NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

December 12, 2023

Acting Secretary Julie Su
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, D.C. 20210

*In re: Petition to Amend the Regulatory Methodology for Determining Adverse Effect in the H-2A Temporary Agricultural Worker Program*

Dear Acting Secretary Su:

The National Council of Agricultural Employers ("NCAE") is the national association focusing on agricultural labor issues from the employer's viewpoint. Established in 1964, NCAE members are farmers and ranchers involved in labor intensive agricultural production, associations, agents, farm labor contractors and others whose business interests revolve around agricultural employer issues. NCAE advocates for legislation, regulation, and federal policies to keep agricultural employers ethically and economically sustainable in the global marketplace.

NCAE's members employ and pay approximately 80 percent of all agricultural labor payroll in the United States. About 85 percent of employers utilizing the H-2A temporary agricultural worker program are members of NCAE or NCAE member associations, and NCAE and its members have extensive expertise in the operational and regulatory aspects of the program. NCAE has a standing H-2A Committee which meets weekly to address issues and concerns regarding the H-2A program and agricultural labor in general.

One of those chief concerns has been the Adverse Effect Wage Rate ("AEWR") and its snowballing increases each year. Additionally, with the recent rulemaking by the Department, the cost of participating in the H-2A program has become prohibitive for many of our members. In 2019, NCAE petitioned the Department to amend the regulatory methodology for setting an AEWR.[1] The Department's response was that it was currently in active rulemaking, and it would address the issues raised in the petition through that rulemaking. Unfortunately, the Department failed to address any of the issues in that rulemaking that NCAE raised in the petition pursuant to 5. U.S.C. §553(e).

[1] *See* Exhibit A.

**1550 Wilson Boulevard, Suite 700**
**Arlington, VA 22209**
**202-629-9320**

NCAE again petitioned the Department to amend the regulatory methodology in 2020.[2] That petition, addressed to Secretary Scalia, has never received a response.

Because the Department is no longer in active rulemaking surrounding the H-2A program with regard to wages[3], NCAE is renewing its petitions pursuant to 5 U.S.C. §553(e) that the Department amend its regulations to conform with the Immigration and Nationality Act's ("INA") Section 218(a)(1) dual purpose of protecting the wages and working conditions of similarly employed U.S. workers and to provide a sufficiently available workforce for U.S. farmers and ranchers when there are not readily able, willing, and qualified U.S. workers.

The INA is silent as to how the Secretary of Labor is to determine that no adverse effect exists by importing an H-2A worker. However, the INA does place an affirmative duty on the Secretary of Labor to certify that no adverse effect exists.

The current regulations as written fail to meet that requirement of the INA. Setting an AEWR annually is not making a determination that the importation of H-2A workers has an adverse effect on U.S. workers. The INA requires the Secretary to certify that H-2A workers do not have an adverse effect on the wages and working conditions of U.S. workers.

Further, the setting of an arbitrary wage does not prove that there was in fact an adverse effect in the first place. By not performing this crucial evaluation, the current regulatory scheme is completely shirking the duties that the INA has placed on the Secretary.

Moreover, the methodology contrived by the Department in establishing AEWRs is devoid of any economic rationale. In fact, the U.S. Department of Agriculture has recognized the fact that the Department of Labor is misusing the Farm Labor Survey (FLS) to establish a majority of the AEWRs as the FLS was designed to count the number of workers in agriculture rather than establish a wage rate completely disconnected from agricultural wages paid in the market for a temporary work program.[4] And since H-2A wages and wages for workers in corresponding employment to H-2A workers are included in the FLS, instead of excluded, an echo effect from that data further corrupts the result.

The Department's most recent regulation for AEWRs further exacerbates the lack of economic rationale for the Department's imposition of wage rates disconnected from the market by using nonfarm Occupational Employment and Wage Statistics (OEWS) wage rates for typical farming and ranching activities that have existed in global agriculture for generations. Of course, these nonfarm wage rates now find their way into the FLS survey results that USDA uses to count the number of workers, further spiking the misused wages by the Department even higher.

The impact of these runaway wages has real, palpable effects on American agriculture and the American people. The Department's misuse of data generated from the FLS and OEWS, absent

---

[2] *See* Exhibit B.

[3] NCAE recognizes that the Department is in active rulemaking on Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63750, Sept. 15, 2023, however this rulemaking does not touch on the AEWR issue that NCAE is petitioning the Department for amendments to the regulations.

[4] *See* Exhibit C.

any finding of an adverse effect on domestic workers due to the employment of H-2A workers, jeopardizes U.S. national security and the food security of millions of American citizens and is also a likely culprit in skyrocketing food prices paid by consumers. Today, more than 60% of the fresh fruit consumed in the U.S. and more than 40% of the fresh vegetables are imported from our foreign competition driving American farmers and ranchers out of business and making the U.S. dependent on others for food.

Wage rates mandated by the Department are not just disconnected from the market for agricultural wages in the U.S., but the artifice employed by DOL is similarly disconnected from international markets and provides a perverse incentive to our foreign competition to expand food production to dump into American markets.[5] This is why the tomatoes, and cucumbers we find in Virginia are grown in Canada and the blackberries, blueberries, and asparagus, we find in U.S. grocery stores are grown in Mexico.

By ignoring the INA's requirement to determine that no adverse effect exists, and by continuing to misuse the USDA's FLS to fallaciously expand wages, the Department effectively places not just a thumb, but a full palm, tipping the scales to favor foreign competition. America's farm and ranch families simply cannot compete in a market which artificially favors foreign competition.

Since the Department is no longer in active rulemaking surrounding the issue of adverse effect and wages in the H-2A program, NCAE is again renewing its petition, as attached in Exhibits A and B, pursuant to 5 U.S.C. § 553(e) and asking that the Department and the Secretary either amend or repeal 20 C.F.R. § 655.120 to conform with the INA requirement that the Secretary certify no adverse effect instead of assuming adverse effect without making such certification. NCAE looks forward to your response pursuant to 5 U.S.C. § 555(e).

Very truly yours,

Michael Marsh
President and CEO

Cc: Administrator Brian Pasternak, ETA/OFLC
Administrator Jessica Looman, ETA/WHD

[5] *See* Exhibit D.