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November 12, 2010

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

Submitted via www.regulations.gov

Re: **Regulatory Information Number (RIN) 1205–AB61 Comment to Proposed Rule "Wage Methodology for the Temporary Non- Agricultural Employment H-2B Program, 75 Fed. Reg. 61578 (Oct. 5, 2010)**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) hereby submits the following comments to the proposed rule, "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program." 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 and is affiliated with the American Bar Association. 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 proposed rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

AILA appreciates the Department of Labor's (DOL) desire to improve the process by which prevailing wages for the H-2B program are determined. However, we are concerned that the policy choices made by DOL in adopting the proposed rule resulted from inadequate time to properly research and analyze the issues, flawed methodologies and assumptions, and an incomplete or inaccurate economic analysis. As a result, the proposed rule has the potential to negatively affect U.S. employers who use temporary foreign workers, as well as U.S. workers

employed in similar or related occupations. AILA's comments are designed to improve this proposed rule to better serve the H-2B program.

The Impetus for and Timing of the NPRM

This notice of proposed rulemaking (NPRM) follows the district court decision, *Comité de Apoyo a Los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), where the court found that DOL failed to consider comments concerning the choice of appropriate data sets used in the prevailing wage process when it adopted the current rule. The court found that this was improper under the Administrative Procedure Act (APA), which requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments" and to engage in "consideration of the relevant matter presented." *See* 5 USC §533(c).

Although the court faulted DOL's rulemaking process in adopting the same prevailing wage scheme for the H-2B program as used for the H-1B and PERM programs, the court did not require, let alone suggest, that DOL alter the existing prevailing wage process. The court only required DOL to ensure that it followed the NPRM procedure by soliciting, considering, and responding to public comments pursuant to the procedures outlined under the APA. In basing this radical revision of the H-2B prevailing wage process on the court's order, DOL is overreaching in its NPRM.

AILA also notes that this issue is far too complex to be resolved in the time frame mandated by the court. The DOL itself has stated that it had inadequate time to consider alternative wage sources.[1] This is evidenced by the numerous times DOL uses the words "may" or "could" in its determinations and in calculating the economic impact of the rule change. It is imprudent to hastily push through a substantial change to the current system that is based on inadequate research and analysis and which may have far-reaching consequences for U.S. workers and employers. Without more concrete data, we ask that no change be adopted at this time.

AILA notes that the current H-2B prevailing wage system is flexible enough to protect U.S. workers and to ensure that employers have access to the labor that they need in times of fluctuating demand. The formulation proposed by DOL will result in artificially inflated H-2B wages, which is contrary to the national interest because it creates a disincentive for employers to create new jobs by making it more costly to employ either U.S. workers or H-2B workers. By allowing a range of wages, the current system allows H-2B wages to reflect current market conditions. In poor economic times, wages may naturally stagnate or decrease slightly for certain occupations while in periods of full

[1] *See* 75 Fed. Reg. 61581 ("The Department considered alternate data sources but given the time constraints imposed by the court's order, we were unable to fully analyze these alternatives. We welcome comments from the public on alternatives for wage sources that provide adequate protections to U.S. and H-2B workers").

employment, wages may naturally increase. A multi-tiered and flexible system allows wages to reflect natural market fluctuations and allows for maximum job creation by employers. This system should not be abandoned and replaced by a new system until both DOL and stakeholders have thoroughly analyzed the current system, the proposed system, and any other potential prevailing wage methodologies that could be adopted.

DOL Proposed Rule for H-2B Prevailing Wage Determinations

DOL proposes to eliminate the current H-2B prevailing wage system in favor of a system that sets the prevailing wage at the highest of the wages dictated by (1) a collective bargaining agreement (CBA); (2) the wage rate under the Davis-Bacon Act (DBA)[2] or the McNamara-O'Hara Service Contract Act (SCA);[3] or (3) the arithmetic mean wage rate established by the Occupational Employment Statistics (OES) survey for the given occupation in the area of intended employment. By using the arithmetic mean of the OES data, DOL would change the current OES system from one that provides a wage for each of four different skill levels, to a system that provides only a single wage for a given occupational classification, regardless of the skills or experience required by the position. As such, it appears that DOL's intent is to increase wages for H-2B workers and similarly situated U.S. workers, even though this purpose is not necessarily consistent with DOL's role in the H-2B program, which is to ensure that employment of foreign workers under the H-2B program does not adversely affect the wages and working conditions of U.S. workers.

DOL also proposes eliminating the use of private wage surveys. Although DOL states that the "cost of reviewing [private wage surveys] outweighs their utility," it also admits that "private surveys can provide useful information." [4] In fact, private surveys often provide reliable prevailing wages for certain positions not adequately covered by the OES such as crab pickers in the seafood industry. DOL should not eliminate this valuable source of wage data.

DOL's Methodology, Assumptions, and Analysis

AILA is concerned that the prevailing wage determination rule that DOL has proposed is based on flawed methodology and unsupported assumptions that do not reflect current economic realities. As an initial matter, DOL's analysis is based primarily on 2009 H-2B filings only.[5] It is worth noting that 2009 is the only year in recent history that the H-2B cap was not reached. Because of this and other economic factors, 2009 was not a typical

[2] 40 USC §276a, *et seq.*
[3] 41 USC §351, *et seq.*
[4] 75 Fed. Reg. at 61581.
[5] *See* 75 Fed. Reg. at 61582. Later, however, DOL appears to extrapolate based on the economic impact to employers over a ten year period. "When summarizing the benefits or costs of specific provisions of this proposed rule, we present the 10-year averages to reflect the typical annual effect." *Id.*

year and therefore may not provide a reliable sample. Data for multiple years was available to DOL, but DOL only used 2009 in its analysis. This makes DOL's predictions potentially flawed.

DOL also presumes that the current H-2B prevailing wage system has resulted in depressed wages for similarly employed U.S. workers. This assumption is unsupported and questionable. DOL assumes that the OES arithmetic mean is likely to be the highest wage in most cases. However, as DOL acknowledges, current H-2B wages paid by employers are actually higher than the proposed OES arithmetic mean in 4.1% of cases.[6] Instead of factoring this into its calculations, DOL considers these to be cases in which there is no difference between the H-2B wage and OES arithmetic mean. Aside from skewing DOL's calculations to favor its chosen methodology, this indicates that contrary to DOL's assertions, wages may not be depressed by the H-2B program. DOL has not provided any evidence of depressed wages or evidence that wages need to increase in order to correct an existing or projected shortfall. In light of the substantial impact the regulation will have on employers (and consequently, on job opportunities for U.S. workers), DOL is required to provide more than mere conjecture or *ipse dixit* on the matter.

As stated, DOL proposes an H-2B prevailing wage system that sets the wage at the highest of the wages dictated by a CBA, the DBA or SCA, or the OES arithmetic mean. This proposed change eliminates the use of the current four-tiered wage level system in the OES survey. Although DOL provides several policy reasons for eliminating the four-tiered OES system in favor of the arithmetic mean, DOL does not appear to have compared the OES arithmetic mean to the DBA and SCA wages for any given occupation. Thus, while DOL states that its calculations under DBA and SCA are highly accurate, it does not compare them to the OES arithmetic mean to see if the arithmetic mean is also accurate and thus a valid metric of local or regional wages. In this regard, DOL's methodology is entirely arbitrary.

DOL acknowledges that the proposed change in the method of determining H-2B prevailing wages will result in a $4.38 increase in the weighted average hourly wage for H-2B workers and similarly employed U.S. workers.[7] DOL estimates the following hourly wage increases in the top five industries with the largest number of H-2B workers:

- Landscaping services: $3.60
- Janitorial Services: $3.72
- Food Services and Drinking Places: $1.29
- Amusement, Gambling, and Recreation: $1.37
- Construction: $10.61"[8]

[6] *Id*. at n.6.
[7] *See* 75 Fed. Reg. at 61582 and n.25.
[8] 75 Fed. Reg. at 61586.

DOL then estimates the total cost to the average small entity of increased H-2B wages as a result of the new wage determination method.[9] However, these estimates are based on the assumption that H-2B workers or similarly situated U.S. workers work an average of 7 hours a day, 5 days a week. When the position is temporary and based on a seasonal or peak-load need, a 35 hour work week is simply not a realistic assumption. An employer's need for workers may be based on production requirements or other factors that require additional labor to meet contractual goals or deadlines. If employers are not able to locate enough workers (as is suggested by the fact that H-2B labor certifications substantially exceed the 66,000 annual cap every year), they are likely to make up the shortfall by having their existing workforce work overtime. DOL provides no basis for assuming a 35 hour work week, and this assumption is arbitrary.

The DOL's underlying premise, that employers voluntarily participate in the H-2B program, reveals a misunderstanding of the need for the program. Many employers are forced to participate because they are unable to fill available positions with U.S. workers. For example, in the hospitality industry, where the season exceeds the availability of students (a large part of the pool of U.S. seasonal workers) employers may require up to 20% to 25% H-2B workers because unlike students, they are available to work from May 1 to October 31. Moreover, many U.S. workers who are not in school are not interested in filling temporary positions. For many employers, such as those that do not have a sufficient local workforce to fill seasonal or peak-load positions, the H-2B program is only voluntary in the sense that the alternatives are to close, relocate, outsource production, reduce operations, or increase automation, all of which would result in a net loss of demand for labor, including for U.S. workers. Therefore, the availability and cost of H-2B workers may have collateral effects on labor demand that extend far beyond the numbers contemplated by DOL.

Moreover, DOL assumes that because there are only 66,000 H-2B visas available each fiscal year, the H-2B program represents a very small fraction of the U.S. economy.[10] However, DOL fails to account for companies that employ large numbers of U.S. workers but nevertheless require H-2B workers to supplement their workforce.

Impact of the Proposed Changes on Employers and the Economy

DOL's requirement that the employer pay the highest of the wages dictated by the various methods creates difficulties that DOL appears to have not contemplated. Where an employer is subject to a CBA, paying a wage other than the CBA scale rate may violate the terms of the agreement and have ramifications under contract and labor law. This could result in labor disputes, litigation, and other complications. Only employers that are a party to a CBA should be required to pay the CBA rate, and employers that are a party to a CBA should be required to pay only the CBA rate.

[9] *Id*.
[10] *See* 75 Fed. Reg. at 61583.

The elimination of the four-tiered wage system in favor of using an arithmetic mean will result in artificially inflated prevailing wages to levels that are unreflective of the market. As DOL acknowledges, the proposed change will result in a $4.38 increase in the weighted average hourly wage for H-2B workers and similarly employed U.S. workers. The current federal minimum wage is $7.25 per hour. An increase of $4.38 is more than a 50% increase over the federal minimum wage. DOL does not provide sample wages for different occupations that utilize H-2B workers, but assuming that H-2B positions are typically unskilled, as asserted by DOL, a $4.38 increase is significant. Moreover, DOL's estimate of the hourly wage increases for the top five H-2B industries demonstrates that certain industries, most notably the construction industry, will be severely impacted. A $10.61 per hour increase in the cost of labor in the construction industry is significant enough to cause certain projects to shut down. Considering all of the industries supported by construction, the negative impact the new rule would have on the construction industry alone has potentially far reaching economic consequences.

The likely consequence of raising the prevailing wage to the arithmetic OES mean is that U.S. worker wages will be undermined, due to the increase in labor costs. When you factor in other costs H-2B employers are required to pay such as pre-employment travel costs to avoid FLSA liability, insurance, return transportation, and costs of the H-2B application process, requiring employers to pay an artificially high prevailing wage makes it more likely that the H-2B program will become the province of large national employers that can afford to earn less profit at certain locations where employment of H-2B workers is the only viable solution. Although DOL recognizes that some employers will be forced to abandon the H-2B program, its view is that this only ensures that H-2B visas will be used by employers with the greatest need (and greater capital to pay higher wages). However the loss of an H-2B employer in a locality where it is a significant spoke in the economic wheel (*i.e.*, amusement park in a small community, renowned seasonal resort in a rural community, or a fish processing plant with a peak-load need) may negatively affect the entire symbiotic business community, not just the professionals, supervisors and other permanent U.S. employees of the H-2B employer. DOL acknowledges that an increase in wages may result in a decrease in demand for labor, decrease in employer profits, outsourcing of labor, and a net loss to the economy.[11]

DOL states that because H-2B visas are capped at 66,000 per fiscal year, the economic effect of the proposed changes is expected to be minimal.[12] However, if the H-2B worker population is truly insignificant to the overall economy, inflating the H-2B prevailing wage will not achieve the DOL's purpose of assisting a significant number of U.S. workers. And further, if H-2B workers are such an insignificant portion of the workforce, why not let the market determine wages? And how can it be said that the H-2B program results in overall lower wages paid to U.S. workers?

[11] *See* 75 Fed. Reg. at 61582 and n.25.
[12] *See* 75 Fed. Reg. at 61583.

Retain the Current Four-Tiered Wage Methodology

Until the DOL and stakeholders have had the opportunity to thoroughly analyze the current system as well as the viability of other potential methodologies, DOL should retain the current four-tiered OES wage system. In its misguided attempt to justify elimination of the current system, DOL opines that the "types of jobs found in the H-2B program involve few if any skill differentials necessitating tiered wage levels."[13] However, DOL cannot justify a one-tier arithmetic mean wage that arbitrarily inflates the prevailing wages of entry-level workers and arbitrarily deflates the prevailing wages of highly-experienced workers. A one-size-fits-all approach simply ignores real-world wage differentiation factors such as supervisory duties, responsibilities, seniority/tenure, talent, dependability and efficiency. And many H-2B employers require prior training or experience, particularly for skilled craft positions (*e.g.* ship fitters) in the construction industry or skilled culinary positions (*e.g.* cooks at high-end resorts).

Regulatory history supports the use of a prevailing wage system that takes into consideration various skill levels. Prior to 2005, where neither the DBA nor the SCA applied, the prevailing wage was tied to either "the average rate of wages … to the extent feasible … by adding the wage paid to workers *similarly employed* in the area of intended employment and dividing the total by the number of such workers …" or the wage rate included in the applicable collective bargaining agreement.[14]

Where no other workers were employed by employers other than the petitioner in the area of intended employment, "similarly employed" was defined as "(1) [h]aving jobs requiring a *substantially similar level of skills within the area of intended employment*; or (2) [i]f there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment."[15] Therefore, determining who was similarly employed necessarily required, at least in cases where there were no workers other than those employed by the petitioner, an analysis of the skill/experience levels within certain occupations. In this regard, DOL theoretically employed a multi-tiered wage system based upon substantially similar skill levels among those "similarly employed" in the area of intended employment.

In 2005, DOL issued an NPRM that would have adopted the four-tier OES wage system for the H-2B program. However, the NPRM was withdrawn in 2007. One alternative would be for DOL to issue the same or a similar NPRM. This would allow DOL to continue using the centralized National Processing Center for prevailing wage determinations. DOL could also enhance prevailing wage accuracy by focusing its future OES survey data-gathering efforts on the key occupations within the top five H-2B industries.

[13] 75 Fed. Reg. at 61580.
[14] 20 CFR §§656.40(a)(2).
[15] 20 CFR §656.40(b).

If DOL is to promulgate a new wage methodology at the risk of forcing long-time compliant H-2B employers out of the program, the resulting system should be based upon real wage levels and data as opposed to speculative and flawed analyses. The short time frame mandated by the court should not be the impetus for adopting a perfunctory single arithmetic mean wage for each bucket of occupations in the same SOC code. An average increase of $4.38 per hour is more than one-half of the $7.25 federal minimum wage, and very few, if any employers of lesser skilled positions, such as housekeepers and landscapers, are paying $13.00 to $15.00 per hour that would be the result of the "average" increase if $4.38 were to be added to current wage rates of $8.50 to $9.50 per hour. Because of the potentially significant economic impact the proposed rule will have on employers and the economy, we strongly urge DOL to retain the current system until further research and analysis can be conducted.

Conclusion

AILA appreciates the opportunity to comment on this proposed rule and we look forward to a continued dialogue with USCIS on issues concerning the H-2B prevailing wage process.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION