

OMB Meeting regarding H-2A Regulations:

Mountain Plains Agricultural Service and Vermillion Ranch Limited Partnership

RIN 1205-AB55

October 16, 2008

The proposed rule contains new adverse provisions that will reduce current use and discourage future use of the H-2A program. Its cumulative effect would be to force many range livestock operations to close, threatening the domestic food supply and impairing the environmental goals of range management.

1. The proposed rule is inconsistent with any reasonable cost-benefit analysis

Under the guise of regulatory reform that would benefit agricultural employers, the proposed rule would have the clear effect of making the H-2A program more burdensome. The sum-total effect of this regulatory proposal is to create more uncertainty for employers about whether temporary or seasonal foreign labor would be a viable option for the labor intensive agricultural industry, because it increases dramatically the discretion of DOL labor-certification officers to deny and revoke applications for H-2A workers and to penalize employers who make such applications.

As a result, current users of the H-2A program may cease using this program altogether, and new users of the H-2A program are unlikely to be found. When scrutinized under the entirely plausible scenario of crop failure and livestock death, this proposed rule is irrational, arbitrary and capricious, inconsistent with the Immigration and Nationality Act (INA) and the Fair Labor Standards Act (FLSA), inconsistent with any reasonable cost-benefit analysis, and would violate the Takings Clause of the 5th Amendment to the U.S. Constitution, and would disproportionately impact livestock producers (who tend to operate small businesses).

2. Revision of Special Procedures

Proposed Section 655.93(c) amends the current regulation to allow DOL to “revise or revoke” current special procedures, such as those for the range production of livestock, “where circumstances warrant.” This is contrary to the current regulation, which encouraged DOL to utilize such procedures. The new “revocation” power clearly undercuts the ability of range producers of livestock and sheep shearing contractors to rely on the existing special procedures – which have been available for over 20 years. This also gives DOL new discretionary power to revoke the procedures without advance notice and opportunity for comment, which is a violation of the Administrative Procedures Act (APA). Without certainty of the continuation of special procedures which include DOL’s historical acceptance of monthly wage rates and working conditions common to certain agricultural sectors, hundreds of longstanding users of the H-2A program will be forced to close their operations in order to avoid hiring an illegal workforce.

3. Variance/ Special Procedures

Proposed Section 655.93(b) changes the current authority for “special procedures” that apply to the range production of livestock by characterizing the special procedures to be “in the form of a variance.” This could require thousands of employers engaged in the range production of livestock, sheep shearing and other agricultural industries for which special procedures have been granted to document in each individual application their need for the special procedures that have been granted to them for the past 20 to 30 years, thus diluting the certainty and reliability of the current established precedent of the use of such procedures.

4. Adverse Provisions for All H-2A Users: New DOL Revocation Authority

Unlike the current system, proposed Section 655.117 allows DOL to revoke an approved labor certification application immediately upon expiration of the 14-day “notice period,” even if the employer timely files rebuttal evidence, “if the Certifying Officer determines the temporary agricultural labor certification should be revoked...” The revocation takes effect immediately, notwithstanding any administrative appeal filed by the employer, thus making administrative appellate review meaningless. This provision allows DOL to “change horses in mid-stream” in an entirely unfair manner. In addition, the proposed rule sets forth no standard for DOL’s determination to revoke the petition when an employer submits rebuttal evidence, thus allowing DOL to revoke on a very broad range of criteria. This revocation authority will severely dampen employer interest in the H-2A program and again result in a violation of the APA and Takings Clause.

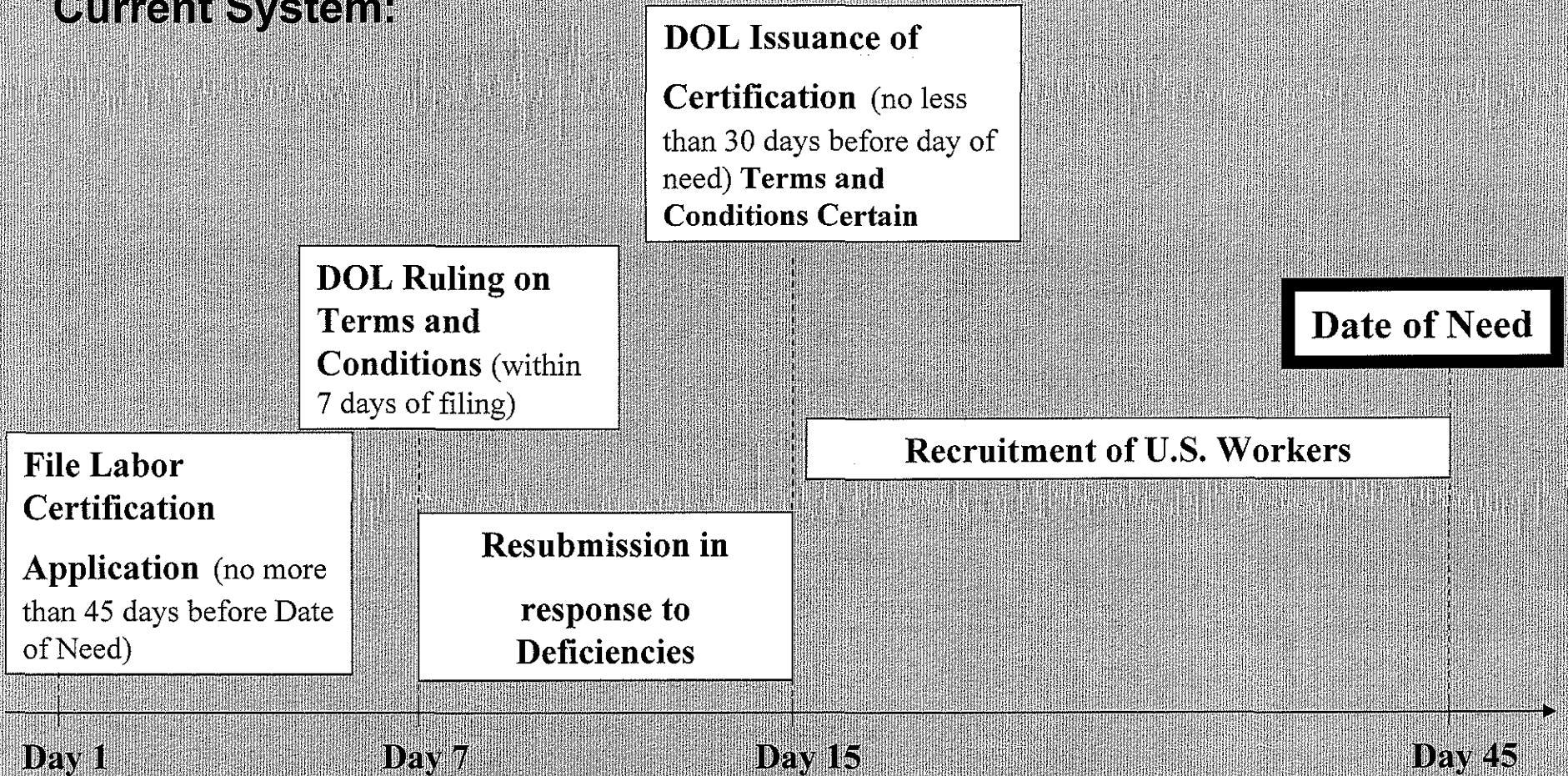
5. DHS Stripped of Independence and Required to Follow DOL

In the proposed rule, DHS intends to substitute DOL’s judgment for its own in the granting, extension, or continued validity of an H-2A petition. This proposal is contrary to INA Section 218 and to the intent and purpose of IRCA, which sought a counter-balance to DOL’s institutional anti-employer bias. DOL’s revocation authority automatically triggers DHS’s revocation of the H-2A status of employed workers who must then leave the crops to wither in the fields and the livestock to be lost or to perish on the range.

6. Improper Replacement of Traditional Labor Certification Process With Attestation System

INA Section 218(c)(2) requires that DOL make an upfront assessment of the acceptability of an H-2A employer’s terms and conditions of employment within 7 days of submission of the application which provides employers with the certainty that their job offers are acceptable or gives them an opportunity to appeal any DOL rejection of such terms and conditions. This requirement, inserted by the Immigration Reform and Control Act of 1986, recognizes that H-2A employers should not be required to start to recruit for US workers until they know that DOL has no quarrel with the terms and conditions of the job opportunity for which they seek certification. The proposed rule violates that statutory requirement by allowing DOL to change its mind, second guess, and nit-pick, the terms and conditions of an employer’s offer well after the recruitment process has begun. This proposed “attestation” structure violates the statute, is unwise economic policy, and must be deleted. In order to remain in compliance with INA Section 218(c), the current labor certification structure must be restored.

Current System:



H-2A Regulations

Proposed System:

