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July 7, 2008

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

Re: Regulatory Information Number (RIN) 1205-AB54  
Comment to Proposed Rule "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes" 73 Fed. Reg. 28941 (May 20, 2008)

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent thousands of U.S. businesses and industries that petition on behalf of workers, as well as foreign-born individuals and their families. Our members also represent asylum seekers, often on a pro bono basis, as well as individuals seeking U.S. citizenship.

AILA appreciates the Department of Labor's desire to improve its portion of the long-dysfunctional H-2B process. Some elements of the proposal would indeed help to improve the process, perhaps significantly so. Others, however, would mark a step backward and should be abandoned. Our comments in these regards are detailed below.

We also note that buried in this rulemaking are proposed changes that would substantially impact programs other than H-2B with respect to the prevailing wage process. We comment on those proposals below, but ask that the Department either abandon this practice of burying significant changes to some programs in rulemakings that, on their face, relate to another, or label those rulemakings clearly so that the affected public is put on notice that changes are proposed to the other programs. In that regard, we urge that no changes affecting any programs other than H-2B be made through the vehicle of this rulemaking, and instead the changes be proposed, and full comment opportunity afforded, in a rulemaking that clearly puts the public on notice as to what program(s) are being affected.

### **Pre-Filing Recruitment**

AILA applauds the proposal to convert the H-2B labor certification process to a pre-filing recruitment and centralized attestation-based program. This should significantly reduce the disparate processing delays currently encountered in certain spots around the country, and streamline the process overall.

We ask, however, that the DOL go further and centralize the job order process as well. Continuing to rely on State Workforce Agencies (SWAs) for job order processing is likely to negate any time savings and uniformity achieved by the other reforms under the proposal. Currently each SWA follows its own procedures for posting job orders. In some states, the employer can post the job order online and can thereby control the timeliness of the posting. In other states, SWA personnel initiate the job order based on information provided by the employer. The speed of getting the order posted varies greatly from state to state, and depends on the responsiveness of SWA staff.

In fact, under the proposal, with the otherwise reduced role of the SWAs and, therefore, likely elimination of knowledgeable SWA personnel, the posting of job orders may become even more unpredictable. Every H-2B case is highly time sensitive because of the limited quota numbers available. A single delay at any point can make the difference between making or missing the cap, and can result in one area of the country having an unfair advantage or disadvantage over another—the very result that the proposed rule would otherwise seek to remedy.

AILA suggests that the National Processing Center (NPC) maintain control of the job order process, by either taking direct responsibility for job order posting or, alternatively, by ensuring that SWAs meet specific timelines for posting or offer mechanisms for automated posting such as employer-initiated online posting. If job orders continue to be handled by SWAs, AILA would also urge that SWAs be required to retain at least one trained staff member dedicated to H-2B job order posting.

### **Recruitment and Labor Unions**

The regulation would require at Section 655.15(d)(2) the use of unions as a recruitment source if it is appropriate to the occupation and customary in the industry and area of

intended employment. This provision would be unworkable in practice, as it has been our experience that unions will not refer workers to non-union shops. The requirement that all employers, including non-union employers, contact the unions is an invitation to create conflict between the employer and union organizations while serving no purpose under the H-2B program. The regulation should be amended to the approach used for the permanent program (PERM), requiring union contact for unionized employers only.

### **Audits and RFIs**

AILA reads the proposed rule to provide for a request for information (RFI) process prior to certification, and for audits on a post-certification basis. We believe that this approach is reasonable to retain both the integrity of the process and the efficiency necessary to make the H-2B process workable within the confines of the statute and the limited quota. However, this will be workable only if DOL is able to adhere to its goal of issuing an RFI within 14 days of receipt of a completed application.

Also, we are concerned about the functioning of a future electronic filing provision and urge the Department not to institute this measure until the electronic filing technology appears to be error free. In addition, the electronic denials used in the PERM process based upon information found on the forms should not be part of the H-2B application. A perceived defect should receive an RFI so as to adhere to the stated purpose of preventing avoidable delays.

