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Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: Notice of Proposed Rulemaking: Temporary Non-Agricultural Employment of H-2B Aliens in the United States (RIN 1205-AB58), 76 Fed. Reg. 15130 (Mar. 18, 2011)**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Labor's (DOL) Notice of Proposed Rulemaking (NPRM), "Temporary Non-Agricultural Employment of H-2B Aliens in the United States," published in the Federal Register on March 18, 2011.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the NPRM and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

### **Overview of the H-2B Program**

The H-2B temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs.<sup>1</sup> The employer's need is deemed temporary if it is a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need.<sup>2</sup> The employer must demonstrate that there are no qualified U.S. workers

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<sup>1</sup> INA §101(a)(15)(H)(ii)(b).

<sup>2</sup> 8 CFR §214.2(h)(6)(ii)(B).

who are able, willing, and available to take the job and that employment of the H-2B worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.<sup>3</sup> Toward this end, the employer must obtain a temporary labor certification from DOL and file it with Form I-129, Petition for a Nonimmigrant Worker, with U.S. Citizenship and Immigration Services (USCIS).<sup>4</sup> H-2B admissions are capped at 66,000 per fiscal year, with 33,000 allocated to each half of the fiscal year.<sup>5</sup> H-2B status is available only to nationals of countries designated by the Secretary of Homeland Security.<sup>6</sup>

### **Evolution of the Temporary Labor Certification Process**

Prior to 2009, a temporary labor certification application was filed on Form ETA 750A with the local state workforce agency (SWA) in the area of intended employment.<sup>7</sup> The SWA directed the employer's recruitment campaign, advised the employer on the appropriate wage, and referred qualified candidates to the employer. The employer prepared a report summarizing the results of its recruitment efforts and providing the lawful job-related reasons for rejecting any of the referred U.S. workers. Once the SWA completed preliminary processing, the application was forwarded to the DOL regional office for a final determination.

On December 19, 2008 (effective January 18, 2009), DOL published a final rule implementing an attestation-based process for H-2B temporary workers which requires the employer to test the labor market and recruit U.S. workers before filing a new Form ETA 9142 directly with DOL.<sup>8</sup> DOL also assumed responsibility for prevailing wage determinations, and implemented post-adjudication audits and civil penalty procedures as enforcement mechanisms. By removing the SWA from the labor certification process, DOL sought to modernize, streamline, and simplify the temporary labor certification process.

On January 19, 2011, in accordance with the district court order in *Comité de Apoyo a Los Trabajadores Agrícolas (CATA) v. Solis*,<sup>9</sup> DOL published a final rule setting forth a new prevailing wage calculation methodology for H-2Bs.<sup>10</sup> The final rule applies only to wages paid for work performed on or after January 1, 2012.<sup>11</sup>

DOL states that the current NPRM was initiated to address deficiencies in the H-2B program which fail to adequately protect both U.S. and foreign workers.<sup>12</sup> DOL states that an audit of cases filed under the attestation-based procedures indicates "a pattern of noncompliance or avoidance of demonstrating compliance," as well as "increasing

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<sup>3</sup> 8 CFR §214.2(h)(6)(i)(A).

<sup>4</sup> 8 CFR §214.2(h)(6)(iii)(A).

<sup>5</sup> INA §§214(g)(1)(B), (g)(10).

<sup>6</sup> 8 CFR §214.2(h)(6)(i)(E).

<sup>7</sup> See generally, General Administrative Letter (GAL) 1-95; 60 Fed. Reg. 7216 (Feb. 7, 1995).

<sup>8</sup> 73 Fed. Reg. 78020 (Dec. 19, 2008).

<sup>9</sup> Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

<sup>10</sup> 76 Fed. Reg. 3452 (Jan. 19, 2011).

<sup>11</sup> 76 Fed. Reg. 21036 (Apr. 14, 2011).

<sup>12</sup> 76 Fed. Reg. 15130, 15132 (Mar. 18, 2011).

evidence ... of violations rising to the criminal level.”<sup>13</sup> As a result, the proposed rule would:

- Eliminate the current attestation-based process and require employers to once again conduct recruitment through the SWAs.
- Require job orders to be listed with the SWA, and require employers to accept all qualified U.S. applicants referred by the SWA, until the third day preceding the employer’s date of need or the date the last foreign worker departs for employment, whichever is later.
- Establish a registration process for the employer to substantiate its need for temporary workers prior to filing the application for temporary labor certification.
- Define “temporary” as less than nine months, except in the case of a one-time occurrence which may last up to three years.
- Add a requirement that jobs must be posted at the employer’s worksite for up to ten days.
- Permit the Certifying Officer (CO) to require the employer to engage in additional recruitment activities where the CO determines that regular recruitment was not sufficient to attract U.S. workers.
- Require employers to guarantee employment for a total number of work hours equal to at least three-fourths of the workdays of each four-week period.
- Change the definition of full-time work from 30 hours to 35 hours per week.
- Require employers to pay transportation costs (inbound and outbound), subsistence costs, and other costs for H-2B workers and U.S. workers who do not live near the place of employment.
- Require employers to include information on its assurances and obligations in its advertisements.
- Provide DOL’s Wage and Hour Division (WHD) with independent debarment authority.
- Prohibit job contractors from using the program.

We are greatly concerned that implementation of the proposed rule will significantly increase the complexity and costs associated with an already complicated regulatory scheme. The proposed changes will make it exceedingly difficult for employers to continue to temporarily supplement their workforces with H-2B workers.

### **Concerns about Timing and Reinstating the Role of the SWAs**

The current attestation-based process was implemented in 2009 to increase program efficiencies and reduce processing delays. Prior to the roll-out of the new system, DOL struggled to meet its internal H-2B adjudication goals. By 2010, processing times for H-

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<sup>13</sup> *Id.*

2B labor certifications had dramatically improved. The proposed rules would restore the prior system's inefficiencies by reinstating the role of the SWAs. In addition, DOL proposes to take what was once a two-step process and add a third pre-adjudication step that would require employers to register with DOL to establish temporary need. Employers preparing to register would be forced to estimate staffing levels six to seven months in advance of the date of need. However, any time savings resulting from early registration would be lost by reintroducing the SWAs into the process. Given pre-2009 performance levels, we are greatly concerned that DOL will not be able act on temporary labor certifications within a sufficient time frame prior to the date of need to allow employers to proceed with filing the necessary I-129 petition with USCIS, and for the H-2B employee to apply for a visa with the Department of State. In order to provide some level of expectation and assurance to employers, the regulations should be amended to require DOL to render a final decision on the labor certification at least 30 days prior to the start date. This is especially important given the additional burdens (payment of travel costs, etc.) imposed on the employer by the proposed rule.

#### **Definition of Terms—20 CFR §655.5**

##### ***Corresponding Employment***

The proposed rule requires employers to provide U.S. workers engaged in “corresponding employment” the same benefits and protections as provided to H-2B workers. Corresponding employment is defined as “the employment of workers who are not H-2B workers by an employer that has an accepted H-2B *Application for Temporary Employment Certification* in any work included in the job order or in any work performed by the H-2B workers.”

The concept and definition of corresponding employment should be removed from the proposed rule because it is without a legal basis and is overly broad. DOL proposes adopting the exact definition of corresponding employment as provided in the 2010 H-2A regulations.<sup>14</sup> This is not supported by DOL's reference to 8 CFR §214.2(h)(6)<sup>15</sup> and exceeds DOL's authority under the INA to the extent that it attempts to import a specific provision from the H-2A program into the H-2B regulatory framework. Moreover, we believe that the 2010 H-2A rule is arbitrary, capricious, and inconsistent with the 1987 rule that governed the H-2A program for nearly 25 years. DOL's inconsistent and confusing application of the concept of corresponding employment in the H-2A program is demonstrated by the resulting random agent adjudications and large and often inappropriate fines.

As does the current H-2A definition of corresponding employment, the proposed rule adopts a broad and unworkable definition. By including the language “or in any work performed by the H-2B workers,” the corresponding employment provision could be applied to virtually anyone in the workforce, where minor duties and responsibilities

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<sup>14</sup> See 20 CFR §655.103(b); 75 Fed. Reg. 6960 (Feb. 12, 2010).

<sup>15</sup> 8 CFR §214.2(h)(6)(i)(A) states that employment of an H-2B worker may not adversely affect the wages and working conditions of similarly employed U.S. workers.

cross over from position to position. When combined with the new prevailing wage requirements, three-fourths guarantee, and new definition of “full-time,” the corresponding employment provision has the potential to place a huge financial burden on employers. Therefore, to the extent that DOL retains the concept of corresponding employment, it should adopt the 1987 definition and include language similar to the 2008 revision of the H-2A regulations clarifying that only U.S. workers who were hired on or after the beginning of the contract period will be afforded H-2B wages and benefits.<sup>16</sup>

### *Definition of Full-Time*

The proposed rule seeks to increase the definition of “full time” from 30 hours per week to 35 hours per week. When combined with the forthcoming prevailing wage requirements, the corresponding employment requirement, and the three-fourths guarantee, this increase imposes a significant burden on H-2B employers. The current 30-hour per week definition of “full-time” should be retained.

### *Definition of Job Contractor*

DOL proposes to amend the definition of job contractor to clarify that an entity exercising some degree of supervision or control over H-2B workers would still be considered a job contractor, while an entity exercising “substantial, direct, day-to-day supervision or control” would not be considered a job contractor.<sup>17</sup>

There is room for debate on what “substantial, direct day-to-day supervision or control” entails. For example, would an employer that determines where the H-2B workers perform services or labor each day be in “control” even if it does not have supervisory employees at the worksite? It would seem “substantial” if the end client does not have such control. Can supervision be performed by an independent third party engaged by the employer? “Supervision” and “control” are two different terms and the word “or” suggests that proof of either may avoid a finding that the employer is a job contractor.

As a result of the ambiguity in the job contractor definition, businesses that have for many years participated in the H-2B program will be faced with uncertainty as to whether they may continue to do so. For many, future participation in the program will hinge upon DOL’s interpretation of the job contractor definition. While DOL states that “[r]eforestation employers provide on site, day-to-day supervision and direction of workers and are therefore not job contractors for purposes of this proposed rule,”<sup>18</sup> it does not provide any additional examples for comparison. Considering that this is a baseline eligibility issue, and one of which the general public should be adequately informed, DOL should provide more examples of employers who would not be considered job contractors under the new definition.

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<sup>16</sup> 29 CFR §501.0; 73 Fed. Reg. 77194–95 (Dec. 18, 2008).

<sup>17</sup> 20 CFR §655.5; 76 Fed. Reg. at 15136.

<sup>18</sup> 76 Fed. Reg. at 15136–37.

### **Temporary Need—20 CFR §655.6**

The proposed rule provides, “[e]xcept where the employer’s need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.”<sup>19</sup> DOL states that the current approach, permitting temporary certifications for periods of up to ten months “encompasses job opportunities that the Department believes are permanent in nature....”<sup>20</sup>

The DHS regulations state that the period of “temporary need” will generally “be limited to one year or less, but in the case of a one-time event could last up to 3 years.”<sup>21</sup> Therefore, DOL’s standard for temporary need should be the employer’s actual need (up to one year, or up to three years for one-time events) and not an arbitrary time period construed by DOL under the guise of ensuring the integrity of the program. The existing H-2B debarment and fine provisions were implemented to prevent employers with permanent, year-round needs from utilizing the H-2B program. Rather than place an arbitrary limitation on the period of temporary need, DOL should further utilize these penalty provisions if it believes employers are misusing the program.

In *Matter of Artee Corp.*,<sup>22</sup> the legacy INS Commissioner held that in determining temporary need, “it is the nature of the need for the duties to be performed” which must be considered. Many employers have a real, confirmed temporary need of more than 9 months. Requiring employers to scale back their dates of need would severely hamper many businesses who depend each year on the H-2B program. Moreover, in the 2008 final rule, DOL engaged in a lengthy discussion on the meaning of temporary need, and came to the conclusion that a temporary need “could, in some cases, last more than one year.”<sup>23</sup> DOL has failed to explain why its view on temporary need has suddenly changed. The provision permitting peak load and seasonal needs of up to 10 months should be retained.

### ***Elimination of Job Contractor Participation***

Under proposed 20 CFR §655.6(a), “[t]he need of a job contractor is inherently permanent in nature, and the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer is a job contractor.” DOL states:

It is the Department’s view that a job contractor does not qualify to participate in the program. The contractor may have many clients, each of whom has a temporary need, but the contractor’s need for the employees it seeks to fulfill its contracts is ongoing and therefore of a *potentially permanent* duration.

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<sup>19</sup> Proposed 20 CFR §655.6.

<sup>20</sup> 76 Fed. Reg. at 15138.

<sup>21</sup> 8 CFR §214.2(h)(6)(ii)(B).

<sup>22</sup> 18 I&N Dec. 366, 367 (Comm. 1982).

<sup>23</sup> 73 Fed. Reg. at 78026.

Accordingly, the contractor's need would not be temporary.<sup>24</sup> (emphasis added).

Though DOL states that this conclusion is consistent with *Matter of Artee, supra*, we disagree. *Matter of Artee*, which involved a temporary help service, supports the concept that even job contractors can prove a temporary need. The Commissioner stated:

If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hires workers for temporary positions.<sup>25</sup>

If a job contractor does not have a year-round need, and routinely does not employ workers in a particular occupation for a specific segment of the year, its needs are seasonal. For example, a job contractor employing landscapers in the metropolitan St. Louis area only will not have a permanent need for mowers because the grass does not grow in the winter. DOL proposes to exclude an entire class of employers from the H-2B program based on the proposition that the needs of *all* job contractors are “ongoing” and “potentially permanent.” The standard for rejection from the H-2B program should be “definitively permanent,” not “potentially permanent.” Job contractors should be afforded the same opportunity as all other employers to demonstrate temporary need. “Potentially permanent” is an unusable standard—in the same vein as “potentially guilty” or “potentially dead.”

Further, if the St. Louis landscape contractor was precluded from the H-2B program, would it be able to prove that its seasonal mowers are eligible for permanent labor certification? The answer is, most likely not. In *Matter of Vito Volpe*,<sup>26</sup> the Board adopted a definition of “permanent full-time work” that excluded employment that is seasonal or of shorter duration, regardless of whether it recurs annually.<sup>27</sup> The Board opined that if an employer consistently needs the duties to be performed on a full-time permanent basis and that need is *ongoing*, the position is permanent. However, if the occupation is one where employers have seasonal layoffs each year, the position is temporary. In short, employers, including job contractors, either have a permanent need or a temporary need for services or labor. A job cannot be neither temporary, nor permanent, or both temporary and permanent at the same time.

In further support of its position that job contractors cannot demonstrate temporary need, DOL cites *Matter of Caballero Contracting & Consulting, LLC*<sup>28</sup> and *Matter of Cajun Constructors, Inc.*<sup>29</sup> However, these cases are fact-specific and should not be read to

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<sup>24</sup> 76 Fed. Reg. at 15137.

<sup>25</sup> 18 I&N Dec. at 367–68.

<sup>26</sup> 91-INA-300 (BALCA 1994).

<sup>27</sup> See also *Matter of Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004).

<sup>28</sup> 2009-TLN-00015 (Apr. 9, 2009).

<sup>29</sup> 2009-TLN-00096 (Oct. 9, 2009).

support an outright bar for all job contractors. In *Caballero*, the Chief Administrative Law Judge (ALJ) noted that Caballero had initially asserted a peak-load need, and then later advocated for a seasonal need based upon the Louisiana hurricane season and its inconsistent weather patterns. The Chief ALJ concurred with the CO that inconsistent weather patterns do not constitute the required predictability for seasonal need, and noted that Caballero also supplied workers to other employers on a year-round basis. These facts are clearly distinguishable from the St. Louis landscaping contractor that has absolutely no need for mowers during the winter season. The contractor's needs are not based solely upon its clients' needs, but rather its own needs as determined by the most basic tenant of seasonal need—predictable weather. If a landscaping contractor does not employ mowers during the winter, how can there possibly be an ongoing need?

In *Cajun Constructors*, Cajun admitted that it had a year round need for construction laborers and a peak-load need for laborers to complete its portion of an Army Corps of Engineers contract. The CO issued an RFI and Cajun then advocated for a one time occurrence. Upholding the CO's determination that it could not establish one-time need, the Chief ALJ stated "...it is the nature of its business [construction services] to work on a project to completion and then move to another..." However, unlike a construction contractor, the St. Louis landscaping contractor's ability to move to another project is curtailed by the off-season and winter months when grass does not grow. The nature of its business is dictated by seasonal changes, not on the availability of year-round projects.

In further justification of the job contractor bar, DOL states that it has already stopped accepting labor certifications submitted by contractors "as a result of the order in *CATA v. Solis*..."<sup>30</sup> In *CATA*, the court interpreted 8 CFR §214.2(h) to require every employer client of a job contractor to file a visa petition and underlying labor certification. The court concluded, therefore, that to allow only the job contractor to file a labor certification would be contrary to DHS regulations. However, DOL acknowledges that the "*CATA* decision *did not impose an outright prohibition* on the participation of job contractors in the H-2B program..."<sup>31</sup> Moreover, although 20 CFR §655.20(e) only allows for one labor certification to be filed for each job opportunity, DOL admits that "under the current regulations, a job contractor and its employer-client(s) could very well file a single application as joint employers and thus be in compliance with both the *CATA* decision ... and §655.20(e)." <sup>32</sup> If the court left open the possibility that DOL may accept a labor certification filed by a job contractor, and *Matter of Artee* supports the proposition that job contractors can prove temporary need, how does the elimination of job contractor participation "effectively achieve the same result" as the court's ruling?<sup>33</sup> Rather than ban job contractors from the program outright, DOL should instead set forth procedures for job contractors and their clients to effectively file one labor certification, while properly completing recruitment and the ETA 9142.

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<sup>30</sup> 76 Fed. Reg. at 15137.

<sup>31</sup> *Id.* at n.4 (emphasis added).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 15137.

Less than 30 months have elapsed since DOL clearly acknowledged the legitimate role of job contractors in the H-2B program with the promulgation of 20 CFR §655.22(k). DOL bases its decision to bar job contractors from the program on a flawed district court order that did not impose an outright prohibition on contractors, two BALCA decisions where the petitioners clearly did not have a temporary need, and a blanket decree that all job contractors should be treated the same because the employment is “potentially permanent.” The reality is that not all job contractors have a permanent need. DOL’s proposed rule is fundamentally unfair in that it deprives job contractors of procedural due process and a neutral judge to review their applications on the merits. While we are not naïve to the fact that program violators exist, we encourage DOL to utilize the existing enforcement mechanisms to crack down on unscrupulous employers rather than bar an entire class of employers from the program.

### **Registration of H-2B Employers—20 CFR §655.11**

DOL seeks to bifurcate the current application process into (1) a registration phase for the employer to substantiate its need for temporary workers; and (2) an application phase to test the labor market.<sup>34</sup> DOL states that this will streamline the labor certification process by enabling it to “prevent employers without a temporary need from even filing the application.”<sup>35</sup> If approved, registrations may be issued for up to three years for the designated occupation in the area of intended employment. If registration is denied, the employer may request administrative review within 10 days of the denial.

The implementation of a registration phase will have the effect of usurping the role of USCIS as primary adjudicator of H-2B matters. Although the INA requires USCIS to consult with DOL in adjudicating H-2A petitions, there is no similar statutory requirement that USCIS consult with DOL on H-2B petitions.<sup>36</sup> Instead, DOL’s role in the H-2B process has evolved over the years as a result of legacy INS’s and USCIS’s recognition of DOL’s expertise in labor market matters. This expertise does not extend to determining whether the employer’s need is temporary. By preventing employers that DOL has determined do not have a temporary need from filing a labor certification, USCIS is effectively removed from the process. This departure from previous practice gives DOL a final adjudicatory role that Congress did not intend. Moreover, by forcing employers to engage in the registration process and appeal if denied, DOL has added an additional layer of bureaucracy to the H-2B process which will cause unnecessary delay.

The proposed rule would also require employers that file an H-2B registration to retain all records for a period of three years even if the registration is denied or withdrawn. DOL states that these records would be “potentially invaluable” to DOL in evaluating future registrations filed by the employer.<sup>37</sup> However, there are many legitimate business reasons as to why an employer’s situation could change following denial or withdrawal of a registration. To hold employers accountable for past unsuccessful applications to

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<sup>34</sup> Proposed 20 CFR §655.11.

<sup>35</sup> 76 Fed. Reg. at 15133–34.

<sup>36</sup> INA §214(c)(1).

<sup>37</sup> 76 Fed. Reg. at 15139.

determine whether they now have a temporary need is unnecessary and will lead to delay. Further, reliance on a prior denial, where the employer is simply trying to correct an error from the previous registration is unfair and overreaching.

### **Use of Registration of H-2B Employers—20 CFR §655.12**

DOL proposes that upon approval of a registration, the employer will be permitted to file an application for temporary labor certification for the duration of the registration's validity period (up to three years), unless there is a significant change during that time.<sup>38</sup> While we applaud DOL's efforts to permit the validity of a registration for up to three years, we again emphasize our concern that DOL is stripping USCIS of its role as the final adjudicator of H-2B matters.

### **Assurances and Obligations of H-2B Employers—20 CFR §655.20**

#### ***Three-Fourths Guarantee***

Similar to the H-2A program, the proposed rule would require employers to guarantee the worker a "total number of work hours equal to at least three-fourths of the workdays in each 4-week period beginning with the first workday after the arrival of the worker at the place of employment, or the advertised first date of need, whichever is later ...."<sup>39</sup> The CO may terminate the employer's obligations under this section if "the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God...."<sup>40</sup> However, the employer is still liable for the three-fourths guarantee until the date the CO terminates the job order. DOL states that "[r]ecent experience ... indicates that [H-2B] workers are often provided much less work than that promised in the job order, which has convinced the Department that this protection is necessary."<sup>41</sup> However, the proposed rule fails to provide any objective data or analysis to support this contention. Moreover, we repeat our objection to the incorporation of H-2A rules into the H-2B program due to the lack of DOL authority to do so.

This rule would require employers to pay wages to workers, regardless of whether they actually engage in work. Although the rule sets forth exceptions for "fire, weather, or other Act of God," there is no exception for man-made catastrophic events, such as an oil spill or controlled flooding. Like Acts of God, such events are beyond the employer's control. Lost revenues from an unforeseen disaster is enough, in many instances, to bankrupt an employer. To hold an H-2B employer responsible for paying its employees where business ceases due to an event beyond its control will economically cripple the employer and lead to layoffs of U.S. workers. At the very least, the three-fourths guarantee, if implemented, should only cover the length of the contract, similar to the H-2A program, rather than the four-week period.

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<sup>38</sup> Proposed 20 CFR §655.12.

<sup>39</sup> Proposed 20 CFR §655.20(f).

<sup>40</sup> Proposed 20 CFR §655.20(g).

<sup>41</sup> 76 Fed. Reg. at 15143.

The proposed rule would also penalize an employer who innocently and mistakenly provides late written notice (or fails to provide notice at all) of abandonment or termination as required under 20 CFR §655.20(y). The three-fourths guarantee should not be applied to an employer's innocent failure to provide written notice, timely or otherwise, of abandonment or termination.<sup>42</sup> It is simply unfair to demand that an employer pay a person who may have worked for only one day or less, three-fourths of the hours offered in a four week period.

### ***Transportation and Subsistence***

The proposed regulations would require employers to reimburse workers, both American and foreign, for travel costs and subsistence to the worksite.<sup>43</sup> The regulation states, “[t]he employer may arrange to pay for the transportation and subsistence directly, advance the reasonable cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker in the first workweek for the reasonable costs incurred by the worker.”<sup>44</sup> However, even with the option of reimbursing the employee during the first week of work, there is still the incentive for individuals to take advantage of employers who are required to pay for trips across the United States. Once reimbursed, a dishonest person could disappear leaving the employer without a worker to fill the position after the first week. Employers have some level of protection when it comes to H-2B workers because they are only authorized to work for a specific employer. U.S. workers are not so constrained and could easily take advantage of an unsuspecting employer. A better alternative would be to allow employers to reimburse employees over the entire period of temporary need or after 50% of the contract has been completed, as is required for H-2A employers.

### **Employer-Conducted Recruitment—20 CFR §655.40**

Under proposed 20 CFR §655.40(c), employers must continue to accept referrals of U.S. job applicants “until the later of the date the last H-2B worker departs for the job opportunity or 3 days before the date of need.” DOL states, “[t]his timeframe increases the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer.”<sup>45</sup>

The three-day requirement raises a number of problems. First, a three-day turn around time for employers to arrange travel and housing for H-2B workers is insufficient. Second, if an employer accepts a last-minute U.S. worker referred by the SWA, and that worker either fails to show up or quits within the first week, the employer may have lost the opportunity to employ the H-2B worker and will incur significant delays and financial hardships if it is required to begin the H-2B process anew. Employers must be able to reasonably rely on the availability of workers in order to plan future operations. Moreover, the three-day rule provides little protection for the H-2B worker who has

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<sup>42</sup> We note that DHS regulations contain no punishment provision for failure to provide or late provision of written notice that the H-2B worker fails to report for work, absconds, or is terminated. *See* 8 CFR §214.2(h)(6)(i)(F).

<sup>43</sup> Proposed 20 CFR §655.20(j).

<sup>44</sup> *Id.*

<sup>45</sup> 76 Fed. Reg. at 15149.

relied on the promise of a job, and may have already obtained a visa from the U.S. consulate. Similar to the U.S. employer, the H-2B worker would be forced to start the process over again with another employer if he or she is able to find one. As an alternative to the three-day rule, DOL could mandate that the job order remain open for 30 days (up from the current requirement of 10 days), which would satisfy the Department's desire to ensure that unemployed U.S. workers receive adequate notice of H-2B job opportunities while not placing an unnecessary burden on H-2B employers.

### **Newspaper Advertisements—20 CFR §655.42**

In its attempt to justify the requirement that the employer place two advertisements (one on a Sunday) in a newspaper of general circulation in the area of intended employment,<sup>46</sup> DOL states that “[n]ewspapers remain an important means to recruit U.S. workers.”<sup>47</sup> In addition to the standard ad content, the proposed rule would require all advertisements to also include: a statement referring to the three-fourths guarantee, a statement that inbound and outbound transportation and subsistence costs will be provided, a statement that tools, supplies, and equipment will be provided, and a statement that daily transportation will be provided (if applicable).<sup>48</sup>

We submit that DOL has once again failed to take the opportunity to move beyond newspaper advertisements as a method for recruiting American workers. Newspaper circulation has been in decline for years, as is evidenced by the overall decline in the number of print newspapers currently on the market. The decrease in newspaper readership, coupled with increased access to Internet job banks has changed the way workers look for jobs. Requiring lengthier (and more costly) ads will not result in more applicants, just more funds expended by employers. DOL should focus on new electronic avenues of job notification instead of requiring employers to run expensive advertisements.

### **Additional Employer-Conducted Recruitment—20 CFR §655.46**

The proposed rule provides that where the CO determines that recruitment conducted in accordance with 20 CFR §§655.42–45 is insufficient to attract qualified U.S. workers, the CO may require the employer to engage in additional recruitment activities.<sup>49</sup> DOL states that its intention in requiring additional recruitment, including in areas of substantial unemployment, is predicated on the belief that more recruitment will result in more opportunities for U.S. workers. However, DOL fails to articulate a clear standard for determining when additional recruitment is necessary, or the specific indicators that DOL will consider when determining whether additional recruitment is required.

The proposed regulation states that additional recruitment “may include, but will not be limited to, posting on the employer’s web site or another web site, contact with community-based organizations, contact with State One-Stop Career Centers, and other

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<sup>46</sup> Proposed 20 CFR §655.42.

<sup>47</sup> 76 Fed. Reg. at 15150.

<sup>48</sup> Proposed 20 CFR §655.41.

<sup>49</sup> Proposed 20 CFR §655.46.

print advertising....”<sup>50</sup> DOL claims that U.S. unemployment rates indicate that Americans would fill job vacancies if they had better notice of the existence of open jobs. However, each year, employers run job orders and place newspaper and online advertisements for H-2B temporary jobs and receive very few U.S. applicants. Requiring more of the same recruitment methods will not produce more U.S. applicants. In addition, DOL should clarify the meaning of “contact” in terms of recruiting with community-based organizations and state career centers.

### **Debarment—20 CFR §655.73**

AILA strongly opposes the extension of debarment authority to WHD as inefficient, duplicative, and unnecessary. Further, where there is no evidence of fraud or misrepresentation, debarment of an employer for a single act, rather than a pattern or practice of repeat violations, is inherently unfair and violates due process.<sup>51</sup> In addition, increasing the maximum debarment period to five years based on what could be a single innocent act will result in the imposition of a disproportionate and overly harsh penalty unrelated to an alleged program violation. Lastly, concurrent debarment authority does not “streamline” the H-2B program as stated by DOL.<sup>52</sup> Indeed, concurrent debarment authority is likely to result in duplicative and inconsistent actions against an employer who may have inadvertently violated the H-2B program and in which a more appropriate remedy is available (i.e. back pay for a minor wage violation).

### **Conclusion**

In sum, the significant and unrelenting regulatory changes that have been forced upon the H-2B program over the past several years have created tremendous uncertainty and confusion for the businesses that rely on the program. This program has proven to be extremely valuable to employers who try, year after year, to hire U.S. workers to fill temporary positions without success. We appreciate the opportunity to comment on this NPRM and look forward to a continuing dialogue with the Department on these important matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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<sup>50</sup> Proposed 20 CFR §655.46(b).

<sup>51</sup> 76 Fed. Reg. at 15158.

<sup>52</sup> *Id.*