May 17, 2011

By Electronic Mail

Mr. Michael Jones
Acting 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 1205-AB58: Temporary Non-Agricultural Employment of H-2B Aliens in the United States

Dear Mr. Jones:

The following signatories to this letter all have an interest in the proposed rule. Some are agents and attorneys which assist employers in participating in the H-2B program. Others are national associations whose members participate in the H-2B program. Collectively, they represent a substantial portion of the H-2B user community throughout the United States and those they represent will be greatly impacted by the regulatory proposal discussed below. A brief description of each signatory follows.

Agents

MASLabor. MASLabor H-2B, LLC (hereafter "MASLabor"), located in Lovingston, Virginia, is an employers' H-2B agency representing over 300 U.S. employers in 35 states who hire over 7,000 H-2B workers annually to supplement their regular U.S. workforce. MASLabor's employer clients represent a wide range of industries including landscape, retail nurseries, seafood processing, construction, lifeguards, hotels, resort and restaurants and many other seasonal industries. MASLabor has been involved in advocating for H-2B employers and improvement in the H-2B program through its work on the Board of Directors of Save Small Business, an H-2B advocacy organization, since 2005.

Amigos Labor Solutions, Inc. Amigos Labor Solutions, Inc. (hereafter "Amigos"), Dallas, Texas, is an employers' H-2B agency representing over 130 U.S. employers in 33 states who hire over 1,250 H-2B workers annually to supplement their regular workforce. Amigos' employer clients represent a wide range of industries including landscape, construction and other seasonal industries.

Practical Employee Solutions, Inc. Practical Employee Solutions, Inc. (hereafter "P.E.S") is an employers' H-2B agency representing over 50 U.S. employers in 35 states who in just the past three years alone have hired over 6000 H2-B workers to supplement their regular workforce, which numbers in excess of 15,000. P.E.S.' employer clients are primarily in the hospitality, resort and food service industries.

AgWorks. AgWorks, Inc. (hereafter "AgWorks") is a labor consulting company which works with employers on compliance with labor laws and applications for H-2A and H-2B visa program certification. AgWorks, Inc. does expert witness work with various law firms around the United States in matters of class action lawsuits and provides technical assistance and seminars on labor laws and labor issues. AgWorks, Inc. is owned and operated by Dan Bremer, a former District Director of the U. S. Department of Labor, Wage and Hour Division.

Action International. Action International, Inc. d/b/a Action Visa Assistance (hereafter "A.I.") is an employers' H-2B agency representing over 90 U.S. employers in twelve states who hire over 1500 H-2B workers annually to supplement their regular workforce, which numbers in excess of 1400. A.I.'s employer clients represent a wide range of industries including landscape, golf course, construction, seafood production, and other seasonal industries.

Employment U.S.A. Employment U.S.A. (hereafter "Employment U.S.A.") is an employers' H-2 agency representing over 130 U.S. employers in eighteen U.S. states who hire approximately 800 H-2B workers annually to supplement their regular workforce which numbers in excess of 3,000. Employment U.S.A's employer clients represent a wide range of industries including hospitality, food processing, construction and other seasonal industries.

H2A and H2B Employer Labor Programs. H2A and H2B Employer Labor Programs (hereafter "H.E.L.P") is an employers' H-2B agency representing U.S. employers in a half-dozen states who hire over 106 H-2B workers annually to supplement their regular workforce, H.E.L.P employer clients are primarily in the hospitality industries.

Workforce Advantage. Workforce Advantage (hereafter "W.F.A.") is an employers' H-2B agency representing U.S. employers nation-wide who currently hire between 500-700 H-2B workers annually to supplement their regular workforce. W.F.A's employer clients represent a wide range of industries, including landscape, construction and other seasonal industries.

MJC Labor Solutions, LLC. MJC Labor Solutions, LLC (hereafter "MJC Labor Solutions"), located in Upper Darby, Pennsylvania, is an employers' H-2B agency representing over 15 U.S. employers in Pennsylvania and Delaware who hire over 100 H-2B workers annually to supplement their regular workforce. MJC Labor Solution's employer clients are primarily in the landscape and exterior painting and power washing industries.

Law Firms

MalitzLaw. Jeanne Malitz, Esq. through her California law firm of MalitzLaw (hereafter "MalitzLaw") represents employers who hire H-2B workers annually to supplement their regular workforce. Malitzlaw's clients are primarily in the agriculture-related and sports industries. Ms. Malitz has been involved in advocating for H-2B employers and improvement in the H-2B program through her work on the Department of Labor and Immigration Reform Committees of the American Immigration Lawyers Association (AILA) since 1998.

Associations

American Nursery and Landscape Association. The American Nursery & Landscape Association (ANLA) is the national trade organization representing the vertically-integrated nursery and landscape industry. ANLA represents 1500 active member firms who grow, sell, and use horticultural and landscape plants, and an additional 15,000 family farm and small business affiliate members of the state nursery and landscape associations. ANLA members are estimated to produce three quarters of the plant material moving in domestic commerce in the United States. Many ANLA members engaged in the installation and maintenance of horticultural plants and landscapes use the H-2B temporary and seasonal non-agricultural worker program when efforts to find sufficient US workers for seasonal positions are unsuccessful.

Chesapeake Bay Seafood Industries Association. The Chesapeake Bay Seafood Industries Association (CBSIA) is a non-profit association formed 50 years ago to represent the seafood processing industry in Maryland. CBSIA has more than 70 active members engaged in businesses ranging from crab meat processing to providers of shipping materials and restaurants. It works to further the best interests of the Maryland seafood industry and support all efforts to preserve the resource and livelihood of those who depend upon it. Small businessmen, seafood processors, retailers, wholesalers, restaurants and watermen all depend on a healthy resource to earn a living. CBSIA actively participates in protection and preservation of the resource and its dependent businesses. Issues of importance to CBSIA include: government indifference to the hardships brought on by arbitrary over-regulation, including negative impact on local economies on the Eastern and Western Shores of Maryland; ever-increasing competition from imported seafood products; increased difficulty in obtaining raw product for processing and distribution; public indifference due to lack of understanding of the problems of local processors and watermen; and especially issues associated with their ability to rely on the federal H-2B program. Currently over 50% of the seafood processed in Maryland is H-2B dependent.

Forest Resources Association. Forest Resources Association (hereafter "FRA") (www.forestresources.org) is a Washington, D.C.-based national trade association that promotes the interests of forest products industry members in the economical, efficient, and sustainable use of forest resources to meet the needs of the wood fiber supply chain through private enterprise. FRA is the lead forest industry association in monitoring and intervening with federal regulation or legislation affecting independent contractor relationships, timber harvesting safety, and in-bound forest products transportation.

FRA members are large landowning companies (with millions of acres of forestland ownership), forestry and reforestation contractors (who plant millions of tree seedlings each year), timber harvesting contractors, and wood consuming companies. The millions of trees that are planted each year by FRA member reforestation firms represent a critical start of a life cycle of sustained forest growth, harvest, and renewal in the U.S. wood fiber supply chain. The majority of the reforestation contractors are small businesses with fewer than 100 employees. FRA Forestry Contractor members utilize the H-2B Visa Program to complete tree planting, brush clearing and herbicide application on private and public forest lands. FRA Forestry Contractor member firms individually reforest 300 to 220,000 acres annually. FRA estimates that over 90% of all manual reforestation work in the US is accomplished by forestry contractors using workers admitted through the H-2B program.

Save Small Business. Save Small Business (hereafter "SSB") is a 501(c)(3) Washington-DC based network of small and seasonal business owners dedicated to saving American commerce by supporting and advancing the H-2B nonimmigrant worker program. Save Small Business was created to unify the voice of ALL seasonal employers using the H-2B non-immigrant seasonal worker visa program. Without H-2B workers, many of these small businesses would suffer economic harm, be forced to lay off U.S. workers; some would be forced to close. The H-2B program sustains countless American small and seasonal businesses and contributes to their success and longevity. The H-2B program was created as an avenue to supplement a short-term, seasonal workforce, which simply does not exist on a local level. Save Small Business has been intimately involved in legislative efforts to secure relief from the statutory limitation on annual H-2B visa issuances (the "H-2B visa cap").

Virginia Seafood Council. The Virginia Seafood Council (VSC) is a trade organization that represents and promotes the interests of seafood processors, handlers and growers. VSC actively supports seafood associated companies engaged in regulatory, administrative and political issues that impact the industry. VSC has been protecting and encouraging the sustainable use of our seafood resources for over four decades on the local, state, regional and national levels. VSC members encompass large and small companies, mostly family owned, that include oyster processors, crab processors, fish processors, baitfish operators and specialty seafood production. These small, family businesses operate year round with fewer than 150 employees each yet have an economic impact in the hundreds of millions of dollars. VSC members utilize the H-2B program to shuck oysters, pick crabmeat, process food fish and package baitfish. These production based jobs are vital to our economic survival and sustainability of our seafood industry in Virginia; without the ability to access seasonal workers through the H-2B program the Virginia seafood industry would be severely impacted.

INTRODUCTION

The Department of Labor's Proposed Rules With Regard to the H-2B Program Are Not Within Its Statutory and Regulatory Authority

DOL Lacks the Statutory Authority to Issue the Proposed Rule

The United States has a long-standing policy of allowing U.S. employers to access and utilize foreign temporary workers to support its industrial and economic base. From the earliest government attempts to limit or restrict the flow of immigrants to the United States, exceptions have been included to allow the admission of individuals coming to the United States to work. As the initial exclusion laws of the 1880's greatly reduced the flow of immigrants, Congress acknowledged the legitimate needs of U.S. employers by including exemptions in the Immigration Act of 1917 for immigrants coming to work in the West and Southwest.

Prior acknowledgement was consistently ratified by the enactment of temporary worker programs in the 1940's, and by inclusion of temporary nonimmigrant worker programs in the first comprehensive immigration statutory scheme contained in the Immigration and Nationality Act of 1952, and by the retention and expansion of the programs in the most recent comprehensive legislation, the Immigration Reform and Control Act of 1986. Thus, U.S. employers have continuously and successfully made a case that one purpose of the immigration law is to provide a workforce to support U.S. based industry when "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b).

The Immigration and Nationality Act of 1952 created a visa category for a nonimmigrant "who is coming temporarily to the United States to perform other temporary services or labor if unemployed persons capable of performing such service or labor cannot be found in this country." INA Sec. 101(a)(15)(H)(ii). The Act vested all authority for the admission of aliens, including temporary workers, in the Attorney General and subsequently transferred to the Secretary of the Department of Homeland Security (DHS). *See* Immigration and Nationality Act of 1952, P.L. 82-414, § 214(a); Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (Nov. 25, 2002) The original statutory language creating the temporary worker program at issue in these proposed regulations requires the Secretary to consult with "appropriate agencies" in the process of adjudication visa petition requests for temporary workers. 8 U.S.C. 1184(c)(l).

For over 30 years, the temporary worker program, known as the H2 Program, operated with no additional statutory framework and very little regulatory structure. The majority of the temporary workers admitted during this time period performed work in agriculture, particularly the sugar cane industry, in the Southeast. A smaller number performed temporary work in the seasonal resort industry. The total number of H2 visas issued averaged 20,000 annually. Congressional Research Service, Temporary Worker Programs: Background and Issues, 96th Cong., 2d Sess. (1980). In the mid-1970's, a perceived rise in the number of illegal immigrants

and the concurrent backlog in legal immigration led to calls for a comprehensive review of the current immigration system. *Id.* In 1979, then President Carter established the select Commission on Immigration and Refugee Policy. After two years of hearings and analysis, the Commission released its final report, containing policy recommendations, to Congress in 1981.

Included in the report was a recommendation that changes be made to the H2 program to improve timeliness of admission decisions, streamline the application process, improve fairness to U.S. employers and workers and acknowledgement of the potential need for expansion of the program. Section VI.E, U.S. Immigration Policy and the National Interest, Final Report and recommendations of the Select Commission on Immigration and Refugee Policy, March 1, 1981.

In response to the report, the House and Senate introduced identical bills in the 97th Congress, S. 2222 and H.R. 6514. Both bills contained language pertaining to the H2 program. The provisions created two subcategories of H2 workers – H-2A for workers in agriculture and H-2B for workers in other industries. The accompanying explanatory language indicated that the provisions were intended to streamline the program, codify existing agency procedures governing the program and, in the case of agricultural workers, provide additional worker protections. However, neither bill passed.

Legislation was re-introduced in the 98th Congress as S. 529 and H.R. 1510. Again, both bills contained H2 provisions separating the statutory framework for the admission of agricultural workers from non-agricultural workers.1 The bills required that employers in both categories apply for a labor certification from DOL. For agricultural H-2A workers, the U.S. Department of Labor (DOL) was to certify that "there are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition" and "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." H.R. 1510, Sec. 211(b)(3).

For non-agricultural, H-2B workers, the certification was that "there are not sufficient qualified workers available in the United States to perform the labor or services involved in the petition" and "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."2 Id. The bills also included additional provisions applicable only to the certification of H-2A workers that established recruitment requirements and timelines, certain working conditions and compliance provisions. Id. The legislation provided that the "Attorney General, in consultation with the

[1] S. 529, 98th Cong., 2nd Sess. § 211 (1984); H.R. 1510, 98th Cong., 2nd Sess. § 211 (1984).

[2]As passed by the House of Representatives, H.R. 1510, § 211(b) specifically included language that paralleled that of its H-2A provisions. A petition for an H-2B worker could not be approved by the Attorney General unless the Secretary of Labor provided a labor certification that there were not sufficient qualified U.S. workers and no adverse affect on wages and working conditions of U.S. workers. Section 211 also prohibited the Secretary of Labor from issuing a labor certification if there was a strike or lockout or an employer during the previous 2-year period had substantially violated a material term or condition of the labor certification and required the employer to provide workers' compensation.

Secretary of Labor and, in connection with agricultural labor or services, the Secretary of Agriculture, shall approve all regulations to be issued implementing the amendments made by this section." H.R. 1510, Sec. 211(d). The bills passed both the House and Senate and most all differences were resolved in conference but ultimately failed final passage.

The provisions that had been agreed upon in the House and Senate conference deliberations were re-introduced in the 99th Congress as S.1200 and H.R. 3080. H.R. 3080 was reintroduced as H.R. 3810 and reported out of the House Judiciary Committee.[3] Significantly, for the purposes of our commentary on the proposed regulations, neither bill retained the statutory framework for admission and certification of H-2B non-agricultural temporary workers that was passed by both Houses of Congress in the prior Congress as H.R. 1510 and S. 529. Six pages were devoted to H-2A temporary agricultural workers but all of the provisions related to H-2B were removed. It was not simply a failure to address, it was a conscious, deliberate act to remove changes made to the non-agricultural worker program and to carefully and comprehensively distinguish the requirements and procedures for admission of agricultural workers from those for non-agricultural workers. The legislation was ultimately passed in the 99th Congress and enacted into law as the Immigration Reform and Control Act (IRCA), P.L. 99-103.

Congress made a conscious decision to provide a detailed statutory structure for H-2A agricultural workers as part of IRCA and to exclude such a structure for the H-2B program. *See Food & Drug Agency v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-48 (2000) (Congress had considered bills granting FDA power to regulate tobacco, but those bills did not pass; FDA lacked authority). This legislative history clearly contradicts the attempt by DOL in these proposed regulations to impose the same type of conditions and requirements for the certification of H-2A workers on certification of H-2B workers. Congress has had ample opportunity to address, amend or revise the statutory framework for H-2B and has thus far has declined to do so beyond setting numerical limits on visas. Until Congress acts, DOL is limited to the existing statutory framework and attempts to extend H-2A statutory and related implementing regulatory requirements into the H-2B program is beyond its authority.

The additional attempt by DOL to establish enforcement authority over H-2B program compliance also exceeds its statutory authority. DOL cites P.L. 109-13 as the statutory basis for such authority. A careful reading of the relevant provisions of that law reveal that no such authority was provided. The legislation provided a mechanism for returning H-2B workers to be excluded from the annual cap. Employers seeking workers under this provision were provided opportunity in the visa petition to identify and thus deduct returning workers.

P.L. 109-13, § 404 granted the Department of Homeland Security (DHS) enforcement authority over fraud "in the petition to admit" and allowed DHS to delegate that authority to DOL to impose civil money penalties in certain situations. The authority and delegation relates to the petition for admission of workers and does not in any way reference the labor certification. *Id.* Unlike the H-2A program, there is no statutory requirement to provide a labor certification with a petition for admission and there is no statutory incorporation by reference. DOL itself

[3] H.R. 3810, 99th Cong., 1st Sess. (1985); S. 1200, 99th Cong., 1st Sess. (1985).

implicitly recognizes this lack of authority by including in its proposed rule a definitional change that defines "H-2B petition" to "include[s] the approved Application for Temporary Employment Certification..." 76 Fed. Reg. at 15197. There is no statutory basis for re-defining the term "petition" as it refers to the admission process for H-2B workers.[4] Any delegation of authority by DHS to DOL for fraud and abuse enforcement in the H-2B petition as part of 2005 law does not and cannot include authority over any other portion of the H-2B admission process, including the labor certification process. P.L. 109-13, § 404

From the foregoing statutory and legislative history analysis, it is clear that most of the proposed rules evaluated below are beyond the authority of DOL and without a legal basis. By borrowing the statutory structure of the H-2A program and rules implementing it by DOL issued in 2010, and seeking to import them into the H-2B program, DOL is attempting to achieve through regulation what Congress refused to do when it enacted IRCA in 1986. Moreover, the limited delegation of authority that DOL received in 2005 does not enable it, by virtue of assertion of its authority in its regulatory definition of the term "H-2B Petition," to assume the regulation of the H-2B labor certification process. We respectfully request DOL to withdraw its proposed rulemaking as beyond its regulatory authority.

While we believe the proposed rule is beyond DOL's authority, we nonetheless make the following comments on specific provisions of the rule. We do not repeat this objection to each specific provision upon which we comment, as it is a standing objection to the rule. Moreover, our comments do not and should not be read as implying a concession that DOL has the authority to issue the specific provisions upon which we are commenting.

The NPRM Violates DOL's Regulatory Mandate

DOL describes its regulatory mandate at several places in the NPRM as a "mandate to protect jobs." NPRM, 76 Fed. Reg. at 15160; *see also* NPRM, 76 Fed. Reg. at 15132 ("mandate to prevent adverse effect"), 15160 ("mandate to protect jobs"); 15160 ("mandate to prevent adverse effect"); 15167 ("mandate to prevent adverse effect"). At one point, DOL states that its mandate is to set workplace "requirements" for American employers participating in the H-2B program. NPRM, 76 Fed. Reg. at 15172. If DOL's mandate is to "protect jobs," the imposition of costly assurances and obligations runs directly counter to its mandate.

The mechanism that DOL uses to "protect jobs" is to increase the relative cost of employing an H-2B worker so that employers will exit the H-2B program and presumably hire domestic workers. NPRM, 76 Fed. Reg. at 15169. NPRM, 76 Fed. Reg. at 15173 ("Ultimately, the decision of an employer to apply for H-2B workers is a voluntary choice. That is, any individual employer can avoid the costs associated with the NPRM by not applying for H-2B workers.") By reducing the number of employers participating in the H-2B program, DOL appears to theorize that it would thereby reduce any adverse effect arising from the presence of H-2B workers in the U.S. economy.

[4] Moreover, since the petitioning process is an aspect of the exercise of the Secretary of Homeland Security's regulatory authority under 8 U.S.C. § 1184, DOL lacks the authority to redefine it.

The NPRM would not protect American jobs; rather, it would damage the numerous seasonal and small businesses (and the domestic workers employed by them) who lack an adequate domestic labor supply and who cannot afford the additional costs that the NPRM imposes. It would also damage upstream and downstream businesses and their employees as the level of economic activity from their suppliers and customers is reduced. Rather than protecting jobs, this proposal will cost them. Ultimately, more Americans will be unemployed and underemployed if the NPRM's assurances and obligations are adopted.

The NPRM Is Not Supported by Recent Congressional Intent

Generally speaking, the H-2B program has two objectives: to assure an adequate supply of labor for United States employers, *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977), while avoiding adverse effect on wages and working conditions. In 2006, the Senate passed comprehensive immigration reform. *See* Comprehensive Immigration Reform Act of 2006, S. 2611. Provisions were included in the Senate-passed legislation extending certain provision of the Save Our Small And Seasonal Businesses Act of 2005. *Id.*, § 753.

Congress considered legislation governing the H-2B program in the 111th Congress. *See* H-2B Program Reform Act of 2009, H.R. 4381. In many respects, the NPRM mirrors the proposed legislation, including the proposed registration process, the NPRM's assurances and obligations, and some of the NPRM's proposed enforcement provisions. H.R. 4381 was introduced in the House of Representatives on December 16, 2009 and referred to the Subcommittee on Workforce Protections on February 23, 2010 and to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law on March 1, 2010. There were no other major congressional actions on the proposed legislation. This proposed legislation did not reach the floor of the House of Representatives for substantive consideration. As such, Congress' most recent substantive consideration of the H-2B program was the Senate debate in 2006.

In 2006, numerous Senators, on a bipartisan basis, emphasized that the H-2B program's purpose was to save U.S. jobs. The primary purpose of that legislation was to address a shortage of H-2B visas because, given the economic conditions of the time, the shortage of visas threatened the economic viability of many small and seasonal businesses. During the debate on this amendment, the purpose of the H-2B program was articulated clearly. For example, Senator Mikulski stated: "It guarantees the labor supply that small businesses need during peak seasons is available, when they can't find Americans to take their jobs." The second purpose Senator Mikulski articulated is "to protect the jobs of citizens." 152 Cong Rec. S 2699, 2709 (daily ed. April 3, 2006) (statement of Sen. Mikulski). The H-2B program protects "the jobs of citizens" by protecting the economic viability of the small and seasonal business that employ them. 152 Cong Rec. S 2699, 2711 (daily ed. April 3, 2006) (statement of Sen. Warner).

As such, these purposes complement each other. By ensuring the health of American small and seasonal businesses, the H-2B program protects the jobs of American workers employed in those businesses and other businesses who depend on them. *See, e.g.,* 152 Cong

Rec. S 2699, 2712 (daily ed. April 3, 2006) (statement of Sen. Sarbanes) ("This extension is a necessary adjustment for small and seasonal businesses that rely on temporary workers. We must recognize that the success of one small business impacts another. It has a ripple effect through the economy and helps to maintain the vitality not only of our State's economy but of the Nation's economy."); 152 Cong Rec. S 2699, 2709 (daily ed. April 3, 2006) (statement of Sen. Mikulski).[5]

DOL predicts that the NPRM will reduce "the quantity of labor demanded," *i.e.*, reduce the number of job opportunities that employers offer by increasing the cost of employing H-2B workers. 76 Fed. Reg. at 15162; *see, e.g., The Economics of Mandating Benefits for H-2B Workers: The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers*, Domestic Policy Subcommittee of the House Oversight and Government Reform Committee (April 23, 2009) (testimony of Patrick A. McLaughlin) ("If minimum wage, prevailing wage requirements, or some other factor means that wages cannot be lowered to compensate for employers paying transport costs, then the results are fairly straightforward from an economic perspective. Firms will seek out workers with lower benefit costs. In this scenario, that means companies are less likely to hire workers whose costs employers must bear to transport them to their new jobs.") There seem to be two underlying assumptions here. First, DOL appears to assume that H-2B workers are surplus labor, *i.e.*, that small and seasonal businesses do not really need H-2B workers for their economic viability either because they overstate their needs or because American workers would be available if the job were attractive enough. Second, DOL appears to assume that whether H-2B workers are present or not is irrelevant to the ability of an employer to employ Americans. In other words, DOL believes that Congress was wrong when it concluded that assuring an adequate labor supply of foreign H-2B workers when recruiting efforts fail was essential for protecting American jobs.

Recent congressional consideration of the H-2B program shows that both assumptions are wrong. The congressional debate on the 2006 legislation specifically addressed the issue of U.S. workers. Small and seasonal businesses look and look hard for local workers before

[5] Numerous other Senators expressed similar views on the purposes of the amendment as follows: ("[I]t protects American jobs by keeping small and seasonal business open for business. It guarantees the labor supply that small businesses need during peak seasons is available, when they can't find Americans to take their jobs."); 151 Cong Rec. S 3513, 3539 (daily ed. April 13, 2005) (statement of Sen. Collins) ("Without these visas, employers are simply going to be unable to hire a sufficient number of workers to keep their businesses running during the peak season. Many of these businesses fear this year they will have to decrease their hours of operation during what is their busiest and most profitable time of year. This would translate into lost jobs for American workers, lost income for American businesses, and lost tax revenues for our States.") Not only does an employer's participation in the H-2B program maintain American jobs, it creates more American jobs. 151 Cong Rec. S 3513, 3535 (daily ed. April 13, 2005) (statement of Sen. Warner) ("Over 75 percent of net new jobs in this country come from small businesses. . . . In many parts of the country, for every temporary H-2B worker that is hired, two more full-time domestic workers are sustained."); *see also* U.S. Chamber of Commerce, *The Economic Impact Of H-2B Workers*, p. 3 (Nov. 2010) ("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 otherwise would have over the next calendar year, and with employment also increasing 0.05 percentage points faster. These are small effects – not surprising since H-2B is a small program. But the fact is, the direction is positive.")

seeking H-2B workers. 152 Cong Rec. S 2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski) ("First they hire all of the American workers they can, but they need additional help to meet seasonal demands. Without this help, they would be forced to limit services, lay off permanent U.S. workers or even worse close their doors.")[6]

Reducing the number of H-2B job opportunities by making it too expensive to hire H-2B workers will directly and substantially harm the American economy. The first effect will be to force small and seasonal businesses to "limit services, lay off permanent U.S. workers or even worse close their doors." 152 Cong Rec. S 2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski). Senator Jeffords explained what happened to American workers in the Vermont hospitality industry when seasonal businesses faced a shortage of H-2B workers:

> I have also heard from Vermont businesses that they had to lay off or not hire American workers because they could not find enough employees to round out their crews. Without having the sufficient number of workers to complete projects, they could not hire or maintain their year-round staff. They also could not bid on projects and many had to scale back their operations. In these instances, the lack of seasonal workers had a detrimental effect on our economy and on the employment of American workers.

151 Cong Rec. S 3616, 3638 (daily ed. April 14, 2005) (statement of Sen. Jeffords).

Senator Collins' comments also show the benefits of the H-2B workers for the U.S. economy and U.S. workers, using the example of Maine's forest products industry:

> A similar situation faces Maine's forest products industry, which contributes approximately $5.6 billion annually to Maine's economy. In 2003, more than 600 temporary workers-mostly from Canada-were employed as forestry workers in Maine. Many work in remote areas of the State where there are not enough Americans able to take these jobs. By some estimates, these foreign workers account for as much as 30-40 percent of the wood fiber that supplies paper and saw mills throughout Maine and the Northeast. This number represents roughly 4.8 million tons of wood annually. With an already significant shortage in the wood supply, the loss of these temporary workers poses a serious threat to the industry and to Maine's economy. With fewer workers available to bring wood out of the forest and into mills, supplies will dwindle, prices will continue to rise, and mills may be forced to curtail production, or even temporarily discontinue operations. If this happens, it is American workers who may lose their jobs.

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[6] DOL's own regulatory experience shows this to be true. When the CO issues a labor certification, the certification is an official finding that sufficient domestic workers are not available for the job or jobs in question. *See* http://www.flcdatacenter.com/CaseH2B.aspx; http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm (certification statistics for FY 2006 through Q2 of 2011). Yet, after finding these shortages, DOL bases its analysis in the NPRM on the assumption that domestic workers really are available. DOL is taking a position directly at odds with its own official certifications. If DOL decides to issue a final regulation, we request that it address this tension between its own work and the position it is taking in this rulemaking.

151 Cong Rec. S 980, 983 (daily ed. Feb 3, 2005) (statement of Sen. Collins).

It is clear that DOL's theoretical judgment that "in a practical sense, the macroeconomic effect of reductions in the demand for corresponding workers is expected to be minimal," 76 Fed. Reg. at 15162, is inconsistent with, and therefore must yield to, Congress' judgment that "these losses will be significant." 151 Cong Rec. S 3513, 3539 (daily ed. April 13, 2005) (statement of Sen. Collins) ("These losses will be significant. We must help them be avoided.") Rather than help the losses to be avoided, the NPRM would exacerbate them either by forcing employers to reduce the size and scope of their businesses, or simply close them.

In contrast to this clear and uniform judgment by Congress, the NPRM offers no analytical support for a contrary conclusion. The NPRM's only support for its counterintuitive conclusion is the following two sentences of analysis:

> However, in a practical sense, the macroeconomic effect of reductions in the demand for corresponding workers is expected to be minimal. Because employers cannot replace U.S. workers laid off 120 days before the date of need or through the period of certification with H-2B workers, DOL concludes that there would be no reduction in the employment of corresponding workers among participating employers. (76 Fed. Reg. at 15162).

This analysis is both incomplete and erroneous. It is incomplete because it ignores a significant aspect of the overall problem: that non-corresponding domestic workers (as well as the economic ripple effects through an entire community) will bear the brunt of the increased costs of complying with the NPRM. It is erroneous because H-2B workers do not replace domestic workers, they supplement domestic workforces. 152 Cong Rec. S 2699, 2711 (daily ed. April 3, 2006) (statement of Sen. Warner) ("The current system in place since 2005 has allowed these small and seasonal businesses an opportunity to hire a legal workforce to supplement and maintain the full-time domestic workers they already employ.") It is also erroneous because if the employer needs fewer workers and cannot hire H-2B workers because they are too expensive, there will be nothing to prevent corresponding workers from being laid off just like others. If a company simply closes, it will not employ anyone.

The NPRM Fails to Support Its Assertion That It Will Increase the Employment of U.S. Workers

DOL has not identified any "appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the NPRM provisions." 76 Fed. Reg. at 15163. Nor does DOL have data for estimating the effect of any of the major new costs the NPRM would impose on employers or for estimating the benefits. *See* 76 Fed. Reg. at 15161.[7] Given

[7] The NPRM is replete with statements that DOL lacks any data to support its assumption that the proposed rule will increase the employment of U.S. workers: 76 Fed. Reg. at 15163 ("We cannot identify data on the number of corresponding workers at work sites on which H-2B workers are requested or the current hourly wages of those workers."); *id.* ("The Department does not collect data regarding what we have defined as corresponding employees,

the lack of adequate data and the lack of analysis concerning overall employment effects, the NPRM reaches what can only be considered the speculative conclusion that the benefits of the NPRM outweigh its costs. *But cf.* NPRM, 76 Fed. Reg. at 15136 ("In accord with the CATA decision, DOL believes that the regulatory definition of full-time work should be supported by empirical data.")

The NPRM does not meet DOL's mandate from Congress. Rather than streamlining the H-2B costs and lowering the cost of employing an H-2B worker, DOL is making the process more burdensome and more costly for employers at every turn. This approach openly flouts Congress' judgment that providing American employers with access to temporary foreign workers protects American jobs. The NPRM as written does not advance DOL's mandate from Congress as DOL interprets it. The NPRM should be withdrawn, the appropriate data gathered, and a proposal consistent with Congress' judgment that H-2B employment is essential to protecting American jobs should be issued.

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and therefore cannot identify the numbers of workers to whom the obligation would attach."); *id.* ("Nor can the Department identify what such workers are currently being paid, and so cannot quantify what impacts, if any, the requirement to pay the prevailing wage would signify for such workers."); *id.* ("The Department requests the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H-2B workers are requested and the current hourly wages of those workers."); 76 Fed. Reg. at 15162 ("However, the Department cannot identify a reliable source of data to estimate the number of corresponding workers at work sites on which H-2B workers are requested, nor can it identify the current hourly wages of those workers. Therefore, the Department cannot quantify the impacts, if any, associated with this provision."); *id.*, ("We were unable to identify adequate data to estimate the number of corresponding workers and, thus, we are unable to quantify this transfer. The Department would appreciate public input that would help to quantify these costs."); *id.* at 15163 ("The Department is not able to quantify this effect, however, due to a lack of adequate data."); *id.* ("The cost of visa fees will be entirely avoided if U.S. workers are hired. We have not identified appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the NPRM provisions."); *id.* ("The Department does not have valid data on referrals resulting from job advertisements and, thus, is unable to quantify this impact."); *id.* at 15165 ("Due to a lack of data on the number of SWA referrals, we are not able to quantify this benefit."); *id.* at 15166 ("Because of data limitations on the number of corresponding workers and U.S. workers expected to fill positions currently held by H-2B workers, the Department was not able to monetize any costs to the rule that would arise as a result of deadweight losses associated with higher employment costs under the proposed rule."); *id.* ("Because the Department was not able to monetize any benefits for this NPRM due to the lack of adequate data, the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate."); *id.* ("The Department did not identify data to provide monetary estimates of several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H-2B workers."); *id.* ("These benefits, however, are difficult to quantify due to data limitations."); *id.* ("We were not able to quantify these cost savings due to a lack of data regarding the number of I-9 verifications SWAs have been performing for H-2B referrals.").

A WORKABLE H-2B PROGRAM IS IMPERATIVE AT A TIME OF INCREASED WORKSITE ENFORCEMENT BY IMMIGRATION AND CUSTOMS ENFORCEMENT AND THE PROSPECT OF ENACTMENT OF MANDATORY E-VERIFY LEGISLATION

We are concerned that the proposed regulations will significantly reduce the effectiveness of the H-2B program as a safety valve when there are shortages of U.S. workers to fill job opportunities. While the pressure to use the program may have declined in some industries during the current economy, that likely will change in the future. In addition, worksite enforcement by Immigration and Customs Enforcement (ICE) in the form of employer I-9 audits has increased dramatically during the past several years, resulting in the loss of unauthorized workers in many businesses. ICE statistics show that it has doubled worksite inspections between fiscal years 2008 and 2010 (2,746 vs. 1,191) and issued $6.9 million in fines in FY 2010 compared to $767,500 in fiscal 2008. *ICE Worksite Enforcement – Up to the Job? Before the Subcomm. on Immigration Policy and Enforcement, of the House Comm. on the Judiciary*, 112 Cong. 1st Sess. (Jan. 26, 2011) (State of Kumar Kibble, Deputy Director, ICE).

In addition, the House Committees on the Judiciary and Ways and Means have held several hearings this year on worksite enforcement and mandatory E-Verify. *E-Verify-Preserving Jobs for American Workers*, 112th Cong., 1st Sess. (Feb. 10, 2011); *see also* Subcommittee on Social Security Hearing, Committee on Ways and Means, 112th Cong., 1st Sess. (April 14, 2011). House Judiciary Committee Chairman Lamar Smith has made enactment of mandatory E-Verify a top priority and many expect the House of Representatives to consider such legislation this year. If mandatory E-Verify is enacted, it will result in the exclusion of many "U.S. applicants" from the worksite and put intense pressure on employers to replace those workers. To the extent that U.S. workers authorized to work in the United States cannot be found, employers will have no alternative but to seek access to alien workers through the H-2B program. As our comments below indicate, we believe that, if adopted, the proposed changes to the H-2B program would not provide access to a legal workforce. There would be unwarranted delays, costs and litigation that would severely limit the program's usage—forcing employers to choose between two equally unacceptable options—seeking to access an unworkable temporary worker program or employing unauthorized workers.

COMMENTS ON SPECIFIC PROVISIONS OF THE PROPOSED RULE

THE PROPOSED ELIMINATION OF THE ATTESTATION MODEL

We would like to make some preliminary comments about the proposed elimination of the current attestation system. The 2008 regulations adopted an attestation approach to the filing of applications that was intended to expedite the processing by the National Processing Center (NPC) of applications by eliminating the delays historically encountered by employers in obtaining approvals of their applications. *See* 73 Fed. Reg. at 78022. Under the attestation process, certifying officers have more limited authority to reject applications. Significantly, the use of an attestation process in both the H-2B and H-2A programs after the rules changes in both programs in 2008 resulted in NPC meeting its processing deadlines. This is a significant

departure from the delays that characterized the labor certification process under both programs. Clearly, an attestation model meets its intended purpose of facilitating timely approvals.

The use or non-use of attestation filing of applications for foreign labor certifications tells the story of OFLC's success or failure to comply with application processing deadlines or targets. First, OFLC's compliance with statutory processing deadlines for H-2A applications has been consistently poor, dating back at least to the 1997 GAO report on the H-2A program.[8] The Office's rate of compliance with the requirement that H-2A applications be processed within 15 business days has rarely exceeded 60%, with one notable exception. In the quarter ending in September 2009, OFLC briefly experienced 98% compliance with their 15-day statutory deadline.[9] That period coincided with the Office's use of attestation filing. Once attestation-based filing was eliminated for H-2A applications with the new regulations, the quarters after that saw a return to less than 60% compliance with statutory deadlines, including a 58% rate for FY 2010 as a whole.[10]

The processing of H-2B applications by OFLC had a similarly undistinguished record in the years before 2009, when attestation-based filing was introduced to that program. While first noting that the purely self-imposed timeliness guideline for OFLC is 60 days for H-2B applications, compared with 15 business days for H-2A processing, the Office gradually began to struggle to meet even the looser 60-day goal. From a high water mark of 85% compliance with this target in FY 2005, OFLC's performance slipped to 82% in 2006, 62% in 2007, and 71% in 2008, before bottoming-out at 43% in FY 2009.[11] As the compliance rate slipped in FY 2006 and FY 2007, OFLC dropped its 90% target in favor of 64% and 65% targets, explaining in its FY 2009 CBJ that:

> OFLC justified this 30% reduction in target because, despite undertaking a number of management actions to address the performance issue, OFLC does not expect an immediate improvement as employer demand for H-2B workers has been increasing and resources available from Congress have remained below the President's request.[12]

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[8] The GAO Report cited 59% compliance in 1997. http://www.gao.gov/archive/1998/he98020.pdf at p. 8. That figure was 57% in 2006, 55% in 2007, 56% in 2008, 46% in 2009, and 58% in 2010.
FY 06-08: http://www.dol.gov/dol/budget/2010/PDF/CBJ-2010-V1-07.pdf at p. 58.
FY 09: http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V1-08.pdf at p. 12.
FY 10: http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V1-09.pdf at p. 65.

[9] Workforce Systems Results Report for July 1 – September 30, 2009, at 8.
http://www.doleta.gov/performance/results/quarterly_report/Sept_30_2009/WSR_Report_Complete.pdf.

[10] *Id.*

[11] These figures are from DOL ETA's CBJs for FY 2009-2012:
FY 05-07: http://www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V1-10.pdf.
FY 08: http://www.dol.gov/dol/budget/2010/PDF/CBJ-2010-V1-07.pdf at p. 58.
FY 09: http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V1-08.pdf at p. 12.
FY 10: http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V1-09.pdf at p. 65.

[12] FY 2009 CBJ for Foreign Labor Certification at p. 18.
http://www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V1-10.pdf.

Even the reduced targets were not met in FY 2008 or FY 2009. Of a more present concern, the proposed funding level for OFLC for FY 2012 is approximately $3 million below the FY 2009 level that OFLC cited for its poor performance.

The other side of the timeliness coin is the switch to attestation-based filing of H-2B applications in FY 2010. The FY 2009 low point of 43% of H-2B applications processed within 60 days of receipt was followed by 99% compliance in FY 2010.[13] OFLC explained this 56% jump in compliance as follows:

> For the H-2B program, FY 2010 represented the first full year of implementation of the new attestation-based program model. As a result, H-2B case processing times greatly improved from the prior year and exceeded the GPRA target by 34 percentage points.[14]

Thus, DOL itself credits attestation-based filing for the dramatic improvement in its own handling of H-2B applications. The data support this account; the only flicker of compliance in the H-2A program was a brief period of 2009 when attestation-based filing was permitted, and compliance in the H-2B program has reversed a prolonged decline and secured nearly 100% compliance since FY 2010 with the use of attestation-based filing. The proposed move away from attestation-based H-2B applications, coupled with reduced funding for OFLC and a poor history of pre-attestation compliance, would effectively doom any attempts at timely processing of these time-sensitive applications and impose tremendous additional burdens on American employers.

The tradeoff for the expediency of an attestation process is that the penalties for violating the promises attested to on the newly created ETA Form 9142 are potentially severe. Failure to abide by the attestation results in the imposition of serious penalties and sanctions. *See, e.g.*, Sections 655.72 (revocation) and 655.73 (debarment); and 29 C.F.R. § 503 *et seq*. This is in contrast to the prior history of the H-2B program where DOL had no express enforcement authority.

We believe that DOL's conclusion that an attestation process does "not provide an adequate level of protection for either U.S. or foreign workers" is premature and based on too limited of a study. 76 Fed. Reg. 15132. While the preamble concludes that audits of program use during the first two years of an attestation system indicate that nearly half were in compliance does not provide an adequate basis for reaching such a conclusion. First, the 2008 regulatory scheme was new and complex and a radical departure from the limited administrative guidance that preceded it. Moreover, the nature of the violations, minor and technical, versus significant, are not differentiated. 76 Fed. Reg. 15132. It is reasonably anticipated that the regulated community would require some time to adapt to a new and complicated regulatory system.

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[13] *Id.*
[14] WSR Report for Q4 FY 2010, at 19, *supra*.

The current proposal retains the elevated penalties contained in the 2008 rule and eliminates the attestation process, which was the bargain for tougher penalties. Thus, employers would get the worst of all worlds—a dual certification process with the elevated penalties of an attestation process.

We recommend that DOL retain the attestation procedures contained in the 2008 rules, along with the accompanying enforcement provisions, modified as recommended below. The preamble indicates, however, that while DOL prefers the compliance demonstration model set forth in this proposal, that it is open to consideration of maintenance of the current attestation model with modifications to address certain concerns. 76 Fed. Reg. 15133. Our comments will address the five questions posed in this regard in the preamble.

What kind of specific guidance could DOL provide that would benefit a first-time employer? We believe that public education regarding the attestation-based approach is of critical importance. While DOL typically sponsors several public education programs upon the issuance of new final regulations, we believe that more education programs throughout the U.S. on an on-going basis would be helpful. We also suggest that a "hot-line" be provided to answer questions about basic programmatic issues. As a supplement to the hot-line, it would be helpful if the CO notified employers of technical issues with their application (misspellings and such) informally while the application is under consideration. Such a front-end investment of DOL's resources would obviate the more common and recurring problems.

What kind of guidance would benefit frequent users of the program with respect to repetitive errors in recruitment? We believe that more education also is the answer here. DOL could publish at appropriate intervals a "Top-10" errors and issues list. Similarly, at any point that the CO spots a trend, public notice on DOL's website would assist employers greatly in avoiding others' mistakes. In addition, employers should document attendance and DOL educational sessions and use of the hot-line to demonstrate a good faith effort to comply. Documentation of such compliance efforts should be considered in mitigation of employer errors regarding complex program issues. Mitigation would be inappropriate where the same employer engages in repetitive violations.

Could pre-certification audits augment a post-certification audit in an attestation-based program model? For the reasons stated below, we do not favor a pre-certification audit. A certification process at the front of the process assumes that a review of documentation supporting an application will ensure compliance with program requirements if an employer is intent on skirting its legal obligations. A pre-certification review cannot ensure that proper wages will be paid or that U.S. referrals will be properly considered for a job. The current enforcement scheme provides significant incentive for program users to comply based on audits after an attestation has been accepted. As noted above, education coupled with penalties for non-compliance should ensure program integrity.

What additional sanctions could be taken against employers to ensure compliance with program requirements given the potential for fraud in the H-2B program? We believe that the enforcement scheme provided for in the current regulations is more than adequate. It provides

for the ultimate sanctions of revocation and debarment and will as back pay remedies, as well as civil money penalty assessment. In the most egregious cases, DOL notes that criminal prosecutions have been successfully brought, evidencing that the current array of laws is adequate to ensure program integrity. 76 Fed. Reg. 15132.

What other kinds of actions could DOL take to prevent an H-2B employer from filing attestations that do not meet program requirements? We believe that the answers to the prior four questions are inclusive and that other actions are not necessary.

Section 655.5: Definition of Terms

Corresponding Employment

We strongly recommend that concept of corresponding employment be excluded from the proposed rule because it is without a legal basis. The definitional section of the proposed rule borrows verbatim the definition of the corresponding employment from the definition provided in the 2010 H-2A regulations. See, 20 C.F.R. § 655.103(b), 75 Fed. Reg. 6960 (Feb. 12, 2010). As set forth in the introduction to these comments, we strongly believe that the proposed rule exceeds DOL's authority under INA, to the extent that it attempts import specific provisions from the H-2A program into the H-2B regulatory framework. Moreover, even if DOL had the requisite authority, the 2010 H-2A rule is inconsistent with the 1987 rule that governed the program for nearly 25 years and is arbitrary and capricious in its overbreadth.

The proposed definition borrowed from the H-2A definition would apply to any non-H-2B worker working in any work specified in the job order or any other work performed by the H-2B worker, as long as the work was performed during the validity of the job order. The preamble to the proposed definition further explains that any non-H-2B workers hired during the recruitment period as part of the H-2B certification process and non-H-2B workers already working for the employer would be included within the definition. 76 Fed. Reg. 15135.

As does the current H-2A definition of corresponding employment, this proposal adopts an extremely expansive definition that, if literally interpreted, could routinely entitle an entire workforce to H-2B wages and benefits. The definition reads as follows:

> The employment of workers who are not H-2B workers by an employer who has an approved 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.** To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof. (Emphasis added).

It is asserted in the preamble to the H-2A regulations from which this definition is borrowed that it represents a return to the 1987 definition of corresponding employment.[15] It is not. The final H-2A rule was much broader. By comparison, the 1987 H-2A rule reads:

> These regulations are applicable to the employment of other workers hired by employers of H-2A workers **in the occupations** and for the period of time set forth in the job order approved by ETA as a condition for granting H-2A certification, including any extension thereof.[16] (Emphasis added).

It is clear that the 1987 rule limits corresponding work to that which is included in the occupations defined in the job order. Thus, for example, if a job order is accepted that defines the H-2B occupation as one that includes supervisory work involving landscaping activities, involving knowledge of irrigation systems, plant species and knowledge related to the planting and care of specific plants, but also requires occasional labor activities such as digging holes and planting plants, corresponding employment would be limited to that job description. By contrast, the final 2010 rule would place in corresponding employment "any work" in the job order or "any work performed by the H-2B workers." Thus, in this example under the 2010 final rule, any U.S. worker performing any digging or planting would be considered to be in corresponding employment, regardless of the fact that the accepted job order narrowed the position to supervisory work that included specialized knowledge. The 1987 H-2A regulation from which this concept is imported distinguished between the occupations set forth in the job order, and any work included in the job order or performed by H-2A workers.

If applied literally, DOL could seek to impose corresponding employment upon most jobs in a workforce. The resulting costs would be prohibitive, especially if not anticipated by the employer. Application of this broad definition as written could subject employers to astronomical back wage payments, including the newly proposed transportation and subsistence cost rule, from the unanticipated reach of this proposed definition.

To the extent that DOL intends to retain the concept of corresponding employment in its rule, it should adopt the 1987 definition of corresponding employment and include in it the 2008 revision of the H-2A regulations clarifying that only U.S. workers who are newly hired by employers participating in the H-2B program fall within the definition.[17] Workers who were employed in the occupation prior to H-2B workers being employed in the same occupation would not be entitled to the wages and other benefits afforded to the H-2B workers. Only those workers hired on or after the beginning of the contract period would be afforded such wages and benefits. The comments accompanying the final 2008 rule provides a logical rationale for why this definition does not adversely affect U.S. workers.[18]

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[15] 75 Fed. Reg. 6885 (Feb.12, 2010).
[16] 29 C.F.R. § 501.0 (June 1, 1987).
[17] 29 C.F.R. § 501.0; 73 Fed. Reg. 77194-95 (Dec 18, 2008).
[18] The following rationale was provided in the final 2008 rule: "Where an employee has agreed to work at a certain wage, and begins to receive that wage prior to the time an employer has hired an H-2A worker, the subsequent hiring and payment of the H-2A worker at a rate that is higher than the wage received by the U.S. worker will not adversely affect the wages and working conditions of the U.S. worker—rather, the U.S. worker will be paid

Strike

The proposed rule rejects DOL's longstanding position set forth in both the 2008 H-2B regulations and General Administration Letters (GAL) that governed the H-2B program's operation prior to 2008. Both the 2008 regulation, 20 C.F.R. § 655.4, and GAL No. 01-95, page 6, clarify that DOL will determine whether job opportunities are vacant because of a strike, lockout, or work stoppage on an individualized, position-by-position basis. 73 Fed. Reg. 78025 (Dec. 19, 2008). The H-2A program's definition of the term strike also adopted this longstanding definition prior to and in the 2008 regulation.[19]

Under these longstanding definitions of strike, the admission of H-2B workers would be limited where the specific job opportunity for which the employer is requesting H-2B certification is vacant because the former occupant is on strike or being locked out in the course of a labor dispute. The proposed definition of strike in the H-2B regulations (§ 655.5) borrows from DOL's 2010 H-2A regulations (20 C.F.R. § 655.135(b) (Feb. 12, 2010)). It imposes a very problematical definition that states that the employer seeking certification cannot have workers currently on strike or being locked out in the course of a labor dispute. The effect of this change through an extremely broad definition of the term "strike" would be to allow two or more workers who declare themselves on strike or locked out to preclude the employer from obtaining any H-2A workers.[20] Prior rules would only prohibit the admission of the number of H-2B workers that corresponded with the number of workers actually on strike or being locked out. DOL's preamble comments related to this provision fail to acknowledge that it is rejecting its longstanding rules and offer no justification for this significant change that could cripple program usage by an employer. 76 Fed. Reg. 15135 (March 18, 2011). The same lack of justification exists with regard to the 2008 H-2A regulations. We recommend that the longstanding prior H-2B definition be reinstated.

Section 655.6: Temporary Need

We strongly disagree with DOL's proposal to define temporary need as less than nine months, except in the case of a one-time occurrence. DOL concedes in its preamble comments that the term temporary is governed by DHS' definition. 76 Fed. Reg. 15138 (March 18, 2011). The DHS regulation states that a temporary need is one in which the "period of time will be one year or less, but in the case of a one-time event could last up to 3 years." 8 C.F.R. § 214.2(h)(6)(ii)(B). This is a longstanding definition adopted in DOL's GALs. For example, GAL 01-95, page 2, states: "As a general rule, the period of the employer's need must be 1 year or less, although there may be extraordinary circumstances where the need may be for longer than 1 year."

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precisely what he or she would have had the H-2A worker not been hired at all." 73 Fed. Reg. 77195 (Dec. 18, 2008).

[19] 20 C.F.R. § 655.105(c) (Feb. 12, 2010).

[20] The definitional section of the regulations defines a "strike" as "a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement.)" § 655.103(b) (Feb. 12, 2010).

While DOL's consultative role with DHS may allow it to recommend implementation rules, it does not allow it to contradict in its own proposed rules those issued by DHS. The only hint of a justification for the nine month limitation is DOL's assertion that a ten month period is not consistent with Congressional intent. 76 Fed. Reg. 15138. Yet, there is no citation to such intent, nor is there any reference to it by DHS, the determinative agency on this issue that has taken a contrary view in the Opinion Letter cited below that explains the scope of the term "temporary" that is applicable to the H-2B program. As discussed more completely below, there is no regulatory or legal basis for DOL's attempt to establish an arbitrary nine month definition of temporary need. DHS' definition permits a job to be up to one year except in exceptional circumstances where it can be longer.

To the extent that DOL advances the simplistic notion that there are four seasons, each of which is three months in length and divined that a temporary job not be longer than three seasons, hence, nine months, it has adopted a mechanistic approach that ignores the practical realities of jobs. Companies' needs to fill temporary jobs do not comport with a rigid calendar definition. They follow typical patterns based on the natural and/or economic factors that determine their workforce demands.[21] DOL can and should determine, based on the employer's job order, whether those patterns are temporary based on the facts attested to, rather than consultation of a calendar.

The current definition of "temporary" is supported by DHS' regulation that expressly states that "temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A)9(emphasis added). This regulation makes clear that DOL may require the applicant to show the need for the duties to be performed is temporary, but does not support a rule stating that any duties required beyond nine months are presumptively not temporary.

In an opinion issued by the Office of Legal Counsel of the Department of Justice on December 18, 2010 (2008 OLC LEXIS 9), contemporaneous with the issuance of its rule defining temporary work under the H-2B and H-2A programs, and upon which DOL relies in proposing this rule, DHS makes clear that the new rule comports with "the plain meaning of "temporary" and the agency's longstanding policy of focusing on the nature of the employer's need." Opinion, p.2. The Opinion further explains that the new temporary rule "generally limits temporary work to one year but allows it to last up to three years." Opinion, p. 4. Moreover, consistent with our comments on other parts of this proposed rule, the Opinion recognizes the distinctions between the term "temporary" in the H-2A and H-2B programs, indicating that

[21] DOL asks for comments on whether it "should restrict the definition of short-term demand to one that is the direct result of climatic, environmental or other natural conditions." 76 Fed. Reg. at 15138. We recommend that it not do so for two reasons. First, Congress recently considered legislation that would have so limited access to the H-2B program, H-2B Program Reform Act of 2009, H.R. 4381, § 2, but it did not pass. It would thus appear that Congress does not wish the H-2B program to be limited to such needs. Second, many employers' needs are temporary due to an increase in market demand. If the concept of "temporary" were adopted, it would eviscerate the H-2B program. This may be why Congress did not adopt this change in the H-2B program.

agricultural work is much more likely to be seasonal in nature, while temporary work under the H-2B program is much more likely than work under the H-2A program to involve a non-seasonal project. Opinion, p. 4. Finally the Opinion concludes, stating:

> Moreover, even after DHS promulgates its new H-2B visa regulation, its H-2A and H-2B visa rules would still be similar in essential respects: under both, temporary work would depend on the nature of the employer's need and ordinarily would last for only one year, but could last longer." (Opinion, p. 4, emphasis added).

It cannot be clearer, that the proposed nine month limit on H-2B visas imposes a limitation on the term "temporary" and denies employers on an individual, case-by-case basis the ability to establish that a job is temporary. It imposes upon businesses "one size fits all" rule that has no support under DHS' definitive rule and which, as discussed below, would have a devastating impact on many businesses that rely upon a temporary work force for more than 9 months.

Adoption of a nine-month limit on the admission of workers would have a devastating impact on multiple types of businesses, ranging from hospitality, food service, landscaping and numerous others in all 50 states. A review of the fiscal year 2010 labor certification data for the H-2B program shows that broad adverse impact.[22] Based on the total number of days certified during FY 2010, 1,080 certifications were issued that were for 279 days or longer (9 months x 31 days = 279, not counting 30 or 28 day months). This represents 29 percent of the total certifications granted in FY 2010. Exclusion of nearly a third of the businesses using the H-2B program without any legal or empirical basis would not only be arbitrary and capricious, it would be devastating to the economy by depriving businesses of sufficient workers to enable to effectively run their businesses. The negative ripple effect of this proposed rule on other businesses that depend on those newly excluded from the H-2B program would be significant. *See* 151 Cong Rec. S 3513, 3538 (daily ed. April 13, 2005) (statement of Sen. Warner) (discussing ripple effects of insufficient H-2B visas); 151 Cong Rec. S 3513, 3539 (daily ed. April 13, 2005) (statement of Sen. Collins) ("These losses will be significant. We must help them be avoided.").

For example, many resorts throughout the U.S. have 10 month seasons. If a nine month rule were imposed, many resorts and hotels would have to schedule significant overtime for remaining employees, significantly increasing operational costs, and they would nonetheless be unable to find enough help to work in housekeeping, grounds, and food and beverage jobs. This would affect their ability to attract clients and, to the extent that they provide accommodations for other attractions, such as ski areas or beach resorts or theme parks, all would be negatively impacted.

[22] *See*, http://flcdatacenter.com/CaseH2B.aspx.

Section 655.8: Requirements for Agents

Although many of the signatories on these comments are agents, all the signatories support the requirement that agents be required to submit a copy of an agency agreement or other document demonstrating the agent's authority to represent the employer. We support program integrity measures that establish that bona fide relationships exist and have a significant interest in seeing that those that cannot establish legitimate relationships be excluded from program participation. We also recommend that in providing copies of such documentation, that agents are permitted to redact confidential proprietary business information. DOL accepted this recommendation with respect to such information received from agents in its 2010 rule governing the H-2A program. 75 Fed. Reg. at 6920 (Feb. 12, 2010).

The requirement set forth in proposed section 655.8(b) that an agent provide a copy of a Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration if such is required under MSPA might be confusing to some of the regulated public, since H-2B is viewed as a nonagricultural worker program, as contrasted to H-2A. To the extent that MSPA may require registration of agents providing services to those involved in reforestation and any other industries that are treated as agricultural under MSPA, but not under H-2B, it would be helpful if DOL provided a list of those businesses to which this rule would apply. in order to avoid confusion and provide clarity. Because this information falls under DOL's jurisdiction, it should be a simple and helpful clarification.

The preamble to the proposed regulation poses the question of the appropriate role of agents and whether DOL should continue to permit the representation of employers by agents in the H-2B program. 76 Fed. Reg. at 15138. The preamble indicates that DOL is concerned whether agents have contributed to problems with program compliance. We strongly disagree with the implication that agents represent a compliance problem and believe that there is no objective evidence that would lead a reasonable person to conclude that agents should be prohibited from representing employers. To the contrary, the objective data available suggests that agents are a critical component of the H-2B program; that those they represent have a higher approval rate than employers that handle their own applications; and that a recent GAO study refutes the suggestion that agents are a problem.

A review of fiscal year 2010 statistics regarding H-2B labor certifications show that 85 percent of employers filed an application for certification using an agent and 86 percent of those applications were certified or partially certified.[23] By contrast, only 15 percent of employers filed an application without an agent and of those applications only 62 percent were certified or partially certified. Agent filed applications resulted in only 14 percent denials, while those filed by employers alone resulted in 38 percent denials. OFLC's data leads to the conclusion that agents are valued by employers because they serve them well, as evidenced by the high approval rate. The contrast in approvals and denials indicates that most agents have a high level of program knowledge, resulting in the preparation of applications in compliance with DOL's

[23] FY 2010 H-2B Disclosure Data produced by the Office of Foreign Labor Certification (OFLC) with respect to agents can be found at http://flcdatacenter.com/CaseH2B.aspx.

regulatory requirements. The labor certification is a complicated process and agents afford knowledge and experience that an inexperienced employer, an employer with a small personnel staff, or a larger employer that would prefer contact with agent to handle the very specialized application and recruitment process, need or value.

The question posed in the preamble as to whether agents are a compliance problem is answered in the negative in a recent report of the General Accountability Office (GAO) in its Report to the Chairman, Committee on Education and Labor, House of Representatives, entitled "H-2B Visa Program, Closed Civil and Criminal Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse." GAO-10-1053, September 2010. The report concluded as follows:

> GAO personnel found that most recruiters they called or visited posing as prospective H-2B employers and workers did not encourage our undercover agents to violate program rules. Of the 18 recruiters in multiple states we contacted, 15 appropriately did not offer any advice on violating H-2B program rules.

GAO-10-1053. The report indicates three recruiters did provide suggestions on how to circumvent program rules. While there always will be a few "bad apples" among any group, they are a small minority in the H-2B context. OFLC's and GAO's own data directly answer DOL's questions: 1) agents should be retained as part of the H-2B because they better enable employers to file acceptable applications and are heavily relied upon by employers; and, 2) as a logical extension of the answer to question 1, GAO has found a vast majority of them complied with H-2B program rules.

Section 655.11: Registration of H-2B Employers

We oppose the proposal to bifurcate the application process by creating a registration step, in addition to the application for temporary employment certification. These two steps are in addition to the requirement to file the employer's job order with the SWA. The effect of this proposal would be eliminate a streamlined attestation process and replace it with a two part certification process. The 2008 regulations adopted an attestation approach because of a history of program delays. This proposal ignores the need for timely processing by replacing an attestation with what in effect is a double certification. It ignores the statutory requirement that the H-2B program provide employers access to a legal workforce in a timely manner.

Significantly, there is no justification provided in the preamble discussion to justify this proposal. The proposed rule requires a registration application so that NPC can determine in advance of an application for temporary certification of whether the job is nonagricultural, the need for services is temporary, the number of worker positions and period of need is justified, and the request represents a bona fide job opportunity. Yet, the preamble discussion provides no rationale for why each of these criteria warrants such close scrutiny so as to justify yet another review and approval step. In the preamble discussion of "The Need for Rulemaking," the focus is on whether an attestation system provides sufficient protection to U.S. and foreign workers, focusing on two court cases involving egregious abuses in the H-2B program, the prosecution of

which, evidences that the current enforcement structure works. 76 Fed. Reg. at 15132. The preamble discussion provides no evidence of broad-based programmatic abuses occurring in the limited period of the 2008 rule's existence, or prior thereto, that specifically relate to the above-referenced criteria for which it is asserted require pre-certification scrutiny.

We are extremely concerned that requiring another certification step in the form of a registration some 150 to 120 days from the date of need will result in significant delays in processing employer applications. Moreover, it subjects employers to a lengthy and administratively challenging process that would consume large amounts of administrative time, especially for small employers. Data obtained from DOL's budget justifications the past several fiscal years show that the Office of Foreign Labor Certification (OFLC) fails to accept or reject applications for temporary labor certifications on a timely basis under both the H-2B and H-2A program based on a single certification process. There is no doubt based on the following history of delay that a double certification process that includes a registration would cause further delays.

In fiscal year (FY) 2009, the last year before adopting attestation filing for H-2B certifications, the OFLC was only able to process 43% of H-2B applications within 60 days of receipt.[24] Unlike OFLC's processing of H-2A applications, there are no statutory or regulatory deadlines for processing H-2B applications. Even based on this arbitrary and generous 60-day yardstick for processing applications, fewer than half of H-2B applications were processed "on time." If attestation filing is eliminated, as proposed, OFLC's performance in processing H-2B applications would be expected to fall back to FY 2009 levels. In fact, since the appropriation request for FY 2012 for OFLC is actually more than $3 million less than it was for FY 2009, even performing at 2009's disappointing levels may be an unattainable goal for OFLC.

The proposed importation of many concepts from the H-2A program, coupled with a pre-certification component, would exacerbate, rather than reduce the scope of this problem. OFLC's handling of H-2A applications has demonstrated this consistently. Even with firm statutory and regulatory deadlines, OFLC consistently fails to meet their statutory mandate and processes less than 60% of the H-2A applications within the time provided.[25] The 1997 GAO study of the processing of H-2A applications found a nearly identical 59% compliance rate with these same deadlines.[26]

The proposed registration process compounds DOL's decision to abandon even the loose 60-day "timeliness" guidelines for H-2B application processing, or perhaps to obscure the expected failure to meet that goal. Because the time from initial filing, through OFLC's registration review of the application would not be counted against the 60-day guideline for

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[24] This figure is from DOL's Employment and Training Administration's FY 2011 Congressional Budget Justification at SUIESO – 12: http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V1-08.pdf.

[25] According to ETA's FY 2012 CBJ, only 58% of H-2A applications were processed within the deadlines in FY 2010, the last year for which data were provided. The CBJ is available from DOL's website (*see* p. SUIESO 65): http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V1-09.pdf If anything, this number may be slightly inflated, since attestation filing was used for H-2A applications for part of FY 2010.

[26] Page 8 of the GAO Report, available at: http://www.gao.gov/archive/1998/he98020.pdf.

processing H-2B applications, DOL could hide its timeliness failures and appear to comply with its own timelines while still adding weeks or months of delay to the processing of these applications. Program integrity is certainly important, but so is timeliness in processing these time-sensitive applications. DOL should not abdicate its responsibilities and abandon the latter in favor of pursuing only the former.

This registration proposal will only further aggravate the past processing delay problems that DOL identified as follows in its May 22, 2008 Notice of Proposed Rulemaking have been eliminated:

> The current, duplicative process requires the employer to first file a temporary labor certification with the SWA, which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfer the application to the applicable ETA NPC, which conducts a final review of the application. This process has been criticized for its length, overlap of effort, and resulting delays. Application processing delays, regardless of origin, can lead to adverse results with serious repercussions for a business, especially given the numerical limitation or "cap" on visas under this program, as a result of which any processing delay may prevent an employer from securing visas for H-2B workers during any given half year period for which numbers are available. 73 Fed. Reg. 78022.

Those concerns were legitimate and have not been eliminated in the current proposal. They simply have been ignored. They have been aggravated by another layer of review in the proposed bifurcated certification process, creating a new source of delay at a time when DOL's resources are more limited than they were under a single certification process. The proposed rule focuses entirely on program integrity at the expense of the purpose of the H-2B program to provide a timely legal nonagricultural workforce.

The only potential advantage of the registration requirement as articulated in the proposed rule is that the application for labor certification would be filed 75 to 90 calendar days in advance of the date of need and the employer's recruitment obligation would begin thereafter once a Notice of Acceptance is received. This has superficial appeal, when contrasted to the requirement to begin recruitment 120 days from date of need under the 2008 rule. The preamble suggests that this would shorten the period of recruitment and provide a more accurate picture of U.S. workers interested in the job closer to the time it would begin. Whatever appeal this has, is eliminated by two factors. First, the proposed rule imposes no deadline for its decision on an application for temporary employment certification. Second, even when statutory deadlines exist in a single, rather than bifurcated certification process, as noted above, NPC has demonstrated a consistent inability to meet those deadlines under the H-2B program, as well as the H-2A program, significant parts of which it is proposing to import into this rule. Thus, the theoretical benefit of a shortened recruitment obligation likely would be offset by the reasonably anticipated delays in accepting or rejecting applications.

The proposal argues that it will enhance efficiency in the future by providing a registration of "up to 3 consecutive years" in section 655.12. First, there is no guarantee that multiple year registrations will be issued. Second, the proposal provides that any change in any of four criteria will necessitate completion of a new request for certification. The four criteria imply that all businesses are static and beginning and ending dates of need should never change, that the nature of the duties should not change, nor should the number of workers to be employed. Based on our experience with a large number of employers in a variety of different types of businesses, these criteria do change occasionally and it is reasonable to anticipate that they will in the future. This would trigger the need to reapply for registration and ultimately defeat the purpose of this provision, assuming that it was beneficial because decisions were made in a timely manner.

Section 655.18: Contents of the Job Order

Section 655.18(b): The Job Order and Assurance Requirements Related to Job Requirements And Qualifications

The NPRM proposes a new § 655.18(b) as follows:

> Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers.

In addition, the NPRM proposes a new § 655.20(e) that bears on this topic as well:

> (e) *Job qualifications and requirements.* Each job qualification and requirement listed in the job order must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order.

With one major addition, these proposals substantially track a similar requirement in the current H-2A regulations. The addition is that the H-2A regulation refers only to "normal and accepted qualifications" while the NPRM refers to "normal and accepted qualifications *and requirements*."

Experience with the narrower requirement in the H-2A program reveals several administrative and policy challenges with this proposal. The major problem with this proposal as written is that it invites the certifying officer to micromanage employers' job qualifications and requirements by challenging the "appropriateness" of any job qualification or requirement with which he or she disagrees with for policy reasons. Requiring a background check is a good

example. Background checks are ubiquitous in today's economy. Yet, it is well-known that H-2A applications that include background checks receive heightened scrutiny. Rather than serving as a check on outlandish qualifications, review of appropriateness provides DOL a tool for determining who is qualified and who therefore must be hired. We respectfully ask that DOL modify the proposed rule by adding language that confirms that this proposal does not intended to eliminate or weaken an employer's traditional right to set qualifications and requirements for its employees and that it is not DOL's policy to administer this provision as a pretext for other policy objectives.

We would also ask that DOL clarify the circumstances under which the Certifying Officer (CO) may demand substantiation of the appropriateness of a job qualification or requirement. Concern has been expressed that the centralized model of application review leaves COs without an experiential base for fairly assessing regional labor market needs. Ruth Ellen Wasem, *Immigration of Foreign Workers: Labor Market Tests and Protections* 23 (Congressional Research Service) (Mar. 20, 2009). Whatever the merits of this concern with respect to labor markets, we respectfully believe that such a concern is warranted with respect to the highly particularized assessment of a single employer's requirements in a single market. By removing the COs from the regional offices, they become that much more removed from the day-to-day business realities needed to make these judgments. While DOL theoretically relies on SWAs in the H-2A context, the reality is that the national COs can and do override SWA judgments for little or no apparent reason.

Yet, at the same time, SWA judgments are often off-the-cuff or based on questionable sources. In one case, for example, a SWA consulted Wikipedia to determine if a particular job requirement was normal and accepted. Not only did the SWA use Wikipedia to make its initial judgment, the CO in the Chicago National Processing Center relied on this SWA opinion to send multiple deficiency notices. Wikipedia's role in the process only became apparent when the SWA responded to an Open Records Act request. We would urge DOL to explain how it plans to administer § 655.18(b) and § 655.20(e) to avoid such problems.

Another concern is the CO's discretion to demand substantiation that a job requirement is normal and accepted. First, we would ask DOL to confirm that it intends to use the construction that courts have given the phrase "normal and accepted" in the H-2A context in the H-2B context as well. If DOL intends to depart from this standard, we would ask that the record fully explain and justify the reason for any departure. *See* NPRM, 76 Fed. Reg. at 15136.

Next, we would ask that DOL limit the CO's discretion to demand substantiation to those cases in which he or she has objective and reliable documentation showing that a requirement or qualification is unusual or rare. When demanding substantiation, the CO should disclose fully such factual basis. We make this recommendation for three reasons. First, by the time the CO reviews an application, the employer will have certified, under the penalty of perjury, that the qualification is normal and accepted. While we understand why DOL might not give this certification dispositive weight, we believe it should treated as presumptively true and given weight accordingly. Requiring the CO to have an objective basis in evidence merely acknowledges that everyone is presumed innocent (here, of perjury). Second, like any other

public official, a CO may not act arbitrarily or capriciously. Requiring an objective basis in fact before demanding substantiation ensures that the request is not being made for serious and verifiable reasons. We note that this should add no additional burden to the CO. Finally, the obligation contained in § 655.18(b) and § 655.20(e) calls for a factual determination. If there are contrary facts (not merely off-the-cuff, Wikipedia-based opinions) that call into question the employer's certification, those are the situations in which further substantiation is required. Requiring the CO to have such facts and to disclose them upfront, however, would presumably make it more difficult for a CO to pursue a policy agenda attacking certain qualifications or requirements, *e.g.*, background checks. Full disclosure would aid the employer in addressing the issues.

We would also ask DOL to clarify what types of documentation would satisfy a request from the CO. In practical terms, it is usually very difficult to respond to such a request. The reason is that employers typically judge their qualifications and requirements by the needs of their business first and then learn, based on their experience with others in the same or similar occupations, what is normal and accepted as they compete for qualified employees. The main documentation is their certification. Few employers have the ability, time, or financial resources to conduct a formal survey. An informal survey is unlikely to be accepted (why would the CO accept an informal survey if the CO will not accept a certification under the penalty of perjury?). Prevailing practice surveys are of limited usefulness because they often are not specific enough, not well-conducted, and survey a higher standard – "prevailing practice" – than the applicable "normal and accepted." Absent such guidance, most employers will acquiesce in the CO's demand resulting in the CO exercising *de facto* control over what substantive qualifications an employer can accept. This control would then extend to an entire industry as employers modify their applications to avoid the extra cost and delay of a demand for substantiation. Such micromanagement would be a departure from DOL's current position that seeks to preserve employer flexibility in meeting the demands of the marketplace. *See Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule*, 75 Fed. Reg. 6884, 6907 (Feb. 12, 2010) ("Additionally, this requirement would unduly intrude on the employer's discretion to make business decisions, while not enhancing worker protections.") DOL should modify this rule to avoid this result or, if it cannot be so modified, it should not be adopted.

Section 655.18(f): Deductions

The NPRM proposes § 655.18(f) as follows:

> The job order must specify that the employer will make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's paycheck.

We recommend that DOL amend this section in three ways. First, DOL should define "deductions" for the purpose of this section as an "actual subtraction from earned wages." This prevents an employer from finding itself in violation of this obligation because an employee expended sums without its knowledge, which some treat as deductions. Second, DOL should amend this section to deal with the circumstance where deductions may, but not necessarily will,

be made. For example, state law may permit deductions for damages to employer-owned items. It may be, however, that nothing will be damaged and no deductions will be made. In the H-2A context, employers find themselves in a conundrum. They do not want to potentially discourage someone considering the job by suggesting that a deduction will take place when it might not. Nor do they want to create an issue by failing to disclose a deduction. DOL should amend its proposed form to deal with this situation and amend the language of § 655.18(f) for this purpose as well. Finally, DOL should clarify that "required by law" includes judicial process such as child support orders.

Section 655.18(k): Board, Lodging or Facilities

Proposed 20 C.F.R. § 655.18(k) provides:

> (k) *Board, lodging, or facilities.* If the employer provides the worker with the option of board, lodging, or other facilities or intends to assist workers to secure such lodging, such provision of board, lodging, or other facilities must be listed in the job order. If the employer intends to make any wage deductions related to such provision of board, lodging or other facilities, they must be disclosed in the job order.

We recommend that DOL either eliminate this section or clarify it. Initially, there are several ambiguities present in this section. It is unclear what DOL means by "If the employer . . . intends to assist workers to secure such lodging[.]" Assume, as is common in the hospitality industry, that an employer does nothing other than point a worker toward a potential source of housing and gives him or her a person to contact. It is unclear whether doing that triggers the "intends to assist workers to secure such housing" obligation to list in the job order. The text should also clarify that the intention to assist should be put in the job order, as the current proposal only refers to the "provision of board, lodging, or other facilities" as being required. Next, the definition of "other facilities" is extremely unclear. DOL should add a single, clear definition of this term in the definition section or here. Next, as we have urged before, DOL should define "wage deduction" as an actual subtraction from wages. That would ensure that the complex issues surrounding so-called *de facto* deductions discussed in detail below do not enter these regulations through the backdoor. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (*en banc*) (rejecting application of *de facto* deduction concept to H-2B program).

Section 655.20: Assurances and Obligations

Overview

The NPRM proposes that employers wishing to obtain a labor certification provide (1) a set of "assurances" to DOL and (2) a job order which contains an offer to comply with a range of specified workplace standards. For the most part, these assurances and workplace standards derive from Congress' specification of similar standards for agricultural employers in § 301 of IRCA, now codified at 8 U.S.C. § 1188. The NPRM notes that its proposal would "modify,

expand, and clarify current requirements." NPRM, 76 Fed. Reg. at 15142. Although the NPRM does not note it, many of these assurances and obligations are derived from the H-2B Program Reform Act of 2009, H.R. 4381, which Congress considered, but did not pass, in the 111th Congress. As discussed above, the importation of the assurances and obligations of the H-2A program expressly rejected by Congress when it enacted IRCA and rejected last Congress. There is no legal basis for implementing through regulation what Congress chose not to do through legislation. *See Food & Drug Agency v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-48 (2000) (Congress had considered bills granting FDA power to regulate tobacco, but those bills did not pass; FDA lacked authority).

The assurances and obligations proposed by the NPRM generally fall into three categories. The first consists of income security. These proposals, such as the modified three-quarters guarantee, shift all the risk from seasonal variations in dates of need and business conditions to the employer and its non-H-2B, non-corresponding domestic employees. The second consists of proposals relating to the payment of wages. The most prominent proposal here is the proposal to enshrine the rule of *Arriaga v. Florida Pac. Farms*, 305 F.3d 1226 (11th Cir. 2002), for all but a few pre-employment expenses. The last category contains a miscellany of individual proposals ranging from non-discrimination to absence of strikes or layoffs.

DOL does not explain in the preamble to the NPRM exactly why these specific assurances and standards were chosen. Nor does it describe any specific problem arising from their absence or link their absence to adverse effect on domestic workers. The complete rationale given is that these are the obligations "that WHD will enforce. . . to ensure that an employer's need for H-2B workers is genuine . . . and that employment of H-2B workers will not adversely affect the wages and working conditions of U.S. workers." NPRM, 76 Fed. Reg. at 15142; *see also* NPRM, 76 Fed. Reg. at 15139, 15157, 15172. DOL does acknowledge that imposition of the assurances and obligations will impose an unknown cost, but advises that employers can avoid those costs by foregoing participation in the H-2B program. NPRM, 76 Fed. Reg. at 15173 ("Ultimately, the decision of an employer to apply for H-2B workers is a voluntary choice. That is, any individual employer can avoid the costs associated with the NPRM by not applying for H-2B workers.") DOL provides no empirical data about the economic effect of driving small businesses out of the H-2B program. *See* NPRM, 76 Fed. Reg. at 15136.

DOL incorporates a modified version of the assurance and obligations currently applicable to employers who participate in the H-2A program into the NPRM. The modifications range from minor changes in wording to the addition of several non-binding FLSA interpretations as new standards. We recommend that DOL reconsider both its general approach and the specific proposed assurances and obligations in accordance with following analysis.

DOL Has Failed to Identify a Source of Authority for the Assurances and Obligations It Has Proposed

The NPRM states that these assurances and obligations are necessary to ensure that an employer who wishes to participate in the H-2B program has a "genuine need" and that the employment of the foreign workers will not have an "adverse effect" on the wages and working

conditions of domestic workers.[27] DOL does not discuss how the assurances and obligations have any connection to the determination of whether an employer has a "genuine need" for hiring a temporary worker. That determination would seem to flow from evidence that the employer has identified unmet market demand for its services or its product and that its market test for domestic workers has failed to identify sufficient eligible and qualified workers who will be available when and for the time period needed. The proposed assurances and obligations cannot fairly be said to play a role in establishing whether the employer has a "genuine need."

At first glance, it appears that the prevention of "adverse effect" provides a justification for the NPRM's proposed assurances and obligations. After all, the assurances and obligations are intended to benefit workers by eliminating some characteristic or presumed characteristic of H-2B employment that is 'adverse.' Upon further consideration, it becomes clear that this analysis is superficial. Assuming that the no "adverse effect" certification criterion is properly imported from the H-2A program, *see* 8 U.S.C. § 1188(a)(1), the concept of "adverse effect" is much more limited than the NPRM suggests.

DOL's discussion of the proposed assurances and obligations adopts a concept of adverse effect limited to *economic* adverse effect. The key passage in the discussion appears when DOL is justifying its prohibition of preferential treatment of H-2B workers. It writes:

> Courts have consistently upheld the Department's interpretation that the wages and benefits offered or provided to H-2A agricultural workers must also be provided to domestic workers. See *Farmer v. Employment Security Comm'n of N.C., 4 F.3d 1274, 1276, nn. 2, 3, 4 (4th Cir. 1993)* (H-2A employers must make certain benefits available to all temporary agricultural laborers); see also *Williams v. Usery, 531 F.2d 305, 306 (5th Cir. 1976)* (the Secretary's authority is limited to making an economic determination of what rate must be paid all workers to

[27] It should be noted in this context that "U.S. worker" includes H-2B employees upon receipt of their visa. Following the usage of the INA, the NPRM defines "U.S. worker" to mean:

> *United States worker (U.S. worker)* means a worker who is:
>
> (1) A citizen or national of the U.S.;
>
> (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under *8 U.S.C. 1157*, is granted asylum under *8 U.S.C. 1158*, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or
>
> (3) An individual who is not an unauthorized alien (as defined in *8 U.S.C. 1324a*(h)(3)) with respect to the employment in which the worker is engaging.

See NPRM, 76 Fed. Reg. at 15179. Using this definition creates an unintended circularity: upon receipt of a visa, a foreign national would no longer be "an unauthorized alien (as defined in *8 U.S.C. 1324a*(h)(3)) with respect to the employment in which the worker is engaging" and thus be a "U.S. worker." The NPRM clearly intends to distinguish between U.S. citizens/nationals and the foreign nationals coming to the United States on a temporary basis. This distinction dissolves when it is recognized that the term "U.S. worker" includes all U.S. citizens/nationals and temporary foreign workers. DOL should consider whether it should modify this definition by removing subsection (3) from the definition of "U.S. worker" in the NPRM.

> neutralize any adverse effect resulting from the influx of temporary foreign workers). Similarly, in the H-2B non-agricultural context, paying the prevailing wage rate to all workers protects against possible wage depression from the introduction of foreign workers.

The first of these cases does not discuss the meaning of adverse effect, except to cite to *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976), which ruled that DOL's authority was limited to neutralizing any economic adverse effect arising from an increase in the labor supply:

> Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any "adverse effect" resultant from the influx of temporary foreign workers.

Id. at 306. DOL's authority extends only to guarding against a general wage deflation from the employment of foreign workers. *Id.* at 307. The no adverse effect criterion does not authorize DOL to set workplace standards so that they will be "attractive" to either foreign or domestic workers.

A review of the NPRM shows that DOL has consistently adopted this viewpoint. Immediately after citing *Williams*, DOL continued: "Similarly, in the H-2B non-agricultural context, paying the prevailing wage rate to all workers protects against *possible wage depression from the introduction of foreign workers*." NPRM, 76 Fed. Reg. at 15135 (emphasis added). In every other appearance of the "adverse effect" concept in the NPRM, DOL limits it to ensuring economic parity between domestic workers and H-2B workers. *Id.*

DOL's understanding of adverse effect has been consistent across its rulemakings. In its Final Rule establishing the methodology for calculating the prevailing wage for use in the H-2B program, DOL consistently used adverse effect to mean wage depression or wage deflation. 76 Fed. Reg. at 3452, 3455. One example is particularly clear. In rejecting a proposal to include Davis-Bacon Act ("DBA") fringe benefits in the prevailing wage, DOL stated:

> For H-2B positions for which the DBA wage is not applicable, DOL believes that not requiring fringe benefit payments is an appropriate reflection of DOL's historical practices. As previously noted, fringe benefits costs have never been included in H-2B wage determinations. DOL reaffirms its belief that requiring fringe benefit payments to H-2B workers is not necessary in order to prevent an adverse effect on the wages and working conditions of U.S. workers.

76 Fed. Reg. at 3452, 3472. "Adverse effect on wages and working conditions" is measured in terms of wages and regulation of aspects of the employer-employee relationship other than wages "is not necessary in order to prevent an adverse effect on the wages and working conditions of U.S. workers." *Id.*

Thus, the NPRM's assurances and obligations are not justified as a component of establishing a "genuine need" for temporary help or of the avoidance of "adverse effect," as DOL has consistently construed it.

DOL Has Failed To Justify Its Incorporation of Statutory And Regulatory Obligations Applicable Only To Participants In The H-2A Program Into The H-2B Program

We have commented extensively above concerning the NPRM's proposal to incorporate the assurances and obligations that agricultural employers participating in the H-2A program must make and take upon themselves. Several short comments about this proposal are appropriate at this juncture. First, the NPRM does not provide fair notice that DOL is changing its regulatory position. From at least 1996 up to the issuance of the current NPRM, DOL has taken the position that it would be inappropriate to impose assurances and obligations *designed for agricultural employment* to the full range of *non-agricultural* employment that would qualify for the H-2B program. As DOL explained to the Court in *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 2010 U.S. Dist. LEXIS 90155 (E.D. Pa. Aug. 30, 2010) ("CATA"),

> As Plaintiffs correctly note, . . ., the more extensive requirements governing the H-2A program were adopted when Congress severed the H-2 program, creating the separate and distinct H-2B and H-2A programs. *See* Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, § 301(a) (Jan. 21, 1986). Neither at that time, nor later, did Congress make any changes to the H-2B program. As late as 2005, Congress addressed enforcement issues in the H-2B program, but left DOL's interpretive rules governing the H-2B program intact, including DOL's distinct treatment of H-2A and H-2B recruitment and wage issues. *See* REAL ID Act, Pub. Law No. 109-13, § 404 (May 11, 2005). DOL noted this difference when discussing why the agency declined to transfer the more extensive recruitment requirements of the H-2A program into the H-2B program. *See* 73 Fed. Reg. at 78036.

See United States' Motion for Summary Judgment, Doc. 56. It makes no difference that DOL's position was articulated by counsel in the course of litigation, *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and it seems to have been persuasive. *CATA*, 2010 U.S. Dist. Lexis at *30; *see also Martinez v. Reich*, 934 F. Supp. 232, 237 (S.D. Tex. 1996) ("The congressional history described 'the unique needs of growers and the inadequacy of current protections for farm workers,' but specifically noted that no changes were made to the statutory language concerning non-agricultural workers.") (quotation marks in original). In short, it has long been DOL's position that the H-2A program assurances and obligations were necessary because of what Congress "described as 'the unique needs of growers and the inadequacy of current protections for farm workers[.]" *Id.* The NPRM's proposal to incorporate the H-2A assurances and obligations into the H-2B amounts to a 180 degree change in policy. The NPRM, however, does not acknowledge this change or explain why it is changing its approach.

Moreover, DOL does not provide any analysis in support of its departure from its consistent position. The NPRM merely says that it is merely "modify[ing], expand[ing], and clarify[ing] current requirements." NPRM, 76 Fed. Reg. at 15142. The NPRM does not provide any substantial guidance as to the factual and analytical basis for this proposal. The lack of an articulated basis for the proposal is especially troubling because DOL itself has taken the position that the NPRM proposal is unjustified on the facts. The *Martinez* decision upheld DOL's position that H-2A assurances and obligations could not reasonably be applied to the H-2B program. In responding to the workers' arguments, the court explained:

> Faced with this legislative history, Plaintiffs counter that Congress was preoccupied with the fate of agricultural workers in 1986 because of documented abuses in that area. They insist that since 1986, there are now widespread abuses in hiring foreign non-agricultural workers and, therefore, the more comprehensive regulations for agricultural workers should be adopted for non-agricultural workers. The difficulty with this argument is that there is no record to support it. In oral argument, Plaintiffs' counsel made general reference only to widespread media reports. In 1986, Congress was apparently satisfied with the existing DOL procedures concerning temporary non-agricultural workers, militating against the argument that the 1984 GAL was contrary to congressional intent. There is nothing to indicate that the congressional intent has changed since then. There is likewise nothing to indicate that the GAL procedures are contrary to any evidence in an administrative record documenting any widespread abuses in the use of non-agricultural foreign workers.

Martinez, 934 F. Supp. at 238. A review of the current rulemaking record shows that it contains no evidence "documenting any widespread abuses in the use of foreign non-agricultural foreign workers." Even if there were a legal basis for extending H-2A assurances and obligations into the H-2B program, they could only be extended if empirical data supports the proposed change, NPRM, 76 Fed. Reg. at 15136 ("In accord with the CATA decision, DOL believes that the regulatory definition of full-time work should be supported by empirical data.").[28] The absence of any empirical rationale for the incorporation of the H-2A regulatory structure into the H-2B program prohibits the public from submitting comments on the data that DOL asserts supports its rationale.

DOL Should Decline To Impose The H-2A Regulatory Structure On The H-2B Program At This Time

Assuming that imposing the H-2A assurances and obligations on non-agricultural temporary employment under the H-2B program can be squared with congressional intent (and we believe that it cannot), DOL should decline to impose H-2A assurances and obligations on employers who participate in the H-2B program. Unlike agricultural employment which has relatively uniform characteristics, H-2B employment spans employment in a wide variety of

[28] We interpret this statement to acknowledge the need for empirical data to support each of the regulatory changes offered in the NPRM as we do not believe that DOL is taking the unreasonable position that empirical data is needed to support a relatively minor definition, but is unnecessary to support major regulatory changes.

industries from construction to landscaping to hospitality work to professional athletics. It is evident that the working conditions and potential worker protection concerns will differ among the various industries: a construction worker undoubtedly faces challenges different from those faced by a Maryland crab picker or a Kentucky horse trainer. DOL has a long history of tailoring its administration of the H-2B program to specific industries where appropriate. Just as a "one-size-fits-all" administrative approach did not work in the past, there is no reason to believe that it would work in the future for workplace standards.

If DOL decides to go ahead and impose the H-2A regulatory structure on the H-2B program, it should specify the empirical and analytical bases for that choice in the Federal Register and invite further comment. Only by following this procedure would DOL guarantee that all interested parties have a full and fair opportunity to comment. By providing such an opportunity, DOL and the public would benefit from the additional input from affected H-2B users. NPRM, 76 Fed. Reg. at 15163-67. Given the magnitude of the change, a short wait for additional comment would benefit DOL and the regulated public.

Section 655.20(f): The Three-Quarter Guarantee

In the proposed 20 C.F.R. § 655.18(h) and § 655.20(f), the NPRM proposes the adoption of a so-called three-quarter guarantee. The NPRM states:

> The Department proposes to require that H-2B employers guarantee payment of wages for at least three-fourths of the contract period and proposes to require the employer to list this guarantee in the job order. . . The NPRM proposes to require that employers guarantee the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual date of need, whichever is later, and which ends on the expiration date specified in the job order or in any extensions.

NPRM, 76 Fed. Reg. at 15141. DOL's stated purpose for this new requirement is to provide additional information to potential U.S. workers and "influence the decision to accept the employer's job offer." *Id* at 15142. According to the NPRM, the need for this guarantee arises because "[r]ecent experience enforcing the H-2B regulations demonstrates that workers are often provided much less work than that promised in the job order and this occurrence has convinced DOL that this protection is necessary." *Id.* This recent experience consists of three anecdotes (one from a litigant actively engaged in litigation), 76 Fed. Reg. at 15143, a vague reference to the "DOL's enforcement experience," *id.*, and a reference to a report from a political advocacy group reporting that the H-2B workers being studied did not earn as much money as expected due to lack of work. *Id.*

The NPRM does not provide any empirical data in support of this proposal, a failing that DOL recognizes as a serious weakness in other contexts. *See* 76 Fed. Reg. at 15136 ("In accord with the CATA decision, DOL believes that the regulatory definition of full-time work should be supported by empirical data.") In addition, other agencies have cautioned that it is improper to

generalize from a few anecdotes or case studies in the H-2B context. *See* General Accountability Office, "*H-2B VISA PROGRAM: Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse*," Rep. No. GAO-10-1053, pp. 1, 2, 13 (Sept. 2010) ("Case studies, site visits, and results of proactive testing cannot be projected to the entire population of H-2B employers and recruiters.").

In addition to anecdotes relating to the H-2B program, the NPRM supports its proposal by relying on its "enforcement experience" with the H-2A program. Without providing any details, the NPRM states that that its H-2A enforcement experience shows the need to impose the three-fourths guarantee to the H-2B program because H-2B workers are "in many ways are similarly situated to their H-2A counterparts." 76 Fed. Reg. at 15143. The NPRM does not explain what those "many ways" are. The NPRM concludes its discussion of this potentially costly proposal by noting that DOL has accused "a vegetable farm" of violating the three-fourths guarantee, but then admits that it has not yet proven the violation. *Id.* Moreover, the NPRM treats all discrepancies between the number of anticipated hours and the number of hours ultimately offered as resulting from employer manipulation to avoid obligations to workers. *See, e.g.* 76 Fed. Reg. at 15144. The NPRM, however, does not provide empirical data permitting commenters to evaluate this assumption. Nor does the NPRM provide any empirical data about how the three-fourths guarantee operates in practice or about the nature of any alleged violations.[29]

DOL should decline to adopt this proposal. First, as discussed in detail above, Congress considered, but declined, extending the regulatory structure of the H-2A program into the H-2B program. Second, the NPRM justifies its proposal by noting that having the guarantee will make H-2B jobs more attractive to American workers. NPRM, 76 Fed. Reg. at 15142, 15144. As discussed above, the Secretary, however, lacks the authority to regulate on this basis. *Williams v. Usery*, *supra* 531 F.2d 305, 306 ("Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers.") Third, the costs and benefits of the proposal in the H-2B context are unknown. *See, generally* 76 Fed. Reg. at 15163-77 (detailing data inadequacies related to program analysis).

Finally, the NPRM fails to offer an analytically sound justification for the application of the three-fourths guarantee to every four week period. *See, e.g.* 76 Fed. Reg. at 15172-73. This differs radically from how the three-fourths guarantee applies in the H-2A program. As proposed, an H-2B employer with a 35 hour workweek would be required to offer at least 105 hours every four weeks. Along with this guarantee comes a significant recordkeeping burden,

[29] Current WHD policy asserts a violation of the three-fourths guarantee if an agricultural employer fails to notify DOL the departure of a worker within two days, even if the worker was offered all of the required hours. *See* J & R. Baker Farms, LLC, 2011-TAE-00001; 2011-TAE-00002. In evaluating this NPRM, it would be important to distinguish between this type of case and cases in which too few hours were offered. Moreover, in the latter type of case, it would be important to know the amount of any alleged shortfall. The three-fourths guarantee is complex and often difficult to calculate. Knowing the amount of the alleged shortfall would allow commenters to assess whether the problem posited by the NPRM – widespread overstatement of hours needed – actually exists. But, as noted above, the NPRM does not provide this empirical information. *See* 76 Fed. Reg. at 15136.

including possible modification of standard HRIS and payroll software systems to track hours offered, but declined.

DOL appears to recognize that this proposal potentially poses a significant economic risk to employers. Today, all employers face the risk that work that it anticipates will not materialize. If that happens, the consequence is less revenue, but this loss is mitigated somewhat because labor costs decrease since the hourly employees who would have provided the service would not be working. Under the NPRM, however, not only does the employer lose the revenue in question but it also must bear the labor cost that otherwise would have been avoided.

The additional loss would likely be borne by the employer's non-H-2B workers first in the form of lower wages and later unemployment. It will also be borne by consumers in the form of higher prices and poorer service. The NPRM does not specifically acknowledge this concern, but it does acknowledge that it is possible that employers will be forced to bear this cost. It dismisses this concern with the following statements:

> The three-fourths guarantee is a reasonable deterrent to such potential carelessness and a necessary protection for workers, while still providing employers with flexibility relating to the required hours, given that many common H-2B occupations involve work that can be affected by weather conditions. (76 Fed. Reg. at 15145).
>
> We do not believe the proposal will create any additional burden on employers who have accurately represented their period of need and number of workers needed, and will provide an additional incentive for applicants to correctly state ALL OF their needs on the Application for Temporary Employment Certification. (76 Fed. Reg. at 15173).

DOL's underlying assumption appears to be that employers can predict their labor needs with certainty or near certainty during any given four-week period anywhere from 4 to 14 months in advance. Because of this assumption, DOL infers that any discrepancy results from manipulation or "carelessness" and that therefore employers need an "incentive" to "correctly state ALL OF their needs on the Application for Temporary Employment Certification." NPRM, 76 Fed. Reg. at 15173 (emphasis in original).

This assumption is wrong and, in essence, demands a level of precision that is simply not available in the real world. The majority of H-2B job opportunities arise as small and seasonal businesses supplement their regular workforces to meet peak season labor needs. *See, e.g.* 152 Cong Rec. S 2699, 2711 (daily ed. April 3, 2006) (statement of Sen. Warner); 152 Cong Rec. S 2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski); 151 Cong Rec. S 3616, 3638 (daily ed. April 14, 2005) (statement of Sen. Jeffords); 152 Cong Rec. S 2699, 2713 (daily ed. April 3, 2006) (statement of Sen. Leahy). All of these opportunities are market-dependent and are very difficult to predict with the degree of certainty demanded by the NPRM.

The hospitality industry provides a good example. Many hotels depend on group bookings. A single group will book a large block of rooms in advance. That booking could take the occupancy rate from 20% to 80%. On the one hand, the advance booking allows for some predictability. At the same time, however, there is always a possibility that the group will cancel, reducing the occupancy rate in this example back to 20%. While cancellation fees mitigate this risk somewhat, such fees do not come close to replacing the lost revenue and do not pay for the additional cost for the non-productive work time.

Obviously, whether the group cancels or not is not in the hotel's control and cannot be predicted with certainty especially long in advance. Factors affecting cancellation rates and overall occupancy include the weather – word of a hurricane will for obvious reasons rapidly decrease occupancy rates and increase cancellation[30] – and political events such as reported acts, or even reported increases in the risk, of terrorism, which deter people from traveling. Cancellations do not always reflect a loss of business to a hotel. Sometimes cancellations involve shifting the business from one period to another. That means that measuring three-quarter guarantee compliance over a longer period would mitigate some of this cost. In other words, the shorter the guarantee period, the greater the negative impact on the employer and its non-H-2B domestic workers.

Although the specifics of this example come from the hospitality industry, they logically support the same point in other industries. Demand cannot be predicted with precision and it is arbitrary to infer from a lack of precision that an employer is manipulating the H-2B program. The unpredictability of demand also means that the NPRM's assumption that employers can avoid losses arising from not meeting the three-fourths guarantee is inconsistent with real-world experience. If DOL adopts the NPRM's proposed four week measurement window for three-fourths guarantee, it will merely exacerbate the losses to employers arising from variable market demand.

For these reasons, we recommend that DOL withdraw the proposed three-fourths guarantee at this time. If DOL decides to retain it, it should, at a minimum, study the issue, obtain the data needed to assess rationally the likely effects of the new requirement, and only then re-issue the proposed rule. If DOL decides to move ahead with some version of the three-fourths guarantee, we suggest that it be measured across the entire length of a work contract. The reason for this change is that this that it would make predicting the overall hours needed easier. Again, focusing on the hospitality industry, it is often the case that weather will cause demand to shift from one period of time to another. With the three-fourths guarantee measured in four week increments, any shift out of any particular four-week period inflicts a loss on the employer (and, it bears repeating, its non-H-2B domestic workforce and customers). If the three-fourths guarantee were measured by the work contract, most such shifts would not cause this loss. In short, measuring compliance with the guarantee over the length of the work contract would minimize the risk of imposing losses on employers due to market volatility while deterring egregious errors in business judgment.

[30] This effect is observed even if the hurricane is not in the hotel's precise area as people are unwilling to take the risk that it will move in their direction.

Section 655.20(f): DOL Should Clarify and Modify Its Notice Requirement When An H-2B Or A Corresponding Domestic Worker Separates From His Or Her Employment

The NPRM proposes that employers be required to notify the OFLC (presumably the CO) if an H-2B worker or a domestic worker in corresponding employment separates from his or her employment. The notice must be in writing and must be provided within two working days of the date the separation is discovered. If the employer misses this deadline, DOL proposes that it be fined in an amount equal to the value (if accepted) of the hours the employer would have offered pursuant to 20 C.F.R. § 655.20(f).

We recommend that DOL withdraw this proposed rule. Just as with other proposals, we agree with DOL's observation that it needs, and should present, empirical data in order to justify this proposal. NPRM, 76 Fed. Reg. at 15136. Yet, DOL offers neither empirical data nor any clear rationale for its proposed role. The departure of workers would appear to raise issues within the competence of DHS, not DOL. DOL should delete this proposed requirement unless it can articulate a sound, empirically based rationale for its proposed role.

If DOL decides to proceed with this proposal, we would like to offer several comments. The first group of suggestions relates to the details of the proposed obligation to notify. The NPRM defines the obligation to notify in § 655.20(y):

> Upon the separation from employment of H-2B worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer.
>
> In addition, the employer must notify DHS in writing (or any other method specified by DHS in the **Federal Register** or Code of Federal Regulations) of such separation of an H-2B worker.

DOL should modify the proposal by inserting several clarifications. First, DOL should make it clear that "in writing" includes e-mail notification to tlc.chicago@dol.gov and/or the CO as that e-mail address will likely be known the employers or, at least, would be the most easily obtained. DOL should include the notification procedure in this rule as this is the first place most employers will look when attempting to find out what to do. At a minimum, DOL should include a specific cross-reference to location of the applicable procedures. DOL should also adopt the venerable mailbox rule – that notice is complete as of the time of mailing or transmission. That way the employer will not bear the risk of communication failures on DOL's end – a fax machine that does not pick up, is jammed, or is out of paper or a server breakdown that interrupts e-mail transmission or any other the myriad transmission failures to which even the most sophisticated communication systems are subject.

DOL should also provide a clear rule for counting the "2 work days." There are two particular concerns in this respect. First, the rule does not make clear whether the day of the separation counts. For example, assume an H-2B worker fails to show up for the fifth consecutive day, which happens to be a Wednesday. He works second shift so the no show is confirmed around 5:00 P.M. It is unclear whether the Wednesday counts as the first "work day" and notice is due Thursday or if Thursday is the first workday and notice is due Friday. We recommend that the rule explicitly exclude the day of the event that triggers the 2 work day period.

DOL should also make absolutely clear that "separations" include involuntary terminations of employment. On the one hand, the term "separation" appears on its face to be broad enough to include involuntary terminations. On the other hand, the proposal talks about "discovery of the separation." An involuntary termination is not "discovered;" it occurs. We believe that DOL intended to cover involuntary separations of employment in the rule. It should be amended to make that clear.

DOL should amend the rule to provide direction to employers about what they should do if the second work day falls on a federal holiday or DOL is otherwise not functioning.

In addition, the NPRM defines "abandonment or abscondment" to begin on the first work day following "five consecutive" absences without leave. The proposed section should be amended. First and most importantly, DOL should clarify that an employer need not wait for five consecutive days before firing an employee. Many employers have policies terminating employees for three unexcused absences. Assume that an employee is then absent on three Fridays in a row. Under DOL's definition, that employee could never be terminated for the absences because the absences are not consecutive. DOL should clarify what it means and amend the rule accordingly.

The next substantive part of § 655.20(y) imposes a large fine upon employers who miss the two day deadline. Rather than imposing such a large disproportionate and punitive sanction, DOL should conform its regulation to DHS' and impose a $10.00 fine for instances of delayed notice. 8 C.F.R. § 214.2(h)(5)(B)(3). Under the NPRM, the amount of the fine is fixed upon departure of the worker. Moreover, it punishes an employer who misses the deadline by one day just as much as an employer who misses the deadline by 100 days. Moreover, using the three-fourths guarantee creates unnecessary conceptual confusion. The guarantee is not a guarantee of the payment of a sum certain; it is a guarantee to offer hours. An employer is, in fact, offering the hours, but the employee is rejecting them. The same is true with a termination of employment. The NPRM's proposal is also more complex administratively given the challenges of calculating the guarantee. Assuming for the sake of discussion that any fine is authorized or supported by empirical data, we believe the fine should be consistent with DHS' fine for the same conduct and should be calculated in the same manner.

We would also ask that the NPRM clarify that three-fourths guarantee penalty will not be owed in the event of a lawful termination of employment. It is possible to read the last two sentences of § 655.20(y) to mean that only in cases of voluntary abandonment is the employer

relieved of the three-fourths guarantee obligation. In fact, except for the ambiguous reference in the last sentence of 20 C.F.R. § 655.20(y), the NPRM does not exclude the possibility that an employee might be fired for stealing but that the rule would require the employer to pay the employee the three quarter guarantee amount on top of the theft in addition to any other sanctions it may wish to impose. DOL should amend either § 655.20(f) or § 655.20(y) to make this absolutely clear.

Section 655.20(j): DOL Should Not Adopt A Requirement That H-2B Employers Reimburse The Pre-Employment Expenses Of Foreign Workers

The NPRM proposes to add the following obligation in 20 C.F.R. § 655.20(j)(i):

> (j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide the worker transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment. The employer may arrange and 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. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173.

NPRM, 76 Fed. Reg. at 15185.

Transportation Reimbursement

The NPRM proposes that the employer make this payment or reimbursement "in the first workweek." *See* 20 C.F.R. § 655.20(j)(2). The proposal limits the payment to the costs of "the most economical and reasonable common carrier transportation charges for the distances involved." 20 C.F.R. § 655.20(j)(i). The Wage and Hour division is proposing the same regulations. *See* 20 C.F.R. § 503.16(j)(1)(i) and (2). In addition to paying transportation for foreign workers, the NPRM proposes that the employer pay for the transportation for U.S. citizens, U.S. nationals, and aliens who are permanent residents and other aliens who are authorized to work in the employment in question. *Id.* The transportation provided must meet all U.S. motor vehicle regulatory and insurance standards, even if the transportation occurs in a foreign country with different requirements.

We have several concerns about this proposal. First, this proposal is extremely costly and would impose a deadweight cost on U.S. employers, thereby reducing their ability to employ domestic workers. According to one resource cited by DOL, American University Washington College of Law International Human Rights Law Clinic and Centro de los Derechos del Migrante, Inc. *Picked Apart: The Hidden Struggles of Migrant Worker Women In the Maryland Crab Industry* (July 2, 2010).[31] the typical expense for persons traveling from Mexico is more than $750.00. *Id.* at 15. Using the low-end figure of $750 yields a cost to employers of $49,500,000[32] for H-2B workers' expense. DOL does not provide a typical expense for the domestic travel of corresponding workers because it has no data to make an analysis. 76 Fed. Reg at 15163 ("The Department does not collect data regarding what we have defined as corresponding employees, and therefore cannot identify the numbers of workers to whom the obligation would attach.").

This estimate, however, does not include the cost of paying for transportation for domestic travel. The proposed 20 C.F.R. § 655.20(j)(1)(i) would require employers to pay for domestic travel for "corresponding" U.S. workers:

> When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite.

The proposal is somewhat confusing. Although it refers to the "prevailing practice of non-H-2B employers," that language appears to be superfluous because the employer, by regulation, will always extend such "benefits" to H-2B workers. Moreover, because the term "U.S. worker" includes any alien authorized to work in the employment in question even if he or she is still in a foreign country, this obligation would include payment for international travel as well. It is difficult to estimate the costs imposed by the proposal because DOL does not know how many people are currently corresponding employees and how many would likely be in the future. It should be noted, however, that the NPRM's suggestion that there will likely be few corresponding workers is contrary to the data and program experience. H-2B workers supplement existing workforces. 151 Cong Rec. S 980, 983 (daily ed. Feb 3, 2005) (statement of Sen. Collins);152 Cong Rec. S 2699, 2717 (daily ed. April 3, 2006) (statement of Sen. Stevens); 152 Cong Rec. S 2699, 2711 (daily ed. April 3, 2006) (statement of Sen. Warner), 151 Cong Rec. S 3616, 3626 (daily ed. April 14, 2005) (statement of Sen. Allen); 152 Cong Rec. S 2699, 2713 (daily ed. April 3, 2006) (statement of Sen. Leahy), 151 Cong Rec. S 3616, 3638 (daily ed. April 14, 2005) (statement of Sen. Jeffords); 152 Cong Rec. S 2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski). Thus, given the expansive proposed definition of the term "corresponding employment" two or three H-2B workers placed in a crew of 15-20 domestic workers would immediately convert the domestic workers into corresponding

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[31] *http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf?rd=1*

[32] We calculated these figures by multiplying the average cost by 66,000, the number of authorized visas.

employees. It is possible that a single supplemental H-2B worker might convert several crews into corresponding employees.

Moreover, because the NPRM requires that this cost be paid "in the first workweek,"[33] it provides an incentive for domestic workers to apply for H-2B work, even though they have no real intention of staying through a season. We believe the following scenario is likely to occur with regularity:

> A hotel in Boston places an advertisement in the Boston Globe and the Boston Herald. Its position also is listed on the electronic job registry pursuant to proposed section 655.34. A prospective employee living in San Francisco reads about the job in the newspapers and on the electronic registry and applies. The prospective employee is not offered transportation reimbursement orally or in writing by the employer, nor does the applicant request it as a condition of taking the job. She is hired (as required) and she drives the 3,103 miles to Boston incurring a cost of $1,504 at standard IRS mileage rates for 2007. She starts on a Wednesday, attends a few training sessions, and decides that the job is not for her and quits. She does not have a subsequent H-2B job.

Under the proposed regulations, the hotel would be required to pay her $3,008 plus subsistence in expenses for this employee -- $1,504 each way. It would have to do so even though she never performed any productive work. The possibility that the reimbursement amount might be lower does not change the essential problem with this scenario. The problem is that it greatly increases the cost to an employer if an employee, for whatever reason, is a poor fit for the job while greatly increasing the moral hazard on the employee's part for such strategic behavior. What is worse is that under the NPRM, the employer has no means whatsoever to mitigate this risk.

In light of our experience, we believe that DOL should withdraw the proposed 20 C.F.R. § 655.20(j). If, however, DOL disagrees, we suggest that DOL set the 50 percent point of the work period specified in the job order as the point for reimbursement. This would mitigate somewhat the risk that an employee could manipulate the system for free travel and would allow an employer to recoup some of the cost of transportation from sales before having to disburse this cost. We address the concerns that this might raise under the Fair Labor Standards Act immediately below.

Visa Expenses

In addition to transportation expenses, the NPRM proposes that U.S. employers must pay for the special benefit that the H-2B worker receives when he or she obtains a visa to enter and work in the United States. This proposal is contrary to law in two ways. First, it requires a U.S. employer to bear the cost of the visa when it must be borne by the foreign national. 8 U.S.C. 1351 (requiring Secretary of State to charge foreign national based on reciprocity). By shifting

[33] It is unclear whether this means at the end of the first full week, *e.g.*, the first seven days after the worker begins, or the end of the first pay period in which an employee works even if that is only one or two days. If DOL adopts this proposal, it should clarify what "first workweek" means.

this cost away from the foreign national, the value of the visa charge as a means to induce reciprocal treatment of American nationals is reduced. Second, the law requires the recipient of a special benefit to pay the cost of that benefit. *See* 31 U.S.C. § 9701(b)(2)(A); OMB Circular A-25, ¶ 6(a); *see generally Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 75 Fed. Reg. 36522, 36523 (June 28, 2010) ("Fee Schedule"). Both the State Department and the Office of Management and Budget have determined that it is the visa applicant that derives special value from the visa, not the employer. Legally, the cost must be borne by the foreign national. 31 U.S.C. § 9701(b)(2)(A); OMB Circular A-25, ¶ 6(a)(1), (a)(2)(a).

DOL Should Regulate Only Actual Deductions From Earned Wages And Not Introduce The De Facto Deduction Concept Into The H-2B Program

The NPRM includes several proposed regulations relating to deductions from H-2B workers' pay. The main thrust of these proposals is to import the "*de facto*" deduction concept from certain several decades old interpretations of the FLSA into the H-2B program. Because the *de facto* deduction concept has been ruled inapplicable to the H-2B program and DOL is bound by this decision, we oppose the NPRM's proposal in this respect. We also oppose it on a number of practical grounds. Instead, we propose that the deduction concept be limited to actual subtractions from an employee's earned wages and that the idea of a "kickback" be limited to expenses incurred in the course of performing an employee's duties.

These modifications would permit the employers to control when a deduction/kickback occurs, how much money the deduction/kickback involves, and would permit employers to structure their operations to avoid them where possible and economically efficient. This would be a substantial improvement over the current system in which it is difficult to define what constitutes a deduction/kickback, to control if and when it occurs, and to control its amount. Currently, the implementation of the *de facto* deduction concept turns on highly subjective value judgments of what an employer or an employee "ought" to pay for – subjective value judgments that are often made after the fact and which result in large liabilities. What makes things worse, however, is that reasonable people can and do differ about where to draw the line. *Cf. Arriaga v. Florida Pac. Farms*, 305 F.3d 1226 (11th Cir. 2002), *with Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (*en banc*). We respectfully submit that this is the kind of value judgment that Congress, rather an administrative agency, should make in the first instance.

DOL Improperly Incorporates Fair Labor Standards Act (FLSA) Provisions Related to Deductions Into This NPRM

Several provisions of the NPRM bear on the issue of deductions. The most significant are the proposals found at 20 C.F.R. §§ 655.20(b) & (c). The first of these proposals incorporates by reference the interpretations of the FLSA that are codified in 29 C.F.R. part 531. The proposed § 655.20(b) refers specifically to the interpretation found at 29 C.F.R. § 531.35, but incorporates the whole of Part 531. The second of these proposals would regulate

deductions. From the context, it appears that an actual subtraction from earned wages is contemplated, but the proposal does not make this clear.

DOL provides a one sentence rationale for these rules. It states that: "DOL's experience demonstrates that some employers may seek to reduce their wage liability by imposing unauthorized deductions on gross wages." NPRM, 76 Fed. Reg. at 15142. DOL does not offer any empirical description of this "experience," *see* NPRM, 76 Fed. Reg. at 15136 ("In accord with the CATA decision, . . .[proposals] should be supported by empirical data."), any reason to believe that the concern that this proposal addresses an existing problem among H-2B employers, or any explanation of why it believes repeating what it already believes is the law would address the underlying problem. In fact, because the proposal is based on what "some" undefined proportion of employers "may" do, the proposal appears to be based entirely on DOL's speculation about what may happen.

DOL lacks regulatory authority to adopt this proposal. As we have discussed, DOL's consultative role in the H-2B process does not imply substantive rulemaking authority. While DOL can certainly arrange its processes as it wishes, nothing in the relevant statutes delegates substantive authority to regulate the primary conduct of H-2B program participants.

The question of deductions from wages may be different because it derives from the FLSA, rather than the INA. However, Congress also declined to delegate rulemaking authority in this area to DOL under the FLSA. As 29 C.F.R. § 531.25(a) explains:

> The ultimate decisions on interpretations of the Act are made by the courts (*Mitchell v. Zachry*, 362 U.S. 310; *Kirschbaum v. Walling*, 316 U.S. 517). Court decisions supporting interpretations contained in this subpart are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore v. Swift*, 323 U.S. 134).

DOL acknowledges, as it must, that ultimate decisions on the meaning of the FLSA are for the courts to make and that it is bound by those decisions. Only where there is no court decision is there room for the Secretary of Labor and the Wage and Hour Administrator "to reach conclusions as to the meaning and the application of provisions of the law." This statement was not modified in DOL's recent rulemaking related to the FLSA and it stands as it did almost 45 years ago.

The question of whether the FLSA requires H-2B employers to reimburse a portion of an employee's pre-employment expenses has been definitively resolved by the United States Court of Appeals for the Fifth Circuit in *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (*en banc*). DOL does not acknowledge this adverse decision that rejects its interpretation regarding *de facto* deductions related to expenses in the H-2B context. In particular, the Fifth Circuit held that inbound transportation and visa expenses were not for the

primary benefit of the employer and that nothing in the FLSA required that any portion of them be reimbursed. In short, the underlying legal premise for shifting this burden from the foreign national to U.S. employers – that the FLSA requires or permits it – is incorrect.[34] It follows that DOL lacks the authority to adopt the proposed §§ 655.20(b) and (c). It should withdraw them and reaffirm that DOL, too, is bound by the decisions of the courts.

Section 655.30-35: Processing of an Application and Job Order

The NPRM proposes several changes to the application process. We recommend that the proposed procedure be modified in several ways. First, the NPRM should eliminate the opportunity for the CO to issue multiple, sequential notices of deficiency. Rather, the CO should be required to conduct a thorough, complete review in the first instance and identify all alleged deficiencies immediately. If an alleged deficiency is later noted, it will not preclude acceptance. We believe that this is a critical quality control measure on two levels. First, it ensures that the CO has an actual programmatic incentive for complete consideration of the application. While the CO may aspire to identify all deficiencies upon an initial review, such good intentions may be undermined in reality by the sure knowledge that any oversights can be corrected 21 days later. Second, it provides employers some certainty that the administrative process will come to an end at some point. The key is to align DOL's concrete incentive to reject improper applications with the employer's, the public's, and DOL's need for a smooth, and efficient application process. By allowing sequential notices of deficiency, DOL shifts all the risk of carelessness on the part of the CO to the employer and none to itself.

Section 655.61: Administrative Review

DOL should also clarify and make changes in the proposed administrative process. First, the appeal process should include a provision for *de novo* review. Ironically, while the NPRM substantially follows the H-2A process, it drops this essential protection in the H-2A regulations for accurate and reasonable decision making. A recent H-2A case illustrates why *de novo* review is so essential. In this case, the employer had been unable to obtain a notice of occupancy for its housing due to a set of involved and unusual circumstances at the local level in time for the determination date. The certificate, however, was received shortly thereafter. Although asking for *de novo* review, the OALJ interpreted the request as seeking "on the record review." The employer submitted the certificate of occupancy along with its appeal. Thus, everyone knew that it had substantively complied with all of the program requirements. The CO's attorney tried to exclude the evidence that the employer had complied because it was an "on the record review" and such evidence could not be considered. The employer, who had complied in full with all substantive program requirements, discovered the error and moved to have the appeal be treated as a *de novo* review, which was granted over the objection of the CO. When it was clear that the

[34] It will not do to point out that DOL later attempted to write this obligation into its H-2B regulations and issued a field advisory bulletin taking a position different from the Fifth Circuit. These interpretations were issued before the Fifth Circuit's "ultimate determination" on this issue and that "ultimate determination" makes it clear that the Secretary of Labor's and the Administrator's "conclusions as to the meaning and the application" of the FLSA in this instance were incorrect.

matter was going to be reviewed *de novo* and that the evidence of program compliance would not be excluded, DOL immediately resolved the case through a remand for certification.

This case illustrates the inherent unfairness in limiting the administrative review process to an "on the record review." Even though everyone involved on DOL's side – the ALJ, the CO, and the CO's attorney – knew that the employer met all substantive program requirements, the focus was on procedure over substance by treating the appeal as "on the record" due to ambiguities in the request. If *de novo* review had not been available and requested, the employer – who complied with all substantive program requirements – would not have been able to participate in the H-2A program as intended. Given the severe economic consequences, as described extensively above, that result from the denial of an employer's essential workforce, there is a compelling fairness argument that warrants inclusion of a *de novo* review.

The NPRM should also require DOL to provide all information relating to a particular matter in the administrative file. Currently, the administrative file contains only what the DOL employee preparing it deems to be relevant to the matter. It is then reviewed by supervisory staff, including the CO, before it is transmitted to the CO's counsel. Examples abound in which administrative files are shown to be incomplete, but the CO refuses to complete them. Even simple documents like the H-2A case activity sheet are withheld as "irrelevant" or as "too sensitive" (depending on the case). Requests to the CO's counsel to supplement the administrative file are met with blanket opposition, rather than a careful consideration of what should be in the administrative file. Especially in the case of an "on the record review," it would enhance public perception of the fairness of the process if all material relating to a particular matter were placed in the administrative file as a matter of course and likely produce better outcomes on the merits.

The NPRM should also be modified to specify that appellate proceedings are "adversary proceedings" under the Equal Access to Justice Act. This would make attorney assistance more readily available and promote fairness in a process that often pits experienced DOL lawyers against *pro se* employers in an unfamiliar administrative process.

The NPRM should delete the CO's discretion to require post-acceptance substantive modifications of the job order. There needs to be a point of finality and it should be acceptance. The reason is that changes require modification of job orders and advertisements – all of which cost money and hold up the process. This discretion appears to be unilateral and not subject to any kind of review. At the very minimum, the employer ought to have an opportunity for *immediate* and *de novo* review.

OFLC ENFORFCEMENT PROVISIONS

The general imbalance between employer and worker rights commented upon in the preceding sections of the proposed rule is no more manifest than in the enforcement provisions provided to both OFLC and the Wage and Hour Division (WH). The balance between expedited application processing in the Bush attestation model and enhanced penalties in the post-certification period has been eliminated. In its place, DOL proposes to double the certification

process by imposing registration and certification requirements and coupling them with duplicative OFLC and WH enforcement schemes and severe sanctions. The potential liability and an emphasis on the removal through revocation and debarment of employers from the H-2B program reflect an intent to discourage program usage—contrary to congressional intent.

Section 655.70: Audit Procedures

We recommend that the post-certification audit procedure be eliminated as unnecessary and duplicative. It was appropriate in the attestation model DOL proposes to replace. Because DOL proposes to eliminate the attestation process, there is no justification. In addition, the proposed rule includes, in effect, two additional audits procedures—the registration process and, co-ordered assisted recruitment, as set forth in section 655.71. In addition, this proposal includes concurrent and independent WH enforcement of most of the same provisions reviewed by OFLC. It is appropriate for WH to have investigative authority in a labor-certification system. Because DOL proposes to return to such a system, only WH should have enforcement and audit authority. The proposed triple OFLC audit regime coupled with duplicative WH enforcement cannot be justified, especially at time when federal funding resources are extremely limited. It will be costly to the government and employer community and should be abandoned.

Section 655.72 and 655.73: Revocation and Debarment

The adverse impact of revocation and debarment on a business and its non-H-2B domestic employees that is unable to attract a sufficient number of U.S. workers would be devastating. Willful violations potentially trigger these death sentences. While DOL provides a definition of the term "willful" by providing a list of five factors that are determinative, we urge DOL to clarify that it will consider the totality of the circumstances when considering such factors. Otherwise, it could focus on one of the five factors, such as whether "U.S. workers have been harmed by the violation"—without a quantification of the extent of the harm. *See*, section 655.73(e)(5). DOL also should clarify that it views the punishments of revocation and debarment as extreme penalties for egregious violations, rather than routine remedies, indistinguishable from back pay and civil money penalties.

The proposed rule provides both OFLC and WH debarment authority. We recommend that only OFLC be given such authority. Prior to 2008, OFLC had exclusive authority to recommend debarment under the H-2A program, the model which DOL otherwise has borrowed heavily from in this proposal. This is appropriate because OFLC has greater familiarity with the nature and extent of employer violations in the application and recruitment process and thus a better frame of reference for determining which cases warrant consideration of this serious punishment. By contrast, WH has more general experience, given the broad scope of its other enforcement responsibilities under multiple statutes. Duplicative and concurrent debarment authority is unnecessary.

The proposed rule also states that employers, attorneys and agents may be debarred for up to five years if they know a statement is false or that the conduct is in violation, or show reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the

required conditions. *See*, section 655.73(d). Clarifying distinctions between the affected parties should be made in this proposal. An employer certainly knows whether its representations are truthful. Whether an agent or attorney had actual knowledge of fraud or misrepresentation is a clear legal standard. An agent and attorney can inform an employer of program requirements and the importance of the integrity provisions and attest to those facts in the required forms. By adopting a somewhat undefined "reckless disregard" standard, the proposal provides no guidance as to the extent to which an agent or attorney must intrude him or herself into the details of the client's business. While the "reckless disregard" standard has some legal precedent, it would be helpful to the regulated community that are not attorneys, such as agents, to provide practical guidance as what DOL considers this standard to mean and by providing examples.

We recommend that DOL adopt the up to three year debarment maximum rule contained in the current H-2A regulations. DOL has provided no explanation as to why up to a 5 year debarment period is included in the proposed regulations. *See*, section 655.73(c). While it readily borrows from the H-2A program in other regards, there is no articulation of why a more extreme penalty is justified under the H-2B program. DOL should articulate the rationale for this rule with specific justifications.

WAGE AND HOUR DIVISION ENFORCEMENT PROVISIONS

Section 503.17: Document Retention Requirements

We believe that a three-year retention period for information related to the Application for Temporary Employment Certification is appropriate. Because most employers are familiar with their obligation to keep documents for three years to comply with the FLSA, requiring a similar period for H-2B compliance purposes is appropriate. It also is consistent with H-2A program requirements.

Section 503.20: Sanctions and Remedies—General

The proposed rule includes a provision allowing DOL to seek make whole relief. We ask that DOL clarify what it means by make whole relief. The concept of make whole relief could potentially include compensatory damages for injuries beyond those that occur because of acts or omissions related to violations of the terms and conditions of the H-2B program. This would lead to the evolution of the administrative enforcement mechanism into a direct parallel to the civil damage process available in district court and under the common law. This disadvantages employers because the greater informality of administrative proceedings makes it easier for DOL to impose these remedies. Without a more definite definition of what is intended by the term "make whole," we recommends that it be deleted.

Section 503.23: Civil Money Penalty Assessment

Similar to our concerns about the undefined term "make whole," we are concerned that the lines between back pay remedies and civil money penalties (CMPs) are blurred in the proposed rule. Paragraphs (b) and (c) of section 503.23 state that in instances of wrongful

termination or layoff or refusal to hire, WH may assess a CMP that is equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed $10,000 per violation. Does this mean that any amount assessed is treated as back pay, or is it treated as a proportional CMP that is a penalty and goes to the U.S. Treasury rather than the employee or applicant? Moreover, this section is further confused by the inclusion of section 503.23(e), which sets forth the factors WH is to consider in determining the appropriate CMP. Paragraphs (b) and (c) of this section suggest a formulaic means to determine a CMP, whereas, paragraph (e) suggests a discretionary approach based on the assessment of the various criteria. Any final rule should clarify these ambiguities.

Section 503.24: Debarment

We incorporate all of the comments above made with respect to OFLC's debarment authority. We oppose extension of debarment authority to WH for the reasons set forth above and disagree with DOL's conclusion that extending such authority represents "streamlining." It is duplicative and costly. We are also concerned that DOL is eliminating any distinction between traditional remedies of CMPs and back pay and the "draconian" remedy of debarment. This is best evidenced by the following preamble comment:

> The most significant differences are that the Department now proposes that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment and that the following violations may be considered debarrable…

76 Fed. Reg. 15158. As commented above, any of the listed violations could result in debarment. No distinction is made between a repeat violator and one who has engaged in a violation for the first time. Nor does the proposed definition of the term "willful" provide enough assurance that more commonplace violations would not be treated as debarrable offenses.

Finally, we strongly oppose the WH proposal that would deprive affected entities the opportunity that is afforded in an OFLC debarment proceeding to have a 30-day rebuttal period. Under the concurrent debarment scheme, the due process afforded would depend upon whether OFLC undertook debarment rather than WHD. There is no justification for creating a more formal process for review under which an employer has an opportunity to convince OFLC that debarment is inappropriate, on the one hand, and denying an employer such an opportunity if WH seeks debarment. The rationale offered that employers have "ample opportunity to submit any evidence and arguments in its favor," is not convincing. 76 Fed. Reg. at 15159. WH has broad authority to investigate numerous provisions of H-2B program compliance under the proposed rule. Such investigations are informal and cover many compliance areas. By treating circumstances surrounding a violation that could result in debarment the same as any other violation underscores our concern that attempts to debar will become commonplace under the proposed rules.

Moreover, WH investigations are informal until a Determination Letter is received, and such letters and the option to request a hearing involve limited factual statements. The OFLC debarment procedure allowing a more formalized rebuttal process focused on issues critical to the debarment question is more inherently fair because it affords an opportunity to resolve a critical issue. If, for example, OFLC was unaware of critical information that would have changed its decision on debarment, it would learn quickly and would have an opportunity reverse its decision. The WH provision affords no such immediate opportunity and leaves a business with uncertainty that it will be able operate in the future until the often lengthy administrative hearing process is completed at some unknown time in the future.

CONCLUSION

For all of the reasons stated above, we ask DOL to rescind this regulatory proposal. If it disagrees and issues a final rule, we ask that it consider the recommendations set forth in this letter. A fundamental problem with this proposal is that DOL views its mission solely as the protection of U.S. workers, rather than balancing the needs of U.S. workers and employers. The proposal shifts all risks—of market fluctuations, of uncorrected CO delays and errors—to the employer and its current domestic workforce. A system that serves no one well is the result—not the economy, which greatly benefits from H-2B workers and not the American jobs that depend, directly or indirectly, on H-2B employment.

Congress' fundamental judgment when it authorized the H-2A and H-2B programs was that the best way to protect American jobs was to ensure an adequate labor supply when needed. The NPRM proceeds from the premise that the best way to protect American jobs is to deprive employers of an adequate labor supply making it cost prohibitive to access it. We respectfully submit that Congress is right and that DOL should rethink and retool its approach to the administration of the H-2B program so that it is consistent with congressional intent.

We appreciate the opportunity to comment on the proposed regulations.

Sincerely,

MASLabor H-2B, LLC
Amigo Labor Solutions, Inc.
Practical Employee Solutions, Inc.
AgWorks
Action International
Employment USA
H.E.L.P.
Workforce Advantage
MJC Labor Solutions, LLC
MalitzLaw
American Nursery & Landscape Assoc.
Chesapeake Bay Seafood Industries
Forest Resources Association
Save Small Business
Virginia Seafood Council