### **Prevailing Wage Determinations**

The proposed regulation would transfer the determination of the prevailing wage from the SWA to the NPC on all programs operated by the Office of Foreign Labor Certification. This is apparently based upon the rationale that the centralization of the prevailing wage determination (PWD) will eliminate the disparate determinations resulting from 50 different SWAs making the determination. In the text of the proposal for the regulation, the Department recites that it has received numerous reports that in cases where job descriptions are complex and contain more than one different and definable job opportunity, some SWAs have made inconsistent classifications, thereby resulting in inconsistent PWDs.

Most employers establish job descriptions based upon their analysis of the duties without reference to the Bureau of Labor Statistics Occupational Employment Statistics (OES) Survey. Accordingly, it falls to the SWA or, under the proposed regulation, to the NPC to extrapolate to the OES prevailing wage rate.

AILA members have experienced numerous cases where the SWA has not understood the exact nature of the occupation, and/or the experience required, for which the determination of the prevailing wage is sought and has, as a result, made an erroneous determination. An amelioration of the error by the SWA has been made by dialogue with the attorney for the employer, or the employer itself, to clarify the exact nature of

the occupation and how it compares to descriptions contained in the OES Survey or an appropriate alternate resource.

Such an opportunity for dialogue should be inserted into the regulation. Employers, employees, and the economy as a whole will benefit from such exchange because it will inevitably reduce delays in H-2B processing resulting from an employer's inability to timely obtain an accurate PWD. An appeal, particularly in an H-2B or H-1B context where timing is critical, is not a viable option.

The foregoing becomes even more important when it is considered that the proposed regulation contemplates that the federalization of the PWD would be applied under the H-1B, H-1B1, H-2A and PERM processes as well as H-2B. It has been our experience that, the more a program is centralized, the less meaningful discussion is allowed. That result would be disastrous for these immigration programs, particularly the time-sensitive ones. AILA would support the centralization of the prevailing wage determination ONLY if it includes a mechanism for meaningful dialogue in order to come to an understanding regarding the job and the prevailing wage.

Further, because the H-2B process necessitates that each step of the program is carried out in a timely manner, AILA proposes that 20 CFR Section 655.10 contain a time certain (i.e. 10 business days) in which the NPC must adjudicate a prevailing wage determination. Without a maximum time limit, employers may be faced with a fatal delay in the process since they cannot advertise until the prevailing wage determination is issued. Including a maximum time limit for adjudication of a PWD is consistent with current SWA policy as the majority of SWAs hold themselves to a maximum 10-business day processing time.

When an employer disagrees with the PWD, the proposed regulation specifies the method of review by the NPC. (20 CFR Section 655.11) However, the proposed rule fails to include a time certain in which the CO must complete the review. AILA again emphasizes that timing is critical and recommends that the regulation contain a provision that specifies the maximum time period in which the CO must make a decision on an employer's request for review of the PWD.

As mentioned at the outset, DOL should not be attempting to amend the H-1B and PERM processes in a rulemaking referencing only H-2B in its title. However, if DOL insists upon going forward despite this failure of proper notice, AILA also recommends that the regulations include a maximum time frame for the NPC to issue a PWD within the context of the H-1B regulations. Therefore, AILA recommends that 20 CFR 655.731(a)(2)(A) include the same 10-day maximum processing time as recommended for the H-2B and PERM programs. This is especially true because, in cases of long delays, the proposed rule expressly permits an employer to file an LCA without a PWD if it can't wait for the PWD, with the repercussion that once the PWD is issued and if it contains a higher wage than anticipated by the employer, the employer must pay the employee back wages. The timely processing of a PWD would eliminate the need for an

employer to pay such back wages and would ensure that the employer pays the required wage rate at the time of hire.

Inappropriately and without proper notice, the proposed regulation contains changes to the prevailing wage process for permanent labor certification applications. All PWD in support of a PERM application will be processed through the Atlanta National Processing Center. Once the DOL issues a proper notice of proposed rulemaking pertaining to the PERM process, and in order to ensure that PWDs are processed efficiently and timely, AILA proposes that 20 CFR Section 656.40 contain a time certain (i.e. 10 business days) in which the Atlanta NPC must adjudicate a prevailing wage determination. Including a maximum time limit in which the certifying officer must process a PWD in the PERM context is critical to an employer's ability to initiate pre-filing recruitment and timely file a PERM application.

