



AILA National Office
918 F Street, NW
Washington, DC 20004

Tel: 202.216.2400
Fax: 202.783.7853

www.aila.org

Jeanne A. Butterfield
Executive Director

Susan D. Quarles
Deputy Director, Finance & Administration

Crystal Williams
Deputy Director, Programs

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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-AB55
Comment to Proposed Rule “Temporary Agricultural
Employment of H-2A Aliens in the United States; Modernizing the
Labor Certification Process and Enforcement” 73 Fed. Reg. 8537
(February 13, 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 efforts of the Departments of Homeland Security and Labor to attempt to address agricultural worker policy in the face of the vacuum left by Congress’ failure to act. In the absence of statutory authority, the ability to provide true remedies is limited, but the effort to at least try to improve the process is laudable. We do, however, have some concerns with some important specifics, as discussed below.

Attestation Approach

The Department of Labor states that it is changing its H-2A regulations to make the program more attractive to farmers. According to DOL, the H-2A program serves 7,700 agricultural employers and currently fills 75,000 jobs out of the 1,205,000 wage earning farm positions¹. Again, according to DOL more than half of these 1,205,000 positions are filled by persons illegally present in the United States. The non-utility of the H-2A program is obvious. “This situation clearly demonstrates that the vast majority of agricultural employers in the U.S. find the H-2A program so plagued with problems that they avoid using it altogether.” 73 F.R. 8542 (February 13, 2008)

As a result, DOL wishes to make the program more user friendly. “The Department seeks to remedy this problem and render the H-2A program functional so that if and when agricultural employers are unable to locate sufficient numbers of U.S. workers, they will turn to the program to provide them with a fully legal workforce.” 73 F.R. 8542

DOL purports to make the H-2A program more accessible by substituting an attestation program for what currently it defines as a program of supervised recruitment. In doing so, it relies heavily on post-filing audits to monitor the attestations of the farm employers; it raises penalties for attestation or other compliance errors or failures; and it requires the user to keep records for five years. The result is a proposal that would borrow the worst of all worlds, rather than the best.

Unlike the PERM program, where attestation removes the SWA from all recruitment activities, the H-2A attestation program would require the agricultural employer to direct all job seekers to the SWA. The SWA in turn would vet the job seeker and then send that person to the employer. Thus, the SWA would be involved in the farmer’s recruitment program from the time the farmer places the job order with the SWA (120 to 75 days prior to the date of need) through the end of the recruitment period (three days before the date of need or the date the H-2A workers leave for the United States, whichever is later). This is a longer time period than found in the H-2B program, as the SWA’s recruitment oversight in the latter ends when it forwards the file to the DOL for review and certification. Because the SWA would be used to vet the applicants for agricultural positions, the proposed H-2A attestation program retains the primary feature of supervised recruitment: the SWA would receive all the applications for the position, review them, and then pass them on to the employer.

Without the elimination of the SWA from the recruitment process, the use of an H-2A attestation form is not a meaningful improvement over the current process of joint filings with the DOL and SWA of the application for labor certification.

¹ The Department of Labor and the Department of Homeland Security provide statistics on farm workers that contain noteworthy differences. DOL claims there were 1,344,000 wage earning workers on the Nation’s farms and ranches in 2006. 73 F.R. 8540. DHS, on the other hand, says there were 751,900 farm workers in 2006. 73 F.R. 8239 (February 13, 2008) Without some explanation, the difference in numbers is striking. We have used DOL figures in this response as DOL is the federal agency tasked with documenting the United States labor force and thus its figures should be the more reliable.

This modest gain is more than offset by DOL's insistence on audits and on significant penalties for non-compliance. About its audits, DOL writes:

The introduction of audits serves as both a quality control measure and a means of evaluating applications. Audits would be conducted for quality control and fraud detection purposes on adjudicated applications as well as randomly-selected applications being processed. 73 F.R. 8543

...

The Department will take firm action when it discovers non-compliance by employers. The Department is invoking all available statutory authorities to bolster its enforcement capabilities. If, at the conclusion of an audit, there is evidence of non-compliance with required attestations and/or other program requirements, or if an employer refuses to participate in the audit process, the proposed rule would enable the CO to order a variety of remedies...If the audit reveals that employer's documentation is incomplete, is inconsistent with the employer's statements and/or attestations contained in the application, or if the application and supporting documentation is otherwise deficient in some material respect, the employer may, in addition to debarment, also experience revocation of an approved H-2A certification, as described below. The proposed rule also adds a provision explaining that the Department of Justice's OSC will refer to the CO pertinent information gained in the course of OSC's investigations. Likewise, the proposed rule would require the Department and Department-funded entities to share pertinent information with OSC. 73 F.R. 8548

It is clear from the foregoing that an agricultural employer that chooses to use the revised H-2A program would expose itself to a new and aggressive regime of audits and penalties.

Currently, most farmers who use foreign farm labor have chosen to run the risk of civil penalties and criminal sanctions over participating in an H-2A program that is dysfunctional:

Facing a shortage of available U.S. workers, agricultural employers have been left with the untenable choice of either (a) attempting to legally employ temporary foreign workers through an H-2A program that it widely decried as dysfunctional, but risk losing crops if inefficient program administration results in the workers arriving too late for harvest; (b) using illegal workers, incurring the risk that the workers, and consequently the crops, will be lost to immigration enforcement; or (c) not hiring any workers at all—in effect ending U.S. farming operations. 73 F.R. 8541

Only 6% of the 1,205,000 wage income farm workers in the labor force come through the H-2A program while 50-70% of the 1,205,000 workers are foreign laborers illegally

present in the United States. Clearly, the tens of thousands of farmers who employ those illegally present have chosen to operate outside the law². Why these lawless farmers would now opt into a revised H-2A system with enhanced audits by non-farm federal agents is hard to fathom. Moreover, the requirement that they keep their records for five years exposes them to audits and investigations for at least five years after they first used H-2A workers. Finally, the dramatic penalties for various violations of the regulations increases significantly the risk factor for high-cost error in navigating the complexities of the H-2A program. Moving from a supervised recruitment system to an attestation system that retains supervised recruitment is not an inducement sufficient to turn the tide on widespread lawlessness in the foreign farm labor program.

Accordingly, if the DOL wants to pursue the attestation system, it needs to eliminate the SWA in terms of receiving and vetting applications for employment. Instead, the employer can recruit for the positions, interview the applicants, and make informed decisions on hires. The employer, of course, can be required to place a job order in the interstate and intrastate system, as well as recruit through newspapers and other means, and can then be required to retain job applications for a specified period in the event of an audit. The SWA, however, should not be involved in the application process if DOL chooses to replace the supervised recruitment system currently in place with an attestation system.

Moreover, DOL needs to lower its voice and rhetoric on audits and compliance and to rethink its penalty increases if it reasonably expects America's beleaguered farmers to use a revised H-2A program and expose themselves to additional federal oversight of their activities. AILA wants H-2 visa programs to work as intended and to be utilized. The American farmers' wholesale disregard of the current H-2A program will not be corrected by placing those who choose to participate at higher risk of punishment than those that hire illegally.

Adverse Effect Wage Rate

The AgJobs [Agricultural Job Opportunities, Benefits and Security Act of 2007, H.R. 371, S. 340] legislation would have frozen the adverse effect wage rate for three years and allowed for a formula adjustment in the fourth and subsequent years. It also would have established a Commission on Wage Standards to determine whether the employment of unauthorized aliens in the United States workforce has depressed the wages of U.S. farm workers, whether an adverse effect wage rate remains necessary for the protection of the wages of U.S. workers, and whether alternative wage standards are suitable to protect such wages. AgJobs reflected compromise between interested parties over the contours of the U.S. foreign farm labor program. With this compromise, the parties agreed there should be no change to the adverse effect wage rate (and therefore wages to foreign farm laborers) without a serious study as to the continuing viability of

² The Department of Homeland Security states there were 2,089,790 farms in the United States in 2006 and that 0.3% of all U.S. farmers use the H-2A program. 73 F.R. 8240 Thus, the numbers of farms (and farm owner/operators) employing the 600-800,000 foreign workers in the United States illegally must be in the tens of thousands.

the AEWR and to alternate devices for protecting wages of U.S. workers.

AgJobs is not law. However, the Department of Labor recognizes that AgJobs builds upon years of discussion and ideas from growers, farm worker and advocates, including several Latino groups. 73 F.R. 8552 Groups that have supported AgJobs included the United Farm Workers, National Council of LaRaza, AFL-CIO, American Farm Bureau Federation, Western Growers Association, and U.S. Chamber of Commerce, among 850 others. 73 F.R. 8552 AILA also supports AgJobs.

AILA carries no brief on the wage issue itself. It leaves that discussion to the growers, workers, and the government. However, AILA wants the H-2A program to work and to be used. Accordingly, it recommends that DOL adopt the wage formula described in AgJobs, including the three-year freeze followed by formula changes. In addition, the Department of Labor should undertake its own study of the impact of the undocumented foreign farm laborer on agricultural wages.

Housing

DOL would require employers to request a housing inspection from the SWA at least 60 days in advance of need. If the SWA does not complete the inspection earlier than 30 days in advance of need, DOL would conditionally certify the labor application and the employer may use the housing for the foreign workers. If the SWA conducts the inspection following the conditional determination and finds deficiencies, the SWA would be required notify DOL forthwith. DOL could then revoke the temporary labor certification and refer the matter to the Employment Standards Administration for investigation.

An employer who identifies housing and who secures a conditional temporary labor certification on the basis of such housing should not have its certification revoked when the tardy SWA finally does the inspection. The proposed regulations place no requirements whatsoever on the SWA for completion of the inspection within a stated period of time. Thus, the employer could have foreign workers in the housing and in the fields for several months before the SWA finally did its job. To revoke the conditional temporary labor certification on account of a finding of deficiencies at a late date is not fair to the employer or to the employees whose jobs would thereby be lost.

DOL says that it is borrowing the conditional certification provision from the Migrant and Seasonal Agricultural Worker Protection Act. 73 F.R. 8554 That Act does not penalize the employer, the farm labor contractor, or the employee for the inability of the State to make a timely housing inspection. It provides in relevant part: “[I]f a request for the inspection of a facility or real property is made to the appropriate State or local agency at least forty-five days prior to the date on which it is occupied by migrant agricultural workers and such agency has not conducted an inspection by such date, the facility or property may be so occupied.” 29 U.S.C. 1823 There are no sanctions for housing belatedly found to be deficient.

AILA urges that the SWA be required to complete its housing inspection within 30 days of the request. In the absence of a completed inspection that was timely requested, DOL should issue its temporary labor certification and the issuance should not be conditional. The burden for timely compliance with the housing request should rest with the SWA, where it belongs, and not with the employer or, ultimately, the worker whose employment would be terminated.

Payment of Recruiters, Agents and Attorneys

AILA supports the prohibition on foreign nationals paying recruiters' fees. Given the extensive potential for abuse, which has unfortunately played itself out in reality, we do not believe the regulation goes far enough to prevent abuses. To limit the abuses, AILA urges that the definition of "Agent" be changed.

Much of the existing abuse and potential abuse lies in the lack of definition of who can be a bona fide agent. We suggest that the Department of Labor adopt the long established guidelines set in 8 CFR 292.2. 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. In adopting this standard, the Department of Labor could create more accountability for ethical behavior and abuses, as attorneys and accredited representatives can be held to task. In addition, it would improve the quality level of applications, which is in everyone's interest.

Significant abuse has taken place and will continue to take place unless there is a reasonable system of enforcement against unscrupulous recruiters who charge fees, frequently exorbitant, to foreign nationals. Visas can be sold on the streets of many cities of feeder countries for the H-2 visas. We suggest that enforceability can only be established if the use of recruiters be accounted for in the application and limited to recruiting organizations which maintain an office in the U.S. and are duly licensed to do business in the U.S. according to Federal and State laws.

In contrast to recruiters and agents, there is effective recourse with respect to attorneys who engage in abusive practices, through state bar disciplinary programs. At the same time, workers have significant interests that can and should be protected through the retention of counsel. Indeed, the role of counsel can, and frequently does, serve to curtail abuses because the worker is equipped to fully pursue his rights. AILA reiterates the comments it submitted in connection with the PERM program with respect to the prohibition on payment of attorneys' fees by individuals. Every individual, whether foreign-born or a U.S. citizen, has a right to counsel in appearing before the government, and it is not for DOL or any other agency to attempt to limit that right in any manner.

Fee Increase

The proposed fee increase is more than double the current fees under 655.106(b)(20)(I). Current fees are \$100 per employer/employer member plus \$10 per worker but the total amount due is not to exceed \$1,000 per employer.

The proposed regulation would double the certification fee to \$200 which appears reasonable but the fee per worker fee would be raised tenfold to \$100 per worker. In addition, it appears that a cap on fees per employer has not been included. Thus, an employer who has filed a labor certification for 100 employees would pay a fee of \$10,200. The current fee for this H-2A labor certification is \$1,000. This sum appears to have no relationship to the cost of workers per application. The main costs appear to be for the certification processing, including placement in the state job service, and are the same whether the employer requests one or one hundred workers. The cost per worker on one application is negligible at best.

Furthermore, it does not appear that a careful cost study analysis was made regarding current costs or the need to include in the fees, reasonable future costs for technical advancements to and maintenance of the program. We suggest that an appropriate study be conducted.

Debarment

While AILA generally supports the DOL's efforts to modernize and enhance the statutory process relating to the debarment of employers who substantially violate the terms of a temporary labor certification, we believe that the proposed rule goes too far. Our specific concerns are with the proposed § 655.118(b)(1)(ii) ("*Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons*") and (iii) ("*Reflect a willful failure to comply with the employer's obligations to recruit domestic workers as set forth in this subpart*").

While employers who abuse the system certainly need to be punished, we are concerned that these particular violations, as proposed, are too harsh and subjective, unless they also include requiring a finding that the employer has engaged in a pattern or practice of the prohibited conduct. By including a "pattern or practice" element, similar to that which is found in the current rule (20 C.F.R. § 655.110(g)(1)(i)(A)(2)), unscrupulous employers and their agents who abuse the system could still be punished by the DOL, but honest and conscientious employers, many of whom are less sophisticated in their business practices, would be spared debarment for their innocent oversights and mistakes made in the recruitment process.

Conclusion

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

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION