique characteristics of the U.S. agricultural industry. The objective should be to develop a body of wage agricultural data that comes as close as possible to reflecting the actual prevailing competitive wages for agricultural occupations in agricultural areas in the United States. The expertise of agricultural employer and farm worker stakeholders should also be sought. For its part, the NCAE would be happy to participate in such consultations and provide the benefit of its experience and expertise.

§ 655.109 Labor certification determinations

Subsection (b) sets forth the procedures and criteria for making certification determinations. Certification determinations will be made by the Certifying Officer(s) of the NPC(s), except in cases where the Administrator of the OFLC has specified that an application shall be referred to the National OFLC.

Basis for the Labor Certification Determination

The proposed regulations at § 655.109(b) set forth the process and basis for making labor certification determinations. This provision contains language not in the current regulations that introduce new and potentially important ambiguities into the labor certification process.

The proposed regulation at § 655.109(b)(4) states that the CO will "grant the application" (we presume this means "grant certification") if and only if "the job opportunity does not contain duties, requirements or other conditions that *preclude consideration* of U.S. workers or that *otherwise inhibit their effective recruitment* …" [Emphasis added.] The emphasized language has no counterpart either in the INA or in the current regulations, and appears to us to be inherently imprecise and subject to widely divergent interpretation. The regulation itself seems to recognize this because it goes on to set out criteria to be used in making the determination required by the above quoted sentence. However, the attempted clarification adds additional ambiguity.

At § 655.109(b)(4)(i) and (ii) the clarification sets forth two different, and potentially conflicting, criteria with respect to the existence of a labor dispute involving a work stoppage. Subparagraph (b)(4)(i) states that "the job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute involving a work stoppage." This is the same language as the labor dispute assurance in the current regulations at § 655.103(a). However, the proposed subparagraph (b)(4)(ii) states that "there is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment." The first statement pertains to the specific job opportunity in question, while the second statement could be interpreted to pertain to a labor dispute in the occupation, and would appear to have the effect of precluding certification of any job opportunities in the occupation under such circumstances. The language of the labor dispute criteria pertaining to the issuance of certification is an extremely critical issue which attracted a great deal of attention at the time the current regulations were written in 1987. The agricultural employer community considered the language of the current regulation essential to a functional H-2A program. The agricultural employer community's view of that issue is unchanged. We regard the language of subparagraph (4)(ii), as well as the attestation statement at the proposed § 655.105(c) as provisions that serious degrade the functionality of the H-2A program. We strongly urge the DOL of delete subparagraph (4)(ii).

At § 655.109(b)(4)(vi) the clarification requires that "the requirements of the job are not unduly restrictive and do not represent a combination of duties not normal to the occupation being requested for certification." Similar language appears in a number of places throughout the proposed regulations. We do not find any support in the INA, nor any justification in the proposed rule, for precluding combinations of duties which are necessary to perform the specific jobs required by an employer's business. Put another way, nothing in the INA requires an employer from performing tasks in precisely the same manner as other employers, and that does not allow for combinations of duties required by business necessity.

We believe that the language of the proposed § 655.109(b)(4) should focus only on precluding job offers that have the purpose or intent of differentially favoring particular alien workers, and disqualifying otherwise qualified U.S. workers, and that the provision should state that directly and that the language "clarifying" the current proposal be eliminated.

Notification

The proposed regulation at § 655.109(c) provides for notification of the employer in writing, either electronically or by mail, of the labor certification determination. The provision should require that if the notification is other than electronic, it be sent by means normally assuring next day delivery.

Continued recruitment of U.S. referrals

The proposed regulation at § 655.109(d) provides that if a temporary labor certification is granted the Final Determination letter shall require the employer "to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H-2A worker(s) depart for the place of work …". The proposed regulations and the Final Determination letter should clarify the DOL's policy that such obligation to continue to accept applicants and referrals continues only until the employer has accepted the number of applicants and referrals requested on the employer's labor certification application. This clarification is necessary because SWA personnel and non-governmental activists have cited wording such as that in this paragraph to require the employer to continue to accept applicants and referrals as a condition for H-2A certification irrespective of the number of workers applied for.

Denied Certification

The proposed regulation at § 655.109(e) states that if the certification is denied the Final Determination letter will state "the reasons the application is not accepted for consideration". We presume this was an accidental use of terminology from the current regulations, and what was intended is that the notice will state the reasons the application was denied. If DOL did intend to use the term "not accepted for consideration" to mean something different than "denied" the DOL should explain exactly what it means by that term. We note that the definition of the term "accepted for consideration" in the current regulations was deleted from the proposed regulations.

Appeal of Denial of Certification

The proposed regulation omits a requirement that a Final Determination to deny certification offer the employer an opportunity to request an expedited administrative review of or a de novo administrative hearing before and administrative law judge of the denial. Such recourse is required by the INA at § 218(e). The availability of such recourse should be clearly spelled out in the Final Determination to deny certification as well as in any partial denial of certification.

Partial Certification

The proposed regulations at § 655.109(f) include a provision that has no counterpart in the existing H-2A regulations that grants a CO the discretion to issue a partial certification reducing the number of workers requested or the period of employment or both "based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise." The rule states that this provision is "to ensure compliance with all regulatory requirements." DOL articulates no rationale for why such a provision is necessary or how it will ensure compliance. It is utterly inconsistent with the DOL's stated objective of making the H-2A program a more reliable and usable vehicle for obtaining legal workers. It provides for no due process for an employer whose labor certification request has been arbitrarily changed. It circumvents the appeal of a denial of labor certification statutorily guaranteed to employers.

If the CO believes an application requests an inappropriate number of workers or workers for an inappropriate period the CO should issue a Notice of Deficiency, require a modified application and offer the employer the opportunity for an appeal of the alleged deficiency, as provided at § 655.107(a)(3). The provision for partial certification should be deleted from the regulations.

Re-determination Of Need

The INA at § 218(e)(2) requires that the Secretary shall provide for an expedited re-determination of need for an H-2A worker if able, willing, and qualified eligible individuals are not actually available at the time such labor or services are required and a certification was denied in whole or in part because of the availability of qualified workers. Such a process is provided at § 655.106(h) of the current regulations, but is omitted from the proposed regulations.

Given that a re-determination process is statutorily mandated, we assume its omission from the re-engineered program was an oversight. If the pre-application recruitment requirement of the proposed re-engineered regulations is retained, either as a requirement, or as an option as recommended by the NCAE, applicants and referrals may be required to make job commitments much farther in advance of the actual date of the start of employment than under the current program. There is ample experience that such employment commitments made far in advance of the actual onset of employment are notoriously unreliable. Workers often change their minds or find other more immediate employment opportunities before the start of the certified job. Therefore an expedited and efficient re-determination of need will be much more important in the proposed program, and many more such requests for re-determinations should be anticipated.

An expedited process at least as expeditious as that provided for in the current regulations, which require a re-determination decision within 72 hours, should be provided. We note that the statute specifies that the re-determination be made within a matter of hours, recognizing that the circumstance of such a request are that the employer's date of need is at hand or past and workers are not available. We believe that it is incumbent on the DOL to develop a process, including staffing if necessary, that assures that a decision is made within 72 hours regardless of intervening weekends, holidays, etc. In fact, we recommend that an attestation form for re-determination requests be developed that can be faxed to the DOL, immediately processed and faxed back, that will serve as the labor certification document for filing a petition.

The statutorily mandated re-determination of need exposes a conflict between the H-2A provisions of the INA and the pre-application recruitment process specified in the proposed H-2A regulations. In the proposed program employers are required to attest on their applications that they have conducted the required recruitment and were "unsuccessful in locating qualified U.S. applicants for the job opportunity for which certification is sought." This means that an employer who obtained sufficient commitments from workers as a result of the pre-application recruitment would be unable to make this attestation and would be precluded from filing an application. In the absence of a denial of certification based on the availability of workers, the employer would be unable to request an expedited re-determination of need.

Congress clearly was sufficiently concerned about the failure of recruited domestic workers to report that it included an extraordinarily heavy obligation on the DOL to re-determine need. The H-2A program had no pre-application recruitment process at the time the H-2A provisions were written. Congress clearly did not intend to leave employers in the catch-22 situation that the new pre-application recruitment requirement places them in. It is therefore incumbent on DOL to include in the process for expedited re-determination a process for accommodating employers who could not file a labor certification application because their job opportunities had been filed as a result of pre-application recruitment.

Fee For Certification

The INA at § 218(a)(2) provides that the Secretary of Labor may require, by regulation, "*as a condition of issuing the certification*, the payment of a fee to recover the reasonable costs of processing applications for certification." [Emphasis added.] The proposed regulation at § 655.109(g) sets forth the proposed fees for issuance of certification under the DOL's re-engineered and streamlined H-2A program. The proposal increases the fee for issuance of a labor certification from $100 to $200 per application plus and increase from $10 to $100 per H-2A worker certified. The proposal also eliminates the current $1,000 cap on the fee for a single application. Finally, the DOL proposes to require an additional fee of the same amount for granting approval of an amendment to an application.

The preamble to the proposed rule (at page 8555) provides exactly one sentence of justification for the increased fees, stating that the new fees "comport with the statute's expectation that the fee recover 'the reasonable costs of processing' H-2A applications." No further evidence or justification is provided. In DOL's Summary of Impact (at page 8558) the statement minimizes the impact of the increased fees, and asserts that the increased filing fees will be more than offset by reduced costs in time and resources required by its re-engineered program. This statement is wholly inaccurate. The assertion that employers' costs associated with the re-engineered program will decrease is inaccurate. Furthermore, they minimize and misstate the cost of the increased fees.

DOL's Annual Report of H-2A program usage reports that there were 76,818 job opportunities certified in Fiscal Year 2007. The Annual Report reports 4,704 applications certified and 7,491 employers certified. We presume that the difference between the reported number of employers certified and the number of application certified results from counting joint employer applications as a single application. Such applications will include multiple employers. The proposed regulations, however, continue the existing practice of charging a certification fee for each employer on a joint employer application (and no fee for the covering single application). Therefore, the cost of the proposed fee increase should appropriately be based upon the number of employers certified rather than the number of applications certified.

Based on Fiscal Year 2007 program usage statistics, the proposed increased certification fee will be $9,180,000 compared to the current fee of $1,517,280, or more than a 600% increase.[12] Because most H-2A applications are for relatively few workers, the increased fee for the average application will be even higher. Based on the average number of certified job opportunities per employer, the average certification fee based on the current fee schedule was $202.50, whereas the average certification fee based on the proposed new fee schedule would have been $1,450. The average certification fee will increase more than 7 fold.

DOL fails to explain what costs it included, in implementing the statutory criterion "reasonable costs of processing applications" nor how a more streamlined processing process could result in a 7-fold increase in costs. The DOL also does not explain how it can cost $100 per worker more to process applications for larger numbers of workers than smaller numbers. The process and criteria for certification are exactly the same, whether an application is for one worker or 1,000.

We also note the extensive accounting that DHS undertakes and presents for public review in the Federal Register as a basis for setting its fee schedule, which is also based on the criterion of reasonable cost. We note that the DHS fee for adjudicating an H-2A petition is currently $320 regardless of the number of workers requested. If the DOL has re-engineered and streamlined its application processing, it is difficult to justify the fact that it requires DOL nearly six times the cost to process an application for certification that it costs the DHS to adjudicate the H-2A petition. Finally, even taking into account the fact that the current DOL H-2A certification fee was established in 1987, there has not been a 700% increase in the cost of living in the past 20 years.

The proposed rule also proposes to assess a fee for amendments to applications made after certification. Absent language to the contrary, it appears that the fee for an amendment will be the same as the fee for granting a certification. We note that amendments to applications (described in the regulations at § 655.107(a)(6)) can be for many reasons, including increasing the number of workers requested, adjusting the date of need, and making minor technical amendments to the application, including the job offer. We believe it is reasonable to charge the appropriate additional certification fee (based on the per worker portion of the fee) for an amendment to increase the number of workers in order to avoid creating a disincentive for understating the number of workers on the original application. However, we do not believe that it is reasonable to charge a fee for other amendments, including minor technical amendments. We note that the

---

[12] The estimate of $1,517,280 actually overstates the current fee, because it does not take into account the cap of $ 1,000 on an individual fee. Data is not available to take into account the effect of the $1,000 cap on the fee.

statute authorizes only a fee for certifications. If an additional fee is charged for amendments other than increasing the number of workers, this fee must be modest and in proportion to the reasonable cost of processing the amendment, and certainly not the same amount as is assessed for the initial processing of the application.

We do not believe DOL has properly studied or justified its asserted "reasonable cost for processing an application for certification". In doing so, it should follow the model of the DHS and present detailed cost data to justify its proposed fee increase and provide an opportunity for public scrutiny and comment. Until and unless it does so, we do not believe the DOL has articulated a basis for an increase in the certification fee.

§ 655.111 Required Departure

This is a proposed new addition to the DOL H-2A regulations which has no counterpart in the current regulations. It purports to reiterate the DHS regulations pertaining to the limit on an H-2A alien worker's stay in the United States. We do not believe there is any basis for inclusion of this provision in the DOL regulations pertaining to H-2A labor certifications. It has no bearing on either the issue of the availability of U.S. workers, or whether the employment of aliens will adversely affect U.S. workers, the two issues which are within the statutory purview of the DOL. The Secretary of Labor has no authority on the issue of the length of stay of an H-2A alien in the United States. Its inclusion in the DOL regulations, however, could give rise to an argument that an alien's violation of his or her authorized length of stay was somehow also a violation of the H-2A regulations for which an H-2A employer was liable. This entire section should be deleted from the regulations.

Not only does DOL have no authority over the length of stay of H-2A aliens, but the language of DOL's proposed subsection (a) misstates the DHS regulations on the subject. The proposed DOL regulation states: "A foreign worker *may not remain beyond the validity period of any labor certification under which the H-2A worker is employed* nor beyond separation from employment, whichever occurs first, absent an extension or change of such worker's status pursuant to DHS regulations." (Emphasis added.) In fact, the DHS regulations say no such thing. The language of the proposed § 214.2(h)(5(viii)(B)—Period of Admission, states as follows: "An alien admissible as an H-2A nonimmigrant shall be admitted *for the period of the approved petition*. Such alien will be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a 30-day period following the expiration of the H-2A petition for the purpose of departure or extension based on a subsequent offer of employment. (Emphasis added.)

We also believe that the Notice to Worker provision of the proposed § 655.111(b) has no place in the DOL regulations. The proposed DHS exit program at § 215.9 has no specific notification requirements to workers. If, when such an exit program is implemented, the DHS believes an affirmative notification requirement should be placed on petitioners, it has the authority to impose and enforce one. This is not a function of the DOL, and has nothing to do with the issue of availability of U.S. workers or adverse effect. The only effect of including such a provision in the DOL regulations will be to create additional confusion and potential additional liability for employers.

We believe that § 655.111 exceed the authority of DOL under the INA, that it is unnecessary, repetitive and, in its present form inconsistent, with the requirements of the DHS, and should be withdrawn. At a minimum, if such a provision is retained, it must track precisely any requirement the DHS regulations place on aliens with regard to length of stay, and employers with regard to notifying aliens of exit procedures, and nothing more.

§ 655.112 Audits and referrals

This section creates a new "Audit and Referrals" process that has no predecessor in the current regulations. These audits would be discretionary and both employers whose applications have been certified and whose applications have been denied would be subject to audits. An audit would begin with the delivery of an audit letter. The audit letter would contain a demand for documents. The employer would be required to respond to that demand in a time period selected by the CO, which will not be more than 30 days. The letter will inform the employer that any failure to produce the requested documents within the time frame specified may lead to revocation of a previously issued certification or debarment. The CO may issue a supplemental demand presumably under the same conditions as the original letter.

The CO may then refer the employer for enforcement proceedings (debarment or revocation) for any reason that he or she deems "appropriate," for a failure to provide all the requested documents, or for a material misrepresentation during the application process. Under the regulation, the CO may also share the information with other enforcement entities.

NCAE has two major comments about the proposed § 655.112. First, the preamble does not provide either a policy or a legal rationale for this departure from existing program procedures. At a minimum, DOL should articulate what problem it is trying to solve, why existing procedures are inadequate, and the legal rationale for creating this new, discretionary power in the CO. Second, the time frame for a response is too short. As written, the maximum time for a response is 30 days and could be much shorter. This is insufficient as a practical matter. It is likely that most audit letters will be sent during the growing season – at the time that employers have the greatest demands on their time. This is especially problematic because most current H-2A users are small farmers who do not have, and could not afford, large administrative staffs to handle an audit of the kind envisioned in § 655.112.

§ 655.115 Administrative Review Procedures

The proposed regulation retains the administrative review process for determinations of the certifying officer relating to applications and the revocation of certifications. These procedures are extremely important because of the proposed rule's enhanced enforcement procedures. NCAE recommends the following modifications with a view to ensuring that decisions are made in a timely manner based on a complete record. First, the CO should be required to serve a copy of the certified case file upon the employer or its attorney, if one has appeared on behalf of the employer, as well as upon the Chief Administrative Law Judge. Second, service of the certified case file should be required within two business days of the filing of the employer's notice. A strict deadline would ensure that the administrative process is not delayed because the parties are awaiting the certified case file. Third, the regulation should provide explicitly that hearings for debarments are available and specify the procedures for them.

Finally, in cases involving revocations or debarments as to which the employer has sought a *de novo* hearing, DOL should disclose all relevant documents and other evidentiary material that it may rely on to support its charge or that may reasonably tend to exculpate the employer, including materials bearing solely on the credibility of any alleged witness, at the time of the service of the certified case file. The regulation should provide that a material failure to comply with this disclosure obligation will result in reversal of the CO's decision. Early disclosures as suggested are consistent with well-known and understood obligations under the Federal Rules of Civil Procedure, which guide procedures before the Office of Administrative Law Judges under 29 C.F.R. part 18. The disclosure of exculpatory evidence derives from the government's duty to ensure an effective fact finding process.

§ 655.117 Revocation Of Approved Labor Certification

This section sets forth procedures for revoking an already granted certification. In many ways, the consequences of an erroneous exercise of the power to revoke an already-approved certification are worse than future debarment. This is because an employer will have relied on a certification to make contracts and to complete work. Revoking a certification means that those workers would no longer be available. Crops would rot; contracts would be unfulfilled; and workers would be left unpaid by a bankrupt business. It is therefore extremely important to exercise the power to revoke only for clear and well-substantiated reasons, based upon clear and reasonable criteria, and in accordance with clear procedures that minimize within practical limits the risk of error. Most importantly, revocation should be permissible after the CO issues a Notice of Intent to Revoke and the CO's recommendation is upheld in an administrative hearing where full due process rights are provided. Revocation by the CO, pending an administrative appeal, would lead an onerous outcome. An appeal after the CO's revocation, even if upheld, would not compensate the employer for the economic chaos that may ensue from revocation.

NCAE respectfully submits that the procedures proposed by § 655.117 should be modified in order to meet these objectives. Most importantly, the final rule should provide, just as the proposed § 655.118(c) already does in the context of debarment proceedings, that "The timely filing of an administrative appeal stays the [revocation] pending the outcome of those appeal proceedings." This would provide an employer breathing space to respond to the charges and avoid giving effect to erroneous administrative determinations. In addition, the effective date of the revocation should be one day after the appeal period expires. This is necessary so that the employer will not be required to cease employing the workers while it decides whether or not to appeal. Neither of these changes would undermine DOL's enforcement objectives because it controls in large part the pace of the administrative proceedings (*e.g.*, the alacrity with which it provides the certified case file).

DOL should also clarify the substantive grounds which it might use to initiate revocation proceedings. The bases upon which the power to revoke can be exercised are contained in § 655.117(a). The first ground for revocation, § 655.117(a)(1), is when the CO finds that issuance of the certification was "not justified" under the INA or the Department of Homeland Security's regulations relating to the filing of H-2A petitions. In order to protect the interests of employers who in good faith rely on the correctness of DOL's certification, NCAE urges DOL to exercise this power only when an employer has willfully misrepresented a material fact in its application and certification would not have been granted but for the misrepresentation. NCAE also urges DOL to clarify the legal basis for exercising enforcement authority of DHS regulations and the rationale for doing so. Employers should not have to face two enforcement authorities with different policy objectives enforcing the same regulations. It should also make clear that technical or good faith violations of those regulations will not result in enforcement actions.

NCAE also believes that the procedure set forth in § 655.117(b) should be revised. First, the Notice of Intent to Revoke should include a detailed statement of the factual grounds for each alleged basis for revocation. Trial by surprise is never justified and is especially unfair when the continued existence of an employer's business is at stake. Providing this detail would create no additional burden for DOL and would likely result in more accurate determinations overall.

Second, the rule should provide an employer with enough time to respond. An employer's response is critical both as a matter of fundamental fairness and of the accuracy of fact finding process. NCAE believes that the baseline time for a response should be 30 days, with extensions from the CO available on any reasonable basis. If an extension is denied unjustifiably, that denial may be the basis of, or an additional reason for, reversal by DOL. The power to deny an extension for a legitimate reason allows DOL to police those who would abuse the process for obtaining extensions so that decisions are made in a timely manner, but subjects its decision to an appropriate review for reasonableness so that haste does not unacceptably increase the risk of error.

Third, the final rule should eliminate the automatic revocation for missing the 14-day deadline established in § 655.117(b)(2). The risk of error with such a process is substantial. Because the 14 calendar day period is calculated from date of issuance, all the risk of delay is shifted to the employer. An employer should not have a certification revoked if a letter is mis-delivered or mailed by regular mail sometime after its issuance. Instead of automatic revocation, the regulation should provide that if the employer does not meet the appropriate deadline, the CO will make his or her determination based on the record as it stands. Given the stakes for the employer, this would be sufficient to ensure that the CO is provided with the relevant information in a timely manner.

Fourth, the CO should have more than 14 calendar days, 29 C.F.R. § 655.117(b)(4), to reach a final decision. NCAE believes that the most important consideration is the quality of the fact finding process when the cost of an erroneous decision is wounding or bankrupting a business thereby putting its workers out of jobs. The CO should take all of the time that he or she believes is necessary to reach the best possible decision on the record as it is presented. NCAE fears that a short deadline or any deadline for revocation decisions will tend to lead to more erroneous decisions to revoke because the CO may conclude that it is easier to correct a decision to revoke that later proves to have been erroneous than a decision not to revoke.

Finally, the CO should be required to send notice of his or her determination to the employer and any attorney, agent, or representative by means normally ensuring overnight delivery. The employer should be given 14 calendar days to note an appeal (if it disagrees with it) from the date of receipt. The revocation should become effective on the 15th day after receipt if no appeal has been filed. NCAE believes that using the date of receipt and providing 14 days instead of 10 will provide enough time for an employer to obtain appropriate legal advice, to prepare any filing it so chooses, and to otherwise protect its legitimate business interests.

NCAE believes that an accurate fact finding process is important for all parties involved. The recommendations listed above are intended to balance the public interest in identifying employers that abuse the H-2A program and removing them from the program with the public interest in not inflicting grievous economic injury on a non-abusive employer, which is, after all, presumed innocent until proven guilty.

§ 655.118 Debarment

Section 655.118 sets forth the enhanced debarment procedure. Like the revocation process established in § 655.117, this section would debar an employer from receiving a labor certification from DOL in two steps. The first step would be that the Administrator of OFLC would make a determination that the employer had substantially violated a material term or condition of its labor condition application. This step would occur without notice to the employer and without an opportunity to ensure that the factual record was complete. The second step – and the employer's first awareness of the potential debarment – would be that the Administrator would provide a notice to the employer stating that DOL has decided to debar it from further certifications for the time period and notifying it of its appeal rights. The final step would be an appeal should the employer so choose. Unless the employer chose an expedited appeal on the record, the proceedings would be conducted in accordance with 29 C.F.R. § 18.1 *et seq.* and the ALJ would have 10 business days to decide on a *de novo* basis. The employer could request, but would not be obligated to seek, an administrative hearing within 5 business days of the receipt of the case file.

As noted in its discussion of possible improvements to § 655.117, NCAE agrees with DOL's inclusion in this rule of language suspending the effective date of a notice of debarment during the pendency of appellate proceedings. This is supported by the statute and provides employers an opportunity to defend themselves without losing the right of participating in the H-2A program. NCAE does, however, have some suggestions for improvement to this section.

As with the revocation process, DOL should clarify the substantive bases from debarment. First, NCAE believes that the INA requires that a basis for debarment relate directly to the *employment* of "domestic or nonimmigrant workers." 8 U.S.C. § 1188(b)(2)(A). Thus, DOL's inclusion of missing the deadline for payment of a fee as a ground for debarment would appear to be unauthorized by the statute and bad policy since DOL has other mechanisms for enforcing the obligation to pay certification fees. 29 C.F.R. § 655.118(b)(2). A similar analysis would apply to allegations of "impeding an investigation." 29 C.F.R. § 655.118(b)(1)(v).

Second, the bases for debarment listed in § 655.118(b)(1) should be described with greater specificity. The first basis listed is:

> [Actions which] Are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. or H–2A workforce or of a substantial number of U.S. workers similarly employed in the area of intended employment;

NCAE agrees that only actions/omissions that are <u>significantly</u> injurious could reach the level of a substantial violation. The remainder, however, is problematic. A literal reading of this provision suggests that it might be violated if an employer, although complying in full with the job order, changes a health plan, retirement plan, or its benefits in any way. Moreover, the percentage limitation is a good way to reinforce that the change must significantly injure a large number of people before constituting even a potential "substantial violation." For large employers, 10% may be an appropriate percentage. However, for small employers (and small employers are by far the largest users of the H-2A program), the 10% limitation could mean a single worker. DOL should clarify this standard so that it does not apply automatically to any decrease in benefits and applies to small employers in a manner similar to the way the 10% limitation applies to large employers.

Second, DOL should clarify the language of this provision so that it explicitly links the significant injury to "wages, benefits, and working conditions" to the employer's hiring of H-2A workers. Congress' concern in establishing the labor certification process was that H-2A workers would lower the wages and working conditions of qualified domestic workers. This provision appears to go beyond that policy by including any significant negative change as a potential basis for action when only changes that would not have occurred but for the hiring of H-2A workers in the occupation are potentially relevant.

Also, the reference to "a substantial number of U.S. workers similarly employed in the area of intended employment" is unclear. Moreover, it goes beyond the protection of domestic workers potentially employable in H-2A occupations that the adverse effect concept is intended to protect to include any workers similarly employed in the area of employment by other employers. It implies that if an economic expert concludes that the employment of H-2A workers depresses the wages of similarly employed workers in the area of employment, notwithstanding the fact that the employer fully complied with all program requirements, a basis for debarment would exist. This is patently unreasonable. In addition, this vague standard invites factually intensive and highly complex factual "but for" and proximate causation issues. Section 655.118(b)(1)(i) should be deleted as ambiguous and unwarranted.

NCAE believes that § 655.118(b)(1)(iii) should be revised. It provides that a willful failure to comply with positive recruitment obligations per se is a substantial violation. DOL should clarify that before being deemed a violation, it must be shown that "that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed," 8 U.S.C. § 1188(b)(4), and that it was material. Under § 1188(b)(4), DOL cannot require an employer to engage in futile gestures under the guise of "positive recruitment." H.R. Rep. No. 99-682(I), at 81 (1986), *reprinted* in 1986 U.S.C.C.A.N. 5649, 5685. It should also clarify that the failure must have been material – that if the employer had done what was required, qualified U.S. workers willing to do the job would have been found.

Similarly, the provision permitting debarment for impeding investigations should be clarified so that it requires that the violation be willful and that any impediment be material. The term willful is necessary to avoid strict liability and the inclusion of material is necessary to ensure that the provision (if it were otherwise related to the employment of "domestic or nonimmigrant" workers) is consistent with the INA.

The last substantive basis for debarment in the proposed rule is §655.118(b)(1(vi). This provides for debarment in the event of unauthorized employment. NCAE recommends that DOL clarify that these terms will be interpreted in a common sense manner that is sensitive to the realities of agricultural work. For instance, if a certification describes the area of intended employment as within a 25-mile radius of a particular city, debarment should not result if the worker works in a field for a new customer that is 27 miles from that city. The same is true of activities "not listed on the job order." DOL should approach that issue practically. Debarment is not appropriate when a worker performs tasks reasonably incidental to a duty listed on the job order. This practical, day-to-day flexibility is necessary to make the H-2A program attractive to employers. A strict, legalistic interpretation of the job order in the context of enforcing these provisions would render the program wholly unworkable.

In short, to be workable and fair, DOL should give employers as much prior notice as possible about prohibited conduct, ensure that any alleged "substantial violation" relates directly to the employment of "domestic or nonimmigrant" workers in connection with the H-2A program, remove the proposed failure to timely pay a fee provision, clarify that every violation requires a culpable mental state, and that every violation must cause material harm. DOL should also ensure, and articulate why, any proposed substantive violation is within its authority under the INA.

With respect to the process for adjudicating charges for which debarment is sought, NCAE proposes a process similar to the one proposed for revocations. First, as with revocations, the appropriate official should issue a detailed notice of intent to debar. DOL should disclose all evidentiary material upon which it based its conclusion that grounds for debarment exist as well as all exculpatory material in its possession, custody, or control. The employer should be given sufficient time to submit a rebuttal with respect to the notice. The minimum amount of time should be 30 days with extensions reasonably available. DOL would then decide, upon the complete evidentiary record, whether it believed that debarment was warranted. The DOL should have as long as it needs to make the decision to ensure that its decision is thoroughly considered and fair.

If, after reviewing the evidence presented, DOL concluded that it should proceed with debarment, it would issue of a formal Notice of Debarment. The notice should contain both the factual and legal grounds for the intended action, prescribe an effective date that is after the time period for filing a timely appeal, and provide at least 14 days to appeal. It would notify the employer that the debarment would not take effect until the conclusion of administrative proceedings as well as the other information included in the proposed rule. The proceedings would then be governed by 29 C.F.R. part 18. NCAE believes that the ALJ should not be required to decide the matter in 10 days, especially in complex cases. The rule should also specify that the removal of the requirement to answer the complaint does not preclude the ALJ from requiring an answer or its equivalent as a matter of discretion or limit the discoverability of this information. Finally, the rule should specify DOL bears the burden of proof in the proceedings because the employer is presumed innocent until proven guilty.

DOL's Proposed Amendments To ESA Regulations

§ 501.3(b) Discrimination

This section prohibits "discrimination" in employment. It specifically excepts from this prohibition claims of discrimination within the jurisdiction of the Department of Justice. The provision permits that wage and hour division to investigate a claim of discrimination by "any person" and, where DOL determines that the claim is substantiated, this section provides DOL authority to impose "make whole" remedies, including injunctive relief, if deemed appropriate. In addition, debarment from the H-2A program is another punitive sanction available to the DOL.

While NCAE is opposed to invidious discrimination, this provision raises several concerns. DOL has not articulated the legal basis for its assertion of this authority and imposition of new procedures for handling discrimination in contravention to the numerous congressional enactments in this area. Congress has acted many times with respect to this issue and DOL's assertion of a blanket authority to punish undefined forms of "discrimination" with an uncapped "make whole" remedy is contrary to those enactments, particularly the Civil Rights Act of 1991. NCAE believes that issues of employment discrimination should be handled by the expert administrative agency designated by Congress for eradicating discrimination – the Equal Employment Opportunity Commission. This provision should be stricken.

Waiver of Rights 29 C.F.R. § 501.4

This provision prohibits anyone from seeking a "waiver of rights" under 8 U.S.C. § 1188. NCAE recommends that this provision be clarified, DOL should make it clear that seeking a "waiver of rights" does not include the settlement or compromise of claims. This provision could be read literally to preclude offering a settlement or even refusing to accede in a broad interpretation of any available rights. It certainly would preclude even proposing a waiver or general release. It could also be read to preclude informal compromises during the daily give and take that characterizes any work place. It will also chill the informal resolution of disputes.

DOL (WHD) Investigations 29 C.F.R. § 501.5(b)

This provision requires that DOL-WHD report any employer that does not cooperate with an investigation to DOL-ETA for either revocation of a certification. It then provides that DOL-WHD may debar the employer from further participation for up to three years. This provision should be clarified so that it requires that the violation be willful and that any impediment be material. The term willful is necessary to avoid strict liability and the inclusion of material is necessary to ensure that the provision (if it were otherwise related to the employment of "domestic or nonimmigrant" workers) is consistent with the INA.

Surety Bond 29 C.F.R. § 501.8

NCAE previously has recommended that this provision be deleted in its comments on farm labor contractors. We reaffirm our concern here that this provision provides the Administrator unfettered discretion based upon no stated objective criteria to increase the amount of a bond. At a minimum, DOL should identify the standards for this decision other than being necessary to cover potential liability.

The Term "Work Contract" 29 C.F.R. § 501.10(d)

This provision defines the term "work contract." NCAE's recommendation relates to a practical concern. ETA regulations require that DOL translate the job order into the language of the recruited workers. Some courts have taken the position that MSPA also requires translation of the job order and have held employers liable for ETA's failure to translate job orders. In many instances employers rely upon ETA to do so, because the employer is not necessarily aware in advance of the locations, and thus the languages spoken, to which the order will be sent. NCAE recommends that the regulation provide that ETA be responsible for translating the job order and, if it will not translate the job, for notifying the employer that it will not do so. It should inform the employer of the locations to which the order will be sent and provide the employer with sufficient time to conduct translations into the languages of the workers located in those locations.

Civil Money Penalties 29 C.F.R. § 501.19(e)

This section provides for an increased civil money penalty for the "willful" displacement of domestic workers already working in the H-2A certified occupation. An employer could be fined up to $15,000, if within 75 days of its date of need for H-2A workers it lays-off or discharges a domestic worker. An employer can avoid this fine if it can demonstrate that it offered the job opportunity to the domestic worker and it was refused or rejected the worker (after it was accepted) for a lawful job-related reason.

NCAE recommends that this section be revised. The maximum period of admission under the H-2A program for one employer is 10 months. At the end of the ten month period, all of the temporary or seasonal employees must be discharged. Because that is the end of the employer's period of need and its season, domestic workers are discharged at the same time. The same employer may bring in H-2A workers 60 days later. Under this rule, the discharge of the domestic workers at the end of the preceding 10 month period and reemployment of H-2A workers 60 days later would result in a violation of the 75 day displacement provision, notwithstanding the fact that the employer was in compliance with the H-2A program regulations and discharged workers due to the end of its 10 month season. This exposes employers to large fines for no reason other than the timing of the seasons. NCAE recommends that this provision be revised to reflect the timeframes inherent in the H-2A regulations and avoid the inevitable and inequitable outcome that would result from this proposal.

The safe harbor is more apparent than real. First, it appears that the rule would require an actual offer and would not be satisfied by a good faith, but unsuccessful, attempt to locate the domestic workers. Because the seasonal and temporary work force is largely transitory, it may be difficult to locate domestic workers to make the offer. An employer may be unable to make the required attestation (that it made the offer) because it simply cannot find a worker again. It may also be impractical to make the offer at the end of the period because the employer may not know what its needs are likely to be. For example, a farm labor contractor may harvest a variety of crops. Until the employer has a good idea of what crops its customers (and who its customers will be) will need harvested, it cannot offer work to people. NCAE does not oppose a requirement that an employer make a good faith effort to locate its previous domestic workers in the H-2A occupation and offer an opportunity to return to the job so long as reasonable, good faith efforts to contact these workers. This could be discharged by a written communication to the worker's last known address or any other reasonably specific attempt to make contact.

Finally, DOL should make clear that DOL will not act as a super-personnel department reviewing the substance of the employer's business decisions under the guise of deciding what is and what is not a "lawful, job-related" reason for not offering a position to domestic worker or in any other situation in which this standard may apply. Nothing in the INA imposes a "for cause" dismissal standard and it is possible, unless DOL expressly rejects such an interpretation, that this standard could end up being a "for cause" standard in disguise. It should make clear that this standard will applied similarly to the familiar "legitimate, non-discriminatory reason" standard from Title VII. The issue should be whether the decision in question was a pretext for preferring an H-2A worker. Also, DOL should clarify that its jurisdiction and inquiry do not intrude on any issue within the jurisdiction of the Department of Justice. Thus, if an issue is within the jurisdiction of the Department of Justice, it is not within the jurisdiction of the DOL. This is necessary so that the federal government will speak with one voice about an important enforcement issue.

We appreciate the opportunity to comment on these proposed regulations and urge the DOL to adopt the modifications recommended herein.

Sincerely,

Michael D. Gempler
President

cc Department of Homeland Security

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 4,734 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Annie L. Owens
ANNIE L. OWENS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington D.C. 20006
(202) 663-6000

March 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Annie L. Owens
ANNIE L. OWENS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington D.C. 20006
(202) 663-6000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecftop.htm.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. ______________________ as

☑ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☐ Government

COUNSEL FOR: Representatives Howard Berman, Judy Chu, George Miller, and Lynn Woolsey

____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

____
(signature)

Annie L. Owens
Name (printed or typed)

202-663-6471
Voice Phone

WilmerHale
Firm Name (if applicable)

202-663-6363
Fax Number

1875 Pennsylvania Avenue, N.W.

Washington, D.C. 20006
Address

annie.owens@wilmerhale.com
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on March 19, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

____
Signature

March 19, 2012
Date

11/17/2011
SCC