



November 12, 2010

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

Re: Regulatory Information Number (RIN) 1205-AB61;
20 CFR Part 655: Wage Methodology for the Temporary Non-Agricultural
Employment H-2B Program

Dear Administrator Dowd:

Thank you for the opportunity to submit comments on behalf of the National Council of Agricultural Employers (NCAE.) NCAE is the national trade association focusing exclusively on Agricultural Labor issues from the Agricultural Employer's viewpoint. NCAE represents Agricultural Employer interests before Congress and Regulatory/Administrative bodies such as the Departments of Labor, Homeland Security, Agriculture, the Occupational Safety and Health Administration, and the Environmental Protection Agency. NCAE Members are growers, associations, and others whose business interests revolve around labor intensive agriculture.

Although NCAE generally restricts its involvement with regulations and legislation directly related agricultural work, the H-2B program is extensively used in many jobs that directly support the agricultural production by working in seasonal manufacturing or construction jobs that support supply agriculture, food processing and/or preparation, and because many resort/tourism jobs support local farming and food production. Without these important links in the supply chain that includes suppliers, growers, processors, and consumers the loss of H-2B workers will certainly add to the many pressures that are already pushing American food production out of the country at an

alarming rate. Therefore we feel compelled to add our voice to comment on the current troubling H2-B wage rule.

We believe that the Department of Labor's (DOL's) proposed rule was hastily drafted and is based on false assumptions and unsupported assertions. The proposed rule states that DOL was "unable to fully analyze" alternatives because of "time constraints." Despite DOL's admission that time did not allow an informed analysis, it drafted the rule and has requested that those it will impact review, propose alternatives and comments within 30 days – even less time than DOL admits was inadequate for its own analysis.

DOL claims that the drafting of the proposed rule and the creation of an inadequately analyzed new wage regime was prompted by an order from the U.S. District Court in the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agrícolas*. However, the court only ordered DOL to "promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act (APA) no later than 120 days from the date of this order." The court concluded that DOL did not comply with the APA because it does not provide the public with an opportunity to comment on its wage calculation methodology. The court did not conclude that the current system must be changed; only that it be validated and offered for notice and public comment. The court simply ordered DOL to "show its work" in developing the wage rates it had previously established, not create a new wage rate regime.

DOL notes that it "has grown increasingly concerned that the current calculation method does not reflect the appropriate wage" without any substantiation whatsoever. DOL has performed no study nor produced any data which would provide factual evidence of this "concern." Further, since there is no data or evidence to support that concern which served as the impetus for the draft rule, DOL has no basis to determine whether the current wage rates actually overstate prevailing wages rather than understating them as DOL assumes.

The proposed rule asserts that "skill levels as determined currently do not reflect wage levels in lower skilled jobs." DOL has performed no studies and has not offered data to support that conclusion. We assert that this proposal, neither substantiated with data, nor "showing its work" or other documented methodology, justification, or process must not satisfy either the APA or the court's order.

The proposed rule states that "H-2B workers can have a depressive effect on wages." DOL offers no evidence to support this statement.

DOL's proposed rule would significantly increase costs for seasonal small businesses and could lead to a decrease in both H-2B and American employment in these

companies. NCAE opposes the proposed rule and instead requests that DOL retain the current prevailing wage calculation methodology.

The H-2B program is essential for seasonal businesses that cannot fill seasonal jobs with American workers despite intensive recruitment efforts. The program is also important to workers. For H-2B workers, the program provides well-paying seasonal jobs that allow them to provide for their families and still maintain their homes in their native countries. This program is also important for American workers whose year round positions are reliant upon seasonal laborers during peak seasons. In companies that use the H-2B program, both American and H-2B unskilled workers are well compensated; often well above the federal minimum wage and the prevailing wage.

Rather than creating a new wage structure, which will have devastating consequences for seasonal employers, DOL should retain the current four tiered wage system. The Bureau of Labor Statistics Occupational Employment Statistics (OES) wage data is the most appropriate wage data available since it is collected across all industries and all parts of the country. OES wage data is also the most reflective of the actual wages paid by U.S. employers. Calculating wages based on Davis Bacon Act (DBA) and McNamara-O'Hara Service Contract Act (SCA) wages is not appropriate for many industries unless one of the Acts applies to a specific employer/applicant as a government contractor. For those industries that are regulated by these Acts, there are some inherent problems related with those wage calculations that often makes their use inappropriate for calculating H-2B wages.

While the OES data is the most appropriate wage data to use, it is also important to recognize that the OES Survey already produces wages that are higher than those paid by employers who do not participate in the H-2B program. Companies that use the H-2B program already struggle to compete with organizations that may not be committed to hiring a legally documented workforce. Because it would significantly raise wage rates, the proposed rule would make it even more difficult for good-actor companies to remain competitive.

DOL suggests that the use of the four tiered wage system in the H-2B program depresses wages. This assertion is simply not true. A recent study conducted by well-known immigration economist Madeline Zavodny on behalf of ImmigrationWorks USA and the U.S. Chamber concluded that an increase in H-2B workers in a field is actually associated with a slight increase in wages and employment.

Before a company can hire an H-2B worker, it must undertake numerous steps to recruit American workers. The company must pay the American workers hired during the positive recruitment phase of the H-2B labor certification application the same wage as H-2B workers, despite the fact that these U.S. applicants often do not have experience

working in the relevant seasonal industry. Returning H-2B workers have often worked in the industry in the past. If the Department goes forward with using the OES arithmetic mean as proposed, which NCAE opposes, H-2B filers should be allowed to specify the minimum experience requirements that are associated with the new wage rate.

Any regulatory changes to the H-2B program need to be phased in a manner that does not disrupt the ability of an employer to hire H-2B workers in a timely manner. Since this program requires a new petition process each fiscal year, it makes sense to implement changes beginning with petitions for the 2012 fiscal year. At a minimum, it is vitally important that any changes to wage rates not require employers to complete the recruitment phase or obtain a new foreign labor certification once these steps have already been completed. Under the law, an employer cannot apply for H-2B workers more than 120 days before their date of need. Because the H-2B petition and hiring process involves numerous steps and three federal agencies, any delays in processing petitions will result in H-2B workers being unavailable at the start of the peak seasons when they are most needed.

The Department also proposes to eliminate the use of employer-provided wage surveys in the H-2B program. The use of H-2B wage surveys is critical for industries such as the seafood industry in which appropriate OES data does not exist for certain occupations such as crab pickers.

Most seasonal businesses have very slim profit margins. Because of these slim margins, dramatic increases in labor costs will likely lead to job losses. There is a limit to how much consumers will pay for goods and services before they choose to simply forgo the service or purchase the good from other sources. If prices increase too dramatically, consumers will simply choose not to stay at a given hotel, eat at a certain restaurant, undertake a home improvement project, or hire a landscape contractor. For other industries such as the seafood industry, institutional customers will simply purchase seafood from foreign suppliers that are not bound by arbitrarily high labor costs. The higher wages in the proposed regulation will result in a loss of business and possibly entire industries.

According to the Department of Labor's *The Foreign Labor Certification Report: 2009 Data, Trends, and Highlights Across Programs and States*, the top 10 H-2B certified applications were landscape laborer; forest worker; cleaning, housekeeping; amusement park worker, housekeeper, construction worker; groundskeeper- industrial, commercial; stable attendant; dining room attendant; and waiter/waitress (34). Using the figures for the number of H-2B applications divided by the number of positions certified, we can derive the average number of H-2B workers in each of these top jobs as follows:

- Laborer, Landcape – 26.8 workers/applicant;
- Forest Worker – 98.9 workers/applicant;
- Cleaner/Housekeeping – 29 workers/applicant;
- Amusement Park Worker – 51.7 workers/applicant;
- Housekeeper – 26.2 workers/applicant;
- Construction Worker – 22.3 workers/applicant;
- Groundskeeper – Industrial, Commercial – 23.0 workers/applicant;
- Stable Attendant – 13.1 workers per applicant;
- Dining Room Attendant – 21.4 workers/applicant; and
- Waiter/waitress – 18.6 workers/applicant.

Using the average number of workers per applicant and DOL's own estimates of wage increases in the top H-2B industries, we can calculate the average cost increase for a company in each industry. These simple calculations clearly indicate that a small company's labor costs will increase significantly:

- Amusement, gambling (gaming), and recreation: 51 H-2B employees x \$1.37 per hour x 8 hours per day x 217 days = \$121,294.32
- Landscaping services: 26 H-2B employees x \$3.60 per hour x 8 hours per day x 217 days = \$162,489.60
- Janitorial services (for this calculation we used the cleaner/housekeeping category): 29 H-2B employees x \$3.72 per hour x 8 hours per day x 217 days = \$187,279.68
- Food services and drinking places (for this calculation we used the dining room attendant category): 21 H-2B employees x \$1.29 per hour x 8 hours per day x 217 days = \$47,028.24
- Construction: 22 H-2B employees x \$10.61 per hour x 8 hours per day x 217 days = \$405,217.12

These increased annual costs are very significant for small businesses that already operate with narrow profit margins. The true costs, however, will be much more dramatic because this simple calculation does not include the labor increases for similarly employed American workers or more experienced American workers whose pay should reflect the greater skill or experience level and be proportional to the hourly wage earned by lesser skilled workers. It also does not include additional payroll costs, workers compensation insurance, overtime costs and other associated increases.

These higher costs will lead to a loss of revenue for seasonal employers which will result in domestic worker job losses. Higher labor costs that cannot be passed along to

customers will force companies to hire fewer employees. Abandoning the H-2B program is not an option for employers who are committed to a legal workforce because an adequate number of American laborers are simply not available. A decrease in H-2B workers will actually threaten year round American workers whose jobs are reliant on the support and/or output of seasonal workers.

The proposed rule notes it will “result in lower employment and lower output by firms employing those workers, the lost profits on the foregone output and the lost net wages to the foregone workers represent a deadweight loss because these gains from trade are not attained.” We are disturbed by this cavalier dismissal of the government actively working to harm some businesses in favor of others. We also find it highly troubling that DOL has taken upon itself to decide what is and is not “deadweight” in our economy.

As noted above, many seasonal businesses operate on extremely thin profit margins and rely heavily on their peak seasons to generate revenue in order to retain their full-time American employees. H-2B workers have been key in allowing many of them to do that yet DOL, without any analysis and with no knowledge of relative profit margins of industries and individual businesses, would price them out of business. This was underscored by the rules acknowledgment that “any loss of production resulting from some employers dropping out of the program will be offset by production by other employers that would then be able to employ H–2B workers.”

The proposed rule is also based on the faulty assumption that wage rates are the sole determinant of employers hiring H-2B workers rather than American workers and if wages offered by employers were higher, Americans would apply for and accept those positions. DOL has no evidence to support that assumption.

Further, H-2B workers, as well as American seasonal workers, are well-compensated. If DOL had examined the actual reasons H-2B workers are necessary to fill seasonal jobs and had asked seasonal employers their real-world experiences, they would have learned that Americans generally do not want to accept temporary seasonal positions (regardless of pay), and that many of the jobs are not desired by Americans because of the work that is involved.

The rule also assumes that employers could simply substitute “capital for labor” without explanation. This broad assumption once again ignores the profit margins of seasonal businesses as noted above but also illustrates a lack of understanding of many of the businesses the rule would grievously harm. Like labor intensive agriculture, these jobs are not readily mechanized or automated.

The rule states that “the Department believes this NPRM is not likely to impact a substantial number of small entities” and yet goes on to state that the information used by DOL is not sufficient to provide to the Department statistically valid data to use in analyzing the actual impact on small businesses.” In fact, DOL does not know the impact on small business the rule will have and but still claims it will not have an impact. This is not supportable or acceptable.

The proposed regulation will not only threaten the economic viability of seasonal employers, it will also have negative consequences for the broader economy because the increased labor costs could force companies using the H-2B program to abandon planned purchases of vehicles, equipment, and other products.

NCAE opposes the proposed rule and supports the retention of the current four tiered wage methodology. Arbitrarily increasing wages for H-2B workers will threaten the economic survival of small businesses that are already struggling in today’s economy. For businesses committed to using a legal workforce, such increased labor costs could lead the organization not only to hire fewer H-2B workers, but also to lay off some of the American workers whose jobs depend on the availability of seasonal laborers.

The rule notes that “while the Department has been unable to fully analyze other viable options for the calculation of prevailing wages for small entities, the Department invites comments on the availability, usefulness and costs of other potential, reliable data sources.”

We strongly urge the department to retain current wage determinations and simply comply with the court order by providing the public with an opportunity to comment on its wage calculation methodology. This comment period would allow time to study whether any new methodology is warranted and if so, provide adequate time to develop an informed draft supported by fact as well as allowing adequate time for impacted businesses to review and comment on any changes.

Thank you very much for your consideration of these comments.

Sincerely,

Frank A. Gasperini Jr.

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