When an employer disagrees with the PWD under PERM, the proposed regulation specifies the method of review by the NPC. (20 CFR Section 656.41) However, the proposed rule fails to include a time certain in which the CO must complete the review. AILA again emphasizes that timing is critical and recommends that the regulation contain a provision that specifies the maximum time period in which the CO must make a decision on an employer's request for review of the PWD.

Finally, a note on the validity period of the PWD in the H-2B context: due to the filing issues unique to the H-2B program, prevailing wages for H-2B's should have a minimum of 120 days of validity. Validity of the prevailing wage determination should be based upon the date that recruitment starts.

### **Agents, Recruiters, and the Bar on Payments by Individuals**

AILA opposes the prohibition in proposed § 655.22(1) on payment of attorneys' fees by individuals. We reiterate the principle that every individual, whether foreign born or a U.S. citizen, has a right to legal counsel in any proceeding where his or her interests are at stake before the government. It is not for DOL or any other agency to attempt to limit that right. Indeed, workers have significant interests that can and should be protected through representation by legal counsel. The role of counsel can, and frequently does, serve to curtail abuses because the worker is equipped to fully pursue his or her rights. Moreover, in contrast to "agents" (as currently defined by the proposed rule) and unlicensed recruiters, there is effective recourse with respect to attorneys who engage in abusive or unethical practices, through state bar disciplinary rules. AILA reiterates and incorporates the comments it submitted in connection with the PERM program with respect to individual payment of attorneys' fees in the labor certification process.

AILA does support the prohibition in proposed § 655.22(1) on the employer seeking or receiving payments related to obtaining the labor certification as reimbursement for recruiting costs. AILA believes in the principle that foreign nationals should not pay recruiters' fees or related costs. In its current form, however, the proposal does not go nearly far enough, and suggests the DOL is not serious about preventing fraud and abuse

in the H-2B program. Given the extensive potential for abuse in the program, which has unfortunately played itself out in reality in recent high-profile cases, AILA urges that the regulation be strengthened in the following two ways.

First, the proposal needs to specifically target abuse and deception by foreign labor contractors and recruitment agents outside of the U.S. Such abuse and deception typically occurs in the form of the recruiter charging fees to individuals in the foreign country to be referred to the employer for H-2B visa application sponsorship, and misrepresenting the nature of the employment for which sponsorship is offered. Such unscrupulous international recruiters are known to charge exorbitant fees to foreign nationals before they are even able to apply for a visa to come to the U.S., and make false promises that the visa will allow the foreign national to immigrate permanently. Because the abuse takes place out of the U.S., by non-U.S. entities, to a large extent it is beyond the enforcement scope of DOL or USCIS.

The most notorious recently publicized case of H-2B abuse, involving welders and pipefitters from India who were sponsored for temporary H-2B visas to work on oil rigs in Louisiana and Mississippi after Hurricane Katrina, stems from exactly this abuse. According to news reports, a recruiter in India charged each worker \$20,000 or more in recruitment fees, and promised “lifetime settlement” in the U.S. in connection with arranging for H-2B sponsorship by a U.S. employer. See *Indian Workers Decry Recruitment Tactics*, Washington Post, June 12, 2008, Page A12. It was only after the workers arrived in the U.S. that they learned of the short-term, temporary nature of the visa, after giving up to the foreign recruiter what for many was their life savings.

At a minimum, the proposal should include the same requirement contained in the recently proposed H-2A regulations that the employer is required to contractually forbid any foreign labor contractor whom it engages in international recruitment of workers to seek or receive payments from prospective employees. See Proposed Rule, 73 Fed. Reg. 8538, 8572 (Feb. 13, 2008). Even that is not enough, though. AILA also suggests that (1) any recruiters involved in the H-2B process must be accounted for in the applications, and the rule should limit the involvement of recruiters to organizations which maintain an office in the U.S., are duly licensed to do business in the U.S., and are subject to compliance with all applicable U.S. Federal and State laws, and (2) the foreign recruiter should be required contractually to maintain records that it has properly informed potential visa applicants of the temporary nature of the employment, the rate of pay and other material terms and conditions of the employment.

Given the highly publicized abuses related to foreign recruiters in the H-2B program, AILA does not understand why DOL chose not to include any provision related to payments to foreign recruiters and similar abuses in the proposed regulation, and instead targets domestic payments made for legal services by U.S. attorneys. This is particularly puzzling considering that DOL had clearly put thought into the problem before, in connection with the February 13, 2008, H-2A proposed regulation.

Second, as a related problem, the proposal needs to target abuse in the program being committed by unscrupulous entities who are allowed to serve as “agents” under the extremely broad definition for who may represent an employer in the process. Under the proposal, the employer’s agent, who may as a practical matter carry out certain recruitment activity on behalf of the employer, make representations to U.S. applicants and to foreign nationals, and make representations to the government, may be anybody or any entity, operating under absolutely no standards of ethical conduct or rules of accountability.

The proposed rule does nothing to eliminate or combat many well-known abuses committed by such entities. For example, “agents” have been known to approach employers with a currently illegal workforce, and assure them that the workers can be effectively laundered into a legal workforce through the H-2B program. These “agents” obtain the labor certification, often the most onerous part of the application process, so the employer can file H-2B petitions. Then the “agent” instructs the employer to send the illegal workers across the border to a U.S. consulate in Mexico, and instructs the workers to lie at the visa interview about prior illegal work in the U.S. These entities do not involve licensed attorneys who would be subject to bar association disciplinary rules: Rather, they are opportunists who take advantage of the loophole created by the extremely broad definition of “agent” and the lack of any accountability, to engage in the unauthorized, and frequently incompetent, unethical or illegal, practice of law.

In another example of abusive practice that combines both of these problems - requiring foreign nationals to make exorbitant payments to recruiters in their country and misrepresentation to the government by a third party not subject to ethical standards for immigration representation - an “agent” will approach a legitimate employer in the U.S. with a need for workers, and promise to deliver a legal, temporary work force to the employer at some date in the future at no cost and no obligation. There is no contract between the employer and the agent. The agent simply asks the employer to sign several blank forms, which are the labor certification application and H-2B petition. The agent then proceeds to carry out the H-2B application process in the employer’s name, filling in the required salary and related information on the forms. The employer is unaware of any steps of the process, until the workers arrive. How is the “agent” compensated for this work? It makes money by charging fees to the applicant in the foreign country, effectively “selling” U.S. visa opportunities. The U.S. employer is no more than an unwitting accomplice in the scheme.

AILA urges the DOL to recognize that if it seriously wants to stop such abusive activity and maintain the integrity of the H-2B program, the definition of authorized “Agent” should be changed. We suggest that the Department of Labor adopt the long established guidelines set in 8 CFR § 292.1 for representation in immigration matters. These guidelines limit representation to (1) attorneys duly licensed and in good standing in the U.S., (2) Law students and law graduates not yet licensed to practice law who are participating under the direct supervision of a U.S. licensed attorney or a Board Certified representative, (3) A reputable individual of good moral character who is assisting without direct or indirect remuneration and who has a pre-existing relationship with the

person or entity being represented, and (4) Accredited representatives, who are persons representing a non-profit organization who has been accredited by the Board of Immigration Appeals. By limiting representation in this way, the Department of Labor can achieve more accountability for ethical behavior and improve the quality level of the applications, which is in everyone's interest.

As a final comment AILA draws the DOL's attention to proposed § 655.4, where "agent" is defined as "a legal entity or person which is authorized to act on behalf of the employer for temporary agricultural labor certification purposes." As described above, AILA urges a wholesale replacement of the concept of who is authorized to represent the employer in the labor certification process, but here we simply point out that the reference to "agricultural" labor certification in this H-2B proposal is obviously a mistake, and illustrates DOL's lack of proper attention to this area of the proposal prior to publication.

### **Notification Attestation**

The Department of Labor ("DOL") would require employers to notify the DOL and DHS in writing when an H-2B employee separates from employment within 48 hours after the separation occurs if separation is prior to the end date listed on the Application for Temporary Employment Certification. This notice also would be required if an employee absconds from the employment prior to the end date listed on the application. If an employer fails to notify DOL and DHS within 48 hours of the separation, it risks debarment from the H-2B program for up to 3 calendar years.

Business managers engage in business. They are not the immigration police, and it is not appropriate to ask them to act in that capacity. But if the Department does insist on deputizing employers, we are concerned that the proposed regulations do not clearly detail the process by which employers must notify the DOL and DHS.

The DOL should provide a clear definition of "separation" from employment for the purpose of the 48-hour notification window to take effect. Examples of situations in which it may not be clear when an employer should consider a separation to have taken place include the following: voluntary leave of absence, failure to appear for work, voluntary separation, an employee on FLMA leave, and termination for cause. Typical industry practice among employers suggests that an employee who does not call or show for work for 3 business days is considered to have separated from employment. AILA suggests that DOL adopt a 3 business day waiting period for the employer to determine whether the employee has in fact separated from employment before the 48-hour notification clock starts ticking.

The word "abscond" is mentioned in the Background to the proposed regulations, but it does not appear in the regulation itself at 20 C.F.R. § 655.22(f). Black's Law Dictionary defines abscond as follows: "To depart secretly or suddenly, esp. to avoid service of process; to conceal oneself." This word is not appropriate in the employment context, and AILA suggests the term "job abandonment" in place of "abscond."

Clearer instructions on how an employer should complete notification are needed, including how to notify the DOL and DHS, and information from the employer and/or employee required to document separation or job abandonment. The timing of notification is also not clear, as it is not clear whether the notification needs to be *received* by DOL and DHS from the time of termination, or if the notification must be *mailed* by the employer within 48 hours of termination.

A time period of 48 hours is an unreasonably short window during which to confirm separation or job abandonment and notify DOL and DHS. AILA suggests that, if a notification requirement is instituted, an employer be given a minimum of 10 business days during which to complete this notification. An employer should not have its ability to participate in the H-2B program jeopardized simply because of an unforeseen delay in notifying DOL and DHS of an employee's separation or job abandonment.

### **Debarment**

The proposed regulation includes a debarment provision where an “employer, attorney or agent” is found to have engaged in one of five specified violations of the H-2B regulations. *See* 20 CFR § 655.31(a)(1)(i-v). The proposed regulation also requires the Office of Foreign Labor Certification (OFLC) to issue a Notice of Debarment specifying the grounds of a debarment finding. The Notice must offer “the employer” an opportunity to request review before BALCA and specifies that “the employer, within 30 calendar days of the date of the notice, shall file a written request to the Board of Alien Labor Certification . . .” 20 CFR § 655.31(a)(2). 20 CFR §§ 655.31(d) and (e) address the appeal procedure where “the employer” requests review and final determinations against “the employer.”

Noticeably absent from the debarment provision is the right for an attorney or agent to appeal the OFLC's Notice of Debarment. AILA strongly objects to this omission since attorneys and agents subject to a Notice of Debarment would have no recourse to correct a conceivably incorrect and/or unfair decision. If this omission was not simply a drafting error, and it was instead thought that the employer's right to appeal should suffice, it should be noted that there are many possible scenarios in which an employer may choose not to appeal or merit a different result than the attorney. For example, if an employer does not intend to use the H-2B process again, the employer may have no stake in moving forward with a motion for review. Also, if an employer ultimately demonstrated bad faith in supervised recruitment through no fault of the attorney, under this regulation the attorney may be an innocent victim with no recourse.

AILA recommends that the proposed rule provide attorneys and agents with the right to appeal a Notice of Debarment. The right of an “employer or debarred person or entity” to appeal a debarment decision is expressly provided in the PERM regulations at 20 CFR § 656.26(a). Consequently, providing attorneys and agents the right to appeal a debarment decision under the H-2B regulations is entirely consistent with established Department of Labor policies and regulations.

## Appeals

The proposed rule would replace with an administrative appeal process the current process, which allows USCIS review and granting of the petition, if appropriate, notwithstanding DOL's denial or refusal to certify. AILA opposes this change for the reasons discussed below.

The proposed review or appeal proposal fails to create a set time frame within which critical steps of the process shall occur. Even if that problem were to be addressed, the time to process an appeal would be much too long to allow even a successful appellant/employer to have a chance of obtaining any available H-2B numbers out of the current 66,000 yearly limit or 33,000 half-year limit. For this reason, this portion of the proposed regulation should be deleted in its entirety, and the current system retained.

In the H-2B system, each year there are 66,000 new H-2B numbers available, split into two groups of 33,000 each with the first group effective on October 1 and the second group on April 1. The H-2B numbers are heavily oversubscribed. Due to the heavy demand for these numbers, it is critical for an employer to process the case as quickly as possible through the DOL phase of the case, so that the H-2B petition is filed with USCIS at the earliest possible moment; once the case is filed, the employer's ability to claim an available H-2B number is secure. Any delay whatsoever at the DOL stage can be fatal to that right.

Under DOL's proposal, an employer who receives a denial is virtually guaranteed that all of the available H-2B numbers will be gone by the time the petition can be filed.

Under proposed Section 655.33, the proposal creates this timeline:

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|----|---|--|
| 1. | Day 1                                     | DOL denies labor cert application.   |
| 2. | Day 10                                    | Employer <i>MAY</i> file request for review ("appeal")                     |
| 3. | <b><i>Unlimited briefing schedule</i></b> | <b><i>BALCA WILL issue docketing statement which sets</i></b>              |
| 4. | Day 10<br>After #3                        | CO <b><i>MUST</i></b> submit Appeal File by same day or overnight delivery |
| 5. | Day 10<br>After #4                        | Employer <b><i>MUST</i></b> file its brief                                 |
| 6. | Day 10<br>After #5                        | CO <b><i>MUST</i></b> file its brief                                       |
| 7. | Day 20<br>After #6                        | BALCA <b><i>SHOULD</i></b> notify CO and employer of its decision          |

This schedule is not only unreasonably long in the H-2B context, in reality it also creates an indefinite and potentially unlimited period of time for BALCA to take two crucial steps in order for the process to start and to finish. The first of those steps is BALCA's duty to issue a docketing statement and briefing schedule. Nothing in the regulation

requires BALCA to take that step at any point in time, regardless of the employer's need for the workers, regardless of customers who must rely on that employer for critical supplies in critical industries. Leaving such a critical step without any time limit is a recipe for disaster.

The second flaw in this time line is the last one. Unlike the duty of the employer to file its brief within 10 days of the decision, and the CO's duty to submit the Appeal File within 10 days of the issuance of the docketing statement, and to file its brief within 10 days after the employer files its brief, the regulation provides that BALCA "should" notify the employer and the CO of its decision within 20 days after the CO files its brief.

If BALCA is suffering a seasonal, one time, intermittent or peak load shortage of staff or judges, it may appear to BALCA that other matters are more pressing than the H-2B appeal before it. Given only a general directive, and not a duty, to notify the parties of its decision within 20 days of the CO's brief being filed, BALCA may make a scheduling decision that could result in an indefinite time lapse. Even if BALCA does not face any staff shortage, it still has no specific deadline to meet, just a general goal that DOL wants it to pursue.

In the context of employers who are faced with potentially fatal labor shortages that could spell the end of the company's existence, this proposed set of timelines, some absolute and some indefinite, does nothing more than guarantee that cases denied by DOL will never see the light of day at USCIS.

DOL may have a statutory duty to protect U.S. workers; it does not have a duty to destroy U.S. businesses, and that is the very danger that this proposal courts.

For all these reasons, this portion of the proposed regulation should be deleted in its entirety, and the current system should be retained.

### **Temporary Position up to Three Years**

AILA applauds the Department in proposing in § 655.6(b)(1) that a temporary need for workers may have a period of up to three years in duration. This forward thinking recognizes that such events occur and create the need for temporary workers.

AILA would suggest, however, that the Department re-think its proposal that the employer "test the market" on an annual basis. Such language would appear to require that notwithstanding that the regulation recognizes a temporary need of up to three years, the employer must go through all of the prevailing wage, recruitment and filing steps each year. This increases the workload of the Department, increases the costs to the employer, and fails to recognize the advantages of the employer having the availability of trained, experienced workers. A reasonable alternative would be for the employer to check the prevailing wage determination on an annual basis to assure that the workers are being paid the prevailing wage for the particular position. Further recruitment efforts,

however, would render the official recognition by the Department of a temporary event of up to three years illusory and, instead, render it a seasonal, peakload or intermittent need.

### **Amending Dates of Need**

AILA has serious concerns about the proposed limitations in sections 655.22(p) and 655.34 on the ability to amend the labor certification application. To require amending the end date of need if the job terminates early is impracticable, and should not be subject to such limits. And, although we understand that amending starting dates of need may reflect a concern that some employers may be tweaking the system to get an H-2B cap number, the Department's proposed approach is an ill-advised way to handle this issue.

Many employers have a genuine, stated date of need that they attempt to fill with U.S. workers. If they ultimately cannot fill any or all of their needed slots, then they must wait for H-2B quota numbers to become available. These positions are important for the employer, even if the start date cannot be the optimal date. Thus, they are required by circumstances to adjust the start dates on the applications to meet the realities of the H-2B program. Otherwise, employers in some industries that are encompassed by the H-2B program would never be able to use the program, and thus may not be able to conduct their business, while those in industries with the happy accident of having optimal dates of need coinciding with the dates that quota numbers become available would get access to all of the H-2B numbers. The result would be adding yet another layer of unfairness to a program that already is hobbled by dysfunction.

The solution is not to constrain amendment of the stated start dates. Instead, the Department should change its requirement that recruitment begin no more than 120 days in advance of the need. Instead, the time limitation should be pegged to the realities of working within the quota system, and allow filing sufficiently in advance to complete the process in time for the USCIS October 1 and April 1 filing dates. One approach would be to allow filing within 120 days prior to either October 1 or April 1 for any need starting within the six-month period after that respective date. Whether any of us like it or not, those have become the true dates of need under the realities of this program.

If the Department of Labor nevertheless finds that this revision to the regulation is necessary, it should be done with the proviso that the employer can file the nonimmigrant visa petition, with notice that an amendment has been submitted to the Labor Department and a regulatory guarantee that such a request for amendment will be adjudicated in 5 days so as not to impact the employer's opportunity to acquire H-2B numbers.

### **Required Departure**

Proposed section 655.35 would require that H-2B workers register land border departures at the conclusion of their authorized stay and depart in a manner and place designated by DHS. Limiting departure to certain land borders is an unnecessary and onerous burden.

AILA supports efforts to develop and implement a comprehensive, efficient, and reliable entry-exit system. We do not support, however, efforts that single out a particular segment of the foreign national population in the United States and subject them to a system that they are highly likely to violate inadvertently.

Barriers for temporary foreign workers to enter and exit the United States should be minimized to the greatest extent possible without compromising national security. Specifying that a temporary worker must exit at a designated port of entry, and go through a process that others using the same port are not required to use, virtually guarantees accidental violations in many, if not most, cases.

As we have already seen with the US VISIT kiosks and the NSEERS exit requirements, it is extremely difficult to effectively educate system users about the required method for exit if that method is not integral to how a person naturally exits the country. Many H-2B positions are lower-skilled, and thus those workers will tend to be less educated than the average nonimmigrant subjected to the US VISIT and NSEERS requirements. Thus, the likelihood that they will be able to understand and comply with the requirements will be even less among this group than among those for whom such a system already has failed. This requirement should not be included in the DOL's regulation, and the DOL should work with DHS to develop specific, workable departure verification.

### **Conclusion**

Again, we thank the Department for its efforts in this regard. However, the program will not be workable if the issues discussed above are not effectively addressed.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION