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Submitted to the Department of Homeland Security
Concerning its Proposed Rulemaking on the H-2A Program
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RE: DOL Docket No. ETA-2019-0007, RIN 1205-AB89, Comments in Response to Proposed Rulemaking: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States

INTRODUCTION

The Department of Labor (DOL) proposes a variety of reforms to the H-2A program for agricultural workers. DOL states that this rule "streamlines the process" for H-2A labor certifications for employers seeking to hire foreign temporary farm laborers. The rule generally accomplishes this purpose—with a few exceptions—but fails to exercise the department's full regulatory authority to improve the H-2A program for employers and workers.

As laid out in the H-2A statute (U.S. Code § 1188), the primary guiding principle for H-2A policy is to facilitate the legal hiring of foreign guest workers whenever there are insufficient domestic workers and the employment will not adversely affect the employment of U.S. workers. Facilitating the legal hiring of guest workers when needed serves the purposes of expanding the U.S. economy and reducing employment of illegal immigrants. Ultimately, this rulemaking moves the program closer to achieving these goals but falls short of reaching them.

DOL can go further in creating a regulatory framework that works to meet the needs of U.S. employers while also benefiting U.S. workers. Generally, DOL nearly wholly disregards the effect of its restrictive program requirements on illegal immigration—both by those who enter without inspection and by those who overstay their visas. The interaction between illegal immigration and the availability of low-skilled work visas is now well-documented,[1] and DOL's rules should reflect that illegal employment and illegal migration pose a much greater problem to this country than legal employment lacking every protection that DOL can possibly conceive.

[*] The Cato Institute is a nonpartisan 501(c)(3) nonprofit think tank founded in 1977 and located in Washington D.C.

RECOMMENDATIONS

1. **Adopt the presumption that U.S. employers can hire H-2A workers unless the agency finds specific evidence indicating that it would harm U.S. workers.** DOL's proposal maintains the fundamentally flawed structure of the H-2A program in that it requires employers to prove that their hiring of foreign labor will not harm U.S. workers, rather than DOL prove that it will harm U.S. workers. The law requires DOL to certify that there "are not sufficient workers" and that H-2As "will not adversely affect wages," but it should adopt the presumption that these conditions are met unless it finds specific evidence to the contrary.

   This presumption is based on the fact that unemployