

OVERVIEW of ISSUES in the DOL H-2A NPRM

The Department proposes to modernize the existing H-2A Temporary Agriculture Worker Program by improving the application process and strengthening worker protections. This proposal seeks to address a number of criticisms about the current program, including that it is so cumbersome and prone to delays that many agriculture employers refuse to use it. The proposed regulatory reforms are the first in 20 years and would help provide our Nation's farmers with legal workers in a timely fashion while ensuring protections for both U.S. and H-2A workers.

The proposal contains the following:

Processing Improvements

The U.S. agricultural economy requires a reliable and timely workforce. A farmer's inability to secure sufficient workers on time all too often means that crops rot in the field. Congress established very tight H-2A processing times for that reason, yet the Department consistently fails to meet the deadlines required by law. The Department must improve its process to come into compliance with the law, and to ensure that farmers have the workers they need to provide the U.S. economy with a safe and reliable domestic food supply.

- **Applications.**
 - Eliminate the duplication of activities currently performed by the State Workforce Agencies (SWAs) and the Department's Employment and Training Administration (ETA). Employers would file their H-2A applications directly with DOL instead of filing simultaneously with both the SWA and DOL.
 - Implement an attestation-based labor certification process in place of the current cumbersome process. Employers will be required to attest, under threat of penalties, including fines, revocation of certification, and program debarment, that they have fully complied with all program requirements. DOL will institute an auditing program to ensure compliance with program requirements. This reform builds on our successful re-engineering of the labor certification process in the Permanent Labor Certification Program (PERM) in 2005.
- **Housing Inspections.** Increase the amount of time states have to conduct required housing inspections in response to delays often caused by SWAs overwhelmed by employer requests for pre-certification housing inspections. This reform creates consistency between the housing inspection process under H-2A and the housing inspection process under the Migrant and Seasonal Workers Protection Act, which protects U.S. farm workers.
- **Wage Rate.** Revise the methodology for determining the Adverse Effect Wage Rate to more accurately measure market-based wages by occupation, skill level, and geographic location. Use of the BLS Occupational Employment Survey data on wages would make the H-2A program consistent with the wage calculation methodology successfully used in other temporary worker programs administered by the Department. This reform ensures accurate wage information is available in more

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than 500 localities as opposed to the current 18 regions, resulting in more precise wage calculations that will increase protection for U.S. workers from competition by illegal workers.

It is critical for the H-2A wage rate to reflect market conditions as accurately as possible. Rates that are too low threaten to drive down the wages of U.S. workers, while rates that are too high encourage agricultural employers to instead resort to illegal workers, a practice that both Congress and the Supreme Court have noted also threatens the wages and working conditions of U.S. workers.

- **Application Fee.** Increase the fee to an amount sufficient to recover the reasonable costs of processing applications. The current fee was set 20 years ago and has not been updated since. Significantly, the Department does not currently have authority to retain or use application fees, which are instead sent to the Treasury. The Department is sending draft statutory language to Congress giving DOL the authority to retain the fee as a means of funding the H-2A program and ensuring that fees are used to improve program performance and enhance workers' rights.
- **Employment Eligibility Verification.** SWAs must verify the employment eligibility of any worker referred to an employer in response to an H-2A job order. In Training and Employment Guidance Letter (TEGL) 11-07, issued November 14, 2007, ETA recommended that the SWAs use the Department of Homeland Security's E-verify system to ensure that the workers being referred to employers are eligible for employment. This clarification is consistent with existing statutory requirements.

Enhanced Worker Protections

- **Recruitment.** Employers would be required to substantially increase the amount of time they spend recruiting, thus giving U.S. workers additional time to apply for jobs before the employer resorts to hiring H-2A workers.
- **Foreign Labor Contractors.** Would be required to maintain a surety bond (in an amount based on the number of workers employed) throughout the effective period of the labor certification. DOL will make a claim against the surety bond to secure any unpaid wages or other benefits due to workers under the labor certification.
- **Prohibition on Cost-Shifting and Limits on Foreign Recruiters.** Employers would be prohibited from passing along to workers any of the costs incurred as a result of participating in the program, including the cost of preparing and filing an application, attorney fees, and recruiting costs. In addition, employers that utilize foreign recruiters must also contractually prohibit them from passing on such costs.

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- **Maximum Fines.**
 - Willful failure to meet a condition of the work contract, or discrimination against a U.S. or H-2A worker, or interference with an investigation would increase from \$1,000 to \$5,000.
 - Willful failure to meet a condition of the work contract that results in displacement of a U.S. worker would increase from \$1,000 to \$15,000.
 - Violations of housing or transportation safety and health standards causing serious injury or death would be established at \$50,000 per worker and \$100,000 for willful or repeat violations.
- **New Enforcement Tools.**
 - Random and targeted auditing of applications to ensure employer compliance with program requirements.
 - Revocation of approved certifications for an employer's violation of program requirements.
 - Clarification and improvement of ETA's authority to debar employers for program violations. Separate authority for WHD to also debar employers for program violations.

Other Changes

- **Logging.** The proposed rule will clarify that logging is an activity included in the H-2A program. Loggers are currently admitted under the H-2B program, but have to comply with many H-2A-type program requirements. To reduce confusion about logging standards, the Department proposes to make logging eligible for the H-2A (rather than H-2B) program and accordingly, apply all H-2A requirements.
- **Christmas Trees.** To conform to a recent Federal Circuit court decision, the proposed rule will clarify that Christmas tree production on a farm is agricultural work for purposes of the Fair Labor Standards Act (FLSA). Christmas tree production is already eligible for the H-2A program and the change to the FLSA definition will not affect the H-2A designation.