

October 27, 2010

VIA ELECTRONIC SUBMISSION

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

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

Re: *Wage Methodology for the Temporary Non-Agricultural Employment-H-2B Program*; 75 Fed. Reg. 61578 (October 5, 2010).¹

Dear Secretary Solis and Mr. Dowd,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments to the Employment and Training Administration of the U.S. Department of Labor (DOL) regarding its proposed rule entitled, *Wage Methodology for Temporary Non-Agricultural Employment-H-2B Program*.

Advocacy is concerned that the proposed rule will have a significant economic impact on a substantial number of small businesses. The wage increases proposed by DOL in this rulemaking will hurt seasonal small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do unskilled work, and may shut small businesses out of this vital program. Advocacy urges DOL to consider significant alternatives to this rulemaking recommended by small entities that would meet the agency's objectives without jeopardizing small businesses.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within

¹ *Wage Methodology for the Temporary Non-Agricultural Employment-H-2B Program; Notice of Proposed Rulemaking*, 75 Fed. Reg. 61578 (Oct. 5, 2010).

the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Background

The H-2B program allows employers facing a shortage of U.S. workers to have access to temporary unskilled workers from foreign countries during seasonal or peak times. This program is for non-agricultural employers and is predominantly used by small businesses in the construction, amusement, landscaping, hotel, restaurant and forestry industries.⁶ The number of foreign workers who enter the United States pursuant to the H-2B program is limited to 66,000 for the entire fiscal year, or 33,000 for each six month period of the fiscal year (winter and summer seasons). The demand for new H-2B workers exceeds this limit, and the capacity for each half of the fiscal year is reached earlier each successive year.

To hire an H-2B worker, employers must first attempt to recruit U.S. workers and pay the foreign workers a salary that will not adversely affect the wages and working conditions of similarly employed U.S. workers.⁷ DOL's National Processing Center (NPC) determines the prevailing wage rate for the occupational classification in the area of employment.

On August 30, 2010, the U.S. District Court in the Eastern District of Pennsylvania ordered the Department of Labor to promulgate new regulations for determining the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act within 120 days of the order.⁸ The court found that DOL's 2008 H-2B rulemaking adopted earlier agency guidance on the methodology for determining the prevailing wage rate and the data source utilized in these determinations without specifically asking the public to comment on these issues, and therefore the agency would have to cure this procedural defect.⁹

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.)

⁴ Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

⁵ *Id.* at § 3(c).

⁶ 75 *Fed Reg.* at 61584.

⁷ 20 C.F.R. 655.3(a); 8 CFR 214.2(h)(6)(iv)(A)(1).

⁸ *Comite 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).

⁹ *CATA*, 2010 WL at 25.

DOL's 2005 Prevailing Wage Determination Policy Guide adopted a four-tiered system for wages, and the agency's main source of data became the Occupational Employment Statistics wage survey (OES), compiled by the Bureau of Labor Statistics (BLS).¹⁰ Before 2005, prevailing wage determinations were primarily made under the Davis-Bacon Act (DBA) and the McNamara-O'Hara Service Contract Act (SCA). In the absence of these rates, DOL had utilized a two-level system for determining rates, one for beginning level workers and the other for more experienced workers.¹¹

In this current rulemaking, DOL changes the methodology again for establishing the prevailing wage rate as the highest of the following: 1) wages established by a collective bargaining agreement; 2) a wage rate established under the DBA or SCA for that occupation in the area of employment; and 3) the arithmetic mean wage rate established by the OES for that occupation in the area of intended employment. The employer would be required to pay the workers at least the highest of the prevailing wage as determined by the NPC, the Federal minimum wage and the local minimum wage.¹² DOL estimates the following hourly wage increases by industry associated with this proposed rule: Landscaping services, \$3.60; Janitorial services, \$3.72; Food services and drinking places, \$1.29; Amusement, \$1.37; and Construction, \$10.61.¹³

Regulatory Flexibility Act Requirements

Under the Regulatory Flexibility Act (RFA), when an agency proposes a rule, it must perform an Initial Regulatory Flexibility Analysis (IRFA), unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.¹⁴ The requirements of an IRFA include: 1) a description of the reasons why action by the agency is being considered; 2) a succinct statement of the objectives and the legal basis for the proposed rule; 3) a description of the number of small entities to which the proposed rule will apply; 4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule; 5) an identification of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule; and 6) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact.¹⁵

I. Advocacy Comments on DOL's Regulatory Flexibility Analysis

DOL cannot certify this rule because this rule will have a significant economic impact on a substantial number of small entities. DOL published an Initial Regulatory Flexibility Analysis (IRFA) in the proposed rule. However, Advocacy believes that DOL's IRFA is inadequate. The RFA requires an agency to provide forthright information about the potential economic impact of a proposed rulemaking and to consider alternatives to that rulemaking. DOL's IRFA does not adequately capture the number of small entities

¹⁰ *CATA*, 2010 WL at 18.

¹¹ *Id.*, at 17.

¹² 75 *Fed Reg.* at 61579.

¹³ *Id.*, at 61586.

¹⁴ 5 U.S.C. § 603, 605.

¹⁵ *Id.* at 603.

affected by the rule or the economic impact on small businesses. DOL's IRFA also does not provide any significant alternatives to the proposed rule that would minimize the economic impact on this rule, as required by the RFA.

1. The IRFA Incorrectly Concludes that a Substantial Number of Small Entities Are Not Affected by the Rule

Although DOL completed an IRFA for this rule, the agency states that an IRFA is not required because the "Department believes that this NPRM is not likely to impact a substantial number of small entities."¹⁶ In the IRFA, DOL estimates that the total cost burden per entity of this rule ranges from \$2,402 to \$51,481 and concludes that the "proposed rule is expected to have a significant economic impact" on small entities. However, DOL minimizes the economic impact of this rulemaking by stating that this rule only affects 0.1 percent-2.2 percent of all small U.S. businesses in their respective industries, and concludes that this is not a substantial number of small entities.¹⁷

DOL's analysis dilutes the economic impact of the H-2B rule by incorrectly arguing that over one million small businesses in these industries constitute the "universe" of regulated entities; DOL estimates that 2,740 small entities actually utilize the H-2B program.¹⁸ Advocacy recommends that DOL remove certification references in the IRFA because these statements are confusing and may discourage the public from providing comments to this rulemaking. Advocacy also believes that DOL's miscalculations regarding the small entities that are affected by this rule hinder the agency's ability to produce regulatory alternatives that minimize the costs of this rule for small entities.

Courts have held that the "universe" of potentially affected entities for purposes of an RFA analysis should include only those small entities in the regulated community. In *Southern Offshore Fishing v. Daley*, the court invalidated an RFA analysis for a shark fishing quota because the agency relied on a pool of 2,000-plus individuals who held shark fishery permits as the universe of fishermen potentially affected by the quotas, even though three-fourths of the permittees were not expected to land even one shark.¹⁹ The court stated that "electing the 2,000-plus permit holders as the operative universe enables NMFS to disperse arithmetically the statistical impact of the quotas on shark fisherman."²⁰ In *North Carolina Fisheries Association v. Daley*, the court remanded a fishing quota because the agency utilized the total number of fishing vessels issued flounder permits as the universe for determining economic impacts, instead of fishermen who actually fished for flounder.²¹ The court found that the agency's use of this expanded universe amounted to "willful blindness."²²

Similarly in this case, DOL's decision to rely on a pool of over one million small businesses (or all small entities in these industries) as the universe of small entities

¹⁶ 75 Fed. Reg. at 61584.

¹⁷ *Id.*, at 61586.

¹⁸ *Id.* These are DOL's estimates based on 2002 census data. DOL makes an assumption that 50 percent of H-2B employers are small businesses.

¹⁹ *Southern Offshore Fishing Association v. Daley*, 97-1134-CIV-T-23C, slip op. at 4 (Oct. 16, 1998).

²⁰ *Id.*, at 5.

²¹ *North Carolina Fisheries Association vs. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

²² *Id.*, at 659.

potentially affected by this H-2B rule is incorrect, because over 99 percent of these entities do not utilize the H-2B program.²³ DOL should have correctly identified the universe of affected small entities as H-2B participants, or the 2,740 small entities that DOL estimates would utilize this program. Use of this more accurate universe would have led to the conclusion that this rule would have a significant economic impact on a substantial number of small entities. DOL's identification of the proper universe of affected small entities would have allowed the agency to better evaluate the potential regulatory alternatives to this rule.

DOL's IRFA also does not provide complete information regarding the numbers of small businesses utilizing the H-2B program. DOL makes an assumption that 50 percent of H-2B employers are small entities, but this is not based on any data.²⁴ In the IRFA, the agency states that it has collected data since 2009 regarding entity size, revenue and number of employees but that there were not enough responses to provide the agency with statistically valid data to use in analyzing the actual impact on small businesses.²⁵ Advocacy recommends that DOL release this data, as it has released other H-2B data on their website.

2. The IRFA Does Not Properly Identify the Small Business Industries Affected by the Rule

DOL correctly identifies the construction industry, the amusement industry, landscaping services and janitorial and food services (the hotel industry) as small entities that utilize the H-2B program in its IRFA. However, the IRFA also does not provide information about other small entities in industries that utilize the H-2B program.

DOL states that it was difficult to obtain information regarding the forestry industry because the Census category that includes forestry also includes data from agriculture, fishing and hunting activities. According to the Forest Resources Association, 113 employers applied for H-2B workers for tree planting in 2009. They believe that all but four of these contractors are small employers according to the SBA's small business definition of \$ 7 million in annual revenue.²⁶

DOL also does not provide any information regarding the crab processing industry. According to the Chesapeake Bay Seafood Industries Association (CBSIA), there were 25 licensed crabmeat processing plants in Maryland, and all of these plants are well within the SBA's small business definition of having below 500 employees. Of these licensed plants, about twenty are actually working this year and of these, 15 use H-2B workers. The typical company relying on H-2B workers to pick crab meat will use around 30 to 40 workers with a few larger companies using up to 100 H-2B workers.²⁷ A representative from the National Council for Agricultural Employers stated that there were many

²³ 75 *Fed Reg.* at 61586. DOL calculates the number of small entities utilizing the H-2B program as 2,740, however it finds that the universe of affected entities is over 1.1 million businesses (the total number of U.S. businesses meeting the SBA small business size standard in 2002 in these industries).

²⁴ 75 *Fed Reg.* at 61586, *see* footnote 29.

²⁵ *Id.* at 61585.

²⁶ Telephone call with a representative with the Forest Resources Association (Oct. 22, 2010).

²⁷ Telephone call with a representative for the Chesapeake Bay Seafood Industries Association (Oct. 21, 2010).

agricultural small businesses in food production who hire H-2B workers that are not discussed in the IRFA. These industries include seasonal canning, freezing and processing; livestock confinement and feeding operations; apple and produce packing houses; the horse industry; and agricultural construction contractors.²⁸

3. DOL's Economic Assumptions Minimize the Economic Impact of this rule

DOL utilizes many economic assumptions, instead of actual data from the H-2B program to estimate the possible economic impact of this rule. Advocacy believes that DOL's use of these models minimizes the economic impact of this rule and makes the economic analysis less transparent. In order to have an accurate analysis, DOL should utilize the H-2B related data that the agency has collected from employers for decades and that is posted on the agency website.²⁹

For example, DOL estimates the number of H-2B workers per entity by looking at the total number of workers in a hypothetical small business, and assuming that each industry would fill 50 percent of its workforce with H-2B workers. Using this analysis, DOL concludes that the average "hypothetical" small business would hire the following H-2B workers: landscape (1.2 workers), janitorial (5.7 workers), food services and drinking places (3.2 workers) amusement parks (2.5 workers), and construction (3.2 workers).³⁰ Advocacy believes that these numbers are too low, and may minimize the potential costs of this rule. An analysis of data from the H-2B program shows the following statistics on the number of workers at the median employer for major H-2B occupations for FY09: amusement park workers (35 workers), construction workers (15 workers), forest workers (83), housekeeping (15 workers), landscape (16 workers).³¹ Because the impacts of the rule on small entities are driven by increases in wage rates multiplied by the number of workers paid the higher wage, minimizing the number of affected workers minimizes the impact on affected small entities.

4. The IRFA Is Inadequate Because It Does Not Discuss Significant Alternatives

Agencies must consider alternatives to regulatory proposals in an IRFA. The absence of alternatives renders an IRFA inadequate. DOL's IRFA is inadequate because it does not provide any significant alternatives to this regulation.

DOL does not provide viable alternatives in its IRFA. DOL states that it cannot provide different standards for small entities and that given the time constraints it was not able to consider alternative data sources for calculating the prevailing wage. DOL also argues that employers can avoid the costs of this rule by not applying for the voluntary H-2B program. Employers that utilize the H-2B program are unable to attract domestic workers to perform unskilled work. Choosing to not to employ H-2B workers is not a viable option because these businesses will not be able to attract and employ substitute domestic workers. None

²⁸ Telephone call with a representative for the National Council of Agricultural Employers (Oct. 25, 2010).

²⁹ Department of Labor, Foreign Labor Certification Data Center Online Wage Library, <http://www.flcdatcenter.com/CaseH2B.aspx>, (last visited Oct. 25, 2010).

³⁰ 75 *Fed Reg.* at 61586.

³¹ These numbers were analyzed from data available at DOL's Foreign Labor Certification Data Center Online Wage Library. See footnote 29.

of these options that DOL includes in the proposed rule are significant alternatives that will minimize the cost of this rule for small businesses. Small businesses participating in Advocacy's roundtable have provided a list of significant regulatory alternatives which we describe in the Section III below. Advocacy recommends that DOL consider the alternatives in order to minimize the costs of the rule on small entities.

II. Small Entity Concerns with the Rule

On October 20, 2010, Advocacy hosted a small business roundtable attended by DOL staff and small business stakeholders from the construction, hotel, landscape, construction, crab processing, amusement park and food processing industries. All participants expressed concerns that the proposed rule, if finalized, will have devastating consequences for their businesses. The following comments are reflective of the issues raised during the roundtable and in subsequent conversations with these small business representatives.

1. DOL Should Not Change the Wage Methodology

Roundtable participants expressed concern that DOL is proposing to drastically change the wage methodology for H-2B workers, when the *CATA* court decision only required DOL to cure a procedural defect with the 2008 H-2B rulemaking by seeking public comment on the issue of wage methodology.

The current wage methodology for H-2B workers is based on a four-tiered wage levels in the OES survey for a particular type of employment. DOL is proposing to move to a one-tiered system, based on the "arithmetic mean wage rate established by the OES for that occupation in the area of intended employment."³² To determine the wage calculation under the new rule, DOL will average all of the survey's wage rates in a certain job type across a range of experience and skill levels. In practice, this would result in the wage of a prospective H-2B worker to be increased from a current Level 1 wage to the arithmetic mean—most likely somewhere between a current Level 2 and Level 3 wage.

Small businesses at the roundtable expressed support for the current four-tiered wage structure for calculating H-2B prevailing wages because it recognizes the diversity of jobs, skill levels and experiences in seasonal industries such as landscape and construction. Participants did not understand why DOL was drastically changing the wage methodology without completing a more detailed economic analysis of how this may impact these small businesses that use this program. Small entities at the roundtable were frustrated that DOL is revamping a successful government immigration program that is actually working and encourages the employment of legal workers.

A representative for the American Nursery and Landscape Association and the Professional Landcare Network (ANLA and PLANET) stated that while a majority of the H-2B positions filled by employers tend to be lesser skilled jobs, and therefore more likely paid at the current Level 1 level, it does not make sense to arbitrarily raise the wages for these jobs to be comparable to jobs held by workers at higher skill levels.³³ The H-2B

³² 75 *Fed Reg.* at 61579.

³³ Telephone call with a representative for ANLA and PLANET (Oct.25, 2010).

visa is a program specifically created for unskilled workers, as opposed to the H-1B visa program.

2. H-2B Wages Do Not Depress U.S. Wages

DOL argues that changing the wage calculation methodology is necessary because the current four-tiered system stratifies wages and inappropriately allows employers to pay H-2B workers at the low end of the wage tiers, “ultimately adversely affecting wages of U.S. workers in those same jobs.”³⁴ Roundtable participants were concerned that DOL has shown no data to support the notion that wages of H-2B workers have depressed the wages of similar domestic workers. Accepted economic analysis suggests that wage rates are correlated with the skill level of labor. Because many H-2B workers are in low-skilled or unskilled positions, using a wage rate from the lower tier should correlate with lower skill, and therefore be close to the appropriate wage. Given this, H-2B workers are earning at a similar level to their low-skilled domestic counterparts. The H-2B workers’ wages therefore cannot decrease the wages of U.S. workers.

A recent survey of 367 H-2B employers conducted by ImmigrationWorks USA and the U.S. Chamber of Commerce (2010 H-2B Employer Survey) found that the number of H-2B workers in a given field has no negative effect on U.S. workers’ employment or earnings in that field.³⁵ The study found that at the national level, the number of H-2B workers admitted in a given year is correlated to higher wage and employment growth in occupations that rely heavily on the program.³⁶ These results suggest strongly that DOL should go back and carefully build a record showing actual negative impacts on domestic wages.

3. H-2B Wages Under Current Methodology Vary Significantly

DOL states in its proposed rule that it is also changing the wage methodology to protect H-2B workers.³⁷ Small businesses at the roundtable told Advocacy that they often pay wages above the minimum requirement to H-2B workers under the current prevailing wage system when their skill and experience warrant it. Therefore, these small businesses believe that H-2B wages for all workers should not be artificially raised by \$3.60 to \$10.61 per hour. If DOL increases the wages of all H-2B workers, employers would reduce the number of H-2B workers they would hire and would select the H-2B workers with the higher skill and experience correlated to that wage increase. This circumvents the intent of a program, which is designed to hire low-skilled workers.

³⁴ 75 *Fed Reg.* at 61580.

³⁵ Madeline Zavodny with Tamar Jacoby, on behalf of ImmigrationWorks USA and the Chamber of Commerce, *The Economic Impact of H-2B Workers* (forthcoming Oct. 28, 2010) (2010 *H-2B Employer Survey*). The analysis compared wages in sectors that rely heavily on H-2B visa holders with wages in other industries that hire few or no temporary workers. Rather than having an adverse impact on U.S. workers, the H-2 program actually has a positive impact on U.S. workers. Specifically, the results indicate that a 1-percentage point increase in H-2B workers in a given occupation in a given year is associated with wages in that occupation increasing 0.05 percentage points faster than they others would have over the next calendar year, with employment also increasing 0.05 percentage points faster.

³⁶ *Id.* The original economic analysis conducted for this report concludes that the number of H-2B workers increases when local labor markets tighten. Specifically, in the average state, when employment growth increased by 1 percentage point, employers brought in 216 additional H-2B workers.

³⁷ 75 *Fed Reg.* at 61579.

A 2007 report for the Professional Landcare Network showed that various hourly jobs in the landscape contracting industry are well above both the federal minimum wage and the current, four-tier prevailing wage. The report showed that wages of both U.S. and H-2B workers in the landscape industry reflect higher levels of compensation for higher levels of skill and experience.³⁸

4. Employers Have a Difficult Time Recruiting U.S. Workers for H-2B Work

DOL's economic analysis assumes that as a result of this rule H-2B work will be transferred from foreign workers to domestic workers, who may be attracted by increased wages.³⁹ Small business representatives at the roundtable stressed that the H-2B visa program is an essential safety valve for seasonal employers because is very difficult if not impossible to attract U.S. workers to do unskilled and temporary work in remote areas.

A survey of 93 H-2B employers in the lodging industry by the American Hotel and Lodging Association (AHLA lodging study) found that among properties employing seasonal workers, they accounted for an average of 24 percent of total workers in the peak business season.⁴⁰ The survey found that most lodging businesses hired H-2B workers because they were in a remote location like Cape Cod or in a U.S. National Park, and because of short supply there is often an intense competition for a small local workforce by the tourism business. Lodging respondents also had a difficult time finding documented workers to do unskilled tasks such as housekeeping and working in food and beverage establishments.⁴¹

Representatives from the crab processing industry stated that the Maryland seafood industry has had a difficult time getting Americans to do the difficult job of manually picking crabs. According to a 2008 crab industry study by the University of Maryland's Sea Grant program, 56 percent of Maryland crab processing plants relied on H-2B visa workers; these firms with H-2B workers produce 82 percent of Maryland's crabmeat production.⁴² A representative from the reforestation industry at the roundtable also stated that it has been historically impossible to interest domestic workers to do tree-planting work in forest lands because it is seasonal and manual work done in remote areas.

ANLA and PLANET noted that the H-2B program is vitally important to the landscape industry because of the difficulty of finding American workers willing to perform the manual labor associated with seasonal landscaping services.⁴³ Advocacy spoke to one small landscape business in Maryland present at the roundtable who hires 125 full-time

³⁸ Profit Planning Group, for the Professional Landcare Network, *Employee Compensation Report for the Green Industry* (2007).

³⁹ 75 *Fed Reg.* at 61583.

⁴⁰ RRC Associates, for the American Hotel & Lodging Association, *International Worker Issues in the Lodging Industry: Lodging Operator Survey & H-2B Applicant Data* (April 2010) (AHLA lodging survey).

⁴¹ *Id.*, see section entitled, Hotel Operator Survey: Comment Responses, which lists several open-ended comments submitted by the 93 respondents to this survey.

⁴² Douglas W. Lipton, Associate Professor, Department of Agricultural Resource Economics, University of Maryland, *An Economic Analysis of Guest Workers in Maryland's Blue Crab Industry* (Sept. 8, 2008) (2008 *Crab Industry Study*), which can be found at:

<http://www.indsg.umil.edu/programs/extension/communities/fisheries/H2B>.

⁴³ Advocacy call with ANLA/PLANET.

U.S. and 25 H-2B workers to perform the seasonal work of mowing lawns in resort towns. Last year he received 25 applications from U.S. workers in response to the required H-2B recruitment, and he hired the three applicants that showed up for an interview. Only two of these U.S. workers lasted as long as two weeks on the job.

5. H-2B Workers Create and Sustain Higher Paying U.S. Jobs

Small business representatives commented that utilizing the H-2B visa program to obtain a stable source of seasonal unskilled workers enables their businesses to increase their volume, enabling these employers to hire more U.S. workers for skilled, year-round jobs. The 2010 Employer H-2B Survey found that the number of H-2B visas being used correlates with higher U.S. employment rates.⁴⁴ The report found that on average, when employment growth increased by 1 percentage point, employers brought in 216 additional H-2B workers.⁴⁵

According to the 2008 crab industry study, each H-2B worker in 2008 directly supported 2.54 U.S. jobs in Maryland's economy.⁴⁶ ANLA and PLANET commented that the majority of the more highly compensated positions in the landscape industry are held by American workers, and that these higher level positions would not be available without the support of seasonal, lesser skilled crew members—the type of jobs typically filled by H-2B workers.⁴⁷ Two small businesses in the landscape industry that attended the roundtable also noted that hiring H-2B workers for unskilled positions allowed their businesses to grow and hire Americans for supervisory and full-time positions.

6. Many H-2B Employers May Reduce Operations or Close Completely Due to this Rule

Small businesses at the roundtable were concerned that the steep increase in labor costs for H-2B workers would shut them out of this vital program, and would result in devastating consequences for their businesses. According to the 2010 Employer H-2B Survey, one-third of respondents said that they would reduce operations or close completely if they were not able to hire H-2B workers; this would reduce employment of U.S. workers.⁴⁸

A crab industry representative at the roundtable estimated that the proposed rule would result in an extra \$4.38 per hour or about a 60 percent increase in labor costs for H-2B workers. According to the 2008 crab industry study, if the H-2B visa workers in this industry cannot be replaced by domestic workers, the resulting loss in revenues is \$9.5 million—about 45 percent of the industry's average revenues over 2003-2007.⁴⁹ The representative at the roundtable stressed that the domestic crab processing industry likely cannot compete with foreign crab processing industries at this higher labor rate, and therefore many of these businesses may cease to operate.

A representative from the National Council for Agricultural Employers believes that the increase in wages for H-2B workers will shut American food producers and processors out

⁴⁴ 2010 Employer H-2B survey, at 2.

⁴⁵ *Id.*

⁴⁶ 2008 Crab Industry Study, at 1.

⁴⁷ Advocacy call with ANLA/PLANET.

⁴⁸ 2010 Employer H-2B survey, at 3.

⁴⁹ 2008 Crab Industry Study, at 1.

of the program, and may lead to these companies being priced out of existence. This representative stated that the consequence will be that America will receive produce from foreign countries, and these countries have less rigorous regulatory enforcement for workers and products.⁵⁰ Advocacy spoke to a small business representative from a canning company at the roundtable that employs over 100 U.S. workers and attempts to hire dozens of H-2B workers to do unskilled work, such as cleaning the factory. He noted that his company is the last remaining cannery in his state and is worried that this regulation will force his operations to close due to foreign competition.

Small business roundtable participants in the landscape industry that rely on H-2B workers stated that they simply can't pass on the costs of a \$3.60 per hour increase in H-2B wages to their customers, because it is already a bad economy and clients are looking to cut costs. These businesses stated that the margins are already very narrow in this industry. According to ANLA and PLANET, should these firms choose to abandon the H-2B program and remain committed to hiring only legally documented workers, they will suffer a loss of revenue due to the tremendous difficulty in attracting American workers.⁵¹

DOL's proposal projects an increase of \$10.61 an hour for construction workers in the H-2B program.⁵² Additionally, the proposed rule requires employers to use the highest wage determinations for a given area, including wage determinations under the Davis-Bacon Act.⁵³ According to a representative from the Associated Builders and Contractors at the roundtable, the increased wages for H-2B workers would hurt the construction industry which has very low operating margins and is experiencing difficulties due to the recent economic downturn. The representative indicated that information was available indicating that wages on federally funded construction projects under the Davis-Bacon Act are improperly calculated, resulting in inflated hourly wages.⁵⁴

A reforestation industry representative at the roundtable stated that the rule would have an average increase in wages of \$4.38 per hour, resulting approximately 30 percent to 60 percent increase to tree-planting wages for H-2B workers. The industry is worried that contractors will not be able to pass this increase in tree-planting costs on to forest landowners, which may result in many landowners deferring annual reforestation goals or withdrawing land from forestry.

At the roundtable, a representative from AHLA stated that the profit margins for the lodging industry are very small, and could not sustain an increase of \$3.72 per hour in H-2B wage rates. The AHLA lodging survey found that 73 percent of respondents who applied for H-2B workers already did not receive all of the workers they requested, and 95 percent of this group experienced an impact on their business due to the shortfall. A majority said employees worked overtime (77 percent), positions were left unfilled (59 percent), and/or the quality of service was reduced (50 percent). Additionally, about one-

⁵⁰ Advocacy call with the National Council for Agricultural Employers.

⁵¹ Advocacy call with ANLA/PLANET.

⁵² 75 *Fed Reg.* at 61586.

⁵³ *Id.* at 61579.

⁵⁴ Sarah Glassman, MSEP, Michael Head, MSEP, David G. Tuerck, PhD, Paul Bachman, MSIE, The Beacon Hill Institute at Suffolk University, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages* (Feb. 2008), which can be found at:

<http://www.beaconhill.org/bhistudies/prevwage08/davjsbaconprevwage080207final.pdf>.

third of respondents recruited employees from competitors or other businesses (36 percent).⁵⁵ Small businesses in the lodging industry will likely experience similar detrimental economic impacts if they are unable to utilize the H-2B program, particularly since H-2B workers account for an average of 24 percent of total workers in the peak business season.

III. Small Business Regulatory Alternatives

Small business representatives offered the following regulatory alternatives at Advocacy's small business roundtable:

1. Keep the Current Four-Tiered Wage Methodology

Most roundtable participants recommend that DOL keep the current four-tiered wage methodology based on OES wages, because it allows wages to be based on a diversity of skill levels and expertise in the different industries. Small businesses stressed that this was a government program that is working and should not be revamped without the agency studying the impacts of creating a "one-tiered" system that would artificially inflate unskilled wages. Some participants also suggested the DOL seek public comment on the effectiveness of the four-tiered wage methodology.

2. Allow Employers to Require Extra Experience for Higher Wages

ANLA and PLANET oppose the use of the arithmetic mean to calculate wages. However, the organizations stated that if DOL persists in using this methodology, H-2B filers should be allowed to specify the minimum experience requirements that are associated with the wage. For example, if a prospective H-2B filer's wage increases from a current Level 1 wage to the arithmetic mean (most likely somewhere between a current Level 2 and Level 3 wage); the employer should be able to specify that U.S. workers have 18 months to two years of experience in the job offered.⁵⁶

3. Allow Employer to Utilize an Employer-Provided Survey on Wages

A representative from the crab processing industry at the roundtable recommended that DOL continue to allow the use of an employer-provided survey to determine the prevailing wage, an option that DOL is proposing to remove in this proposed rulemaking. This representative stated that OES wage rates do not relate to the unskilled position of crab picker. However the State of Maryland conducts a rigorous wage survey for the position of crab picker, and the industry should be able to utilize these reliable numbers to calculate the wage of H-2B workers.

4. Other Wage Methodologies

A representative from the Forest Resources Association at the roundtable suggested that forestry H-2B workers be paid the SCA wage rate, a rate 15 percent in excess of the Federal Minimum Wage, or 15 percent in excess of the lowest OES wage rate.

⁵⁵ *AIIA lodging survey*, at 10.

⁵⁶ Advocacy call with ANLA/PLANET.

Conclusion

Advocacy appreciates the opportunity to comment on DOL's proposed rule on the wage methodology for the H-2B program, and we hope these comments are helpful and constructive. Advocacy believes that the proposed rule will have a significant economic impact on a substantial number of small entities. The wage increases proposed by DOL in this rulemaking will hurt seasonal small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do unskilled work, and may shut small businesses out of this vital program. Advocacy recommends that DOL consider the regulatory alternatives to this rulemaking provided by small entities that would accomplish the agency's goals without harming small businesses. Please contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//
Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

//signed//
Janis C. Reyes
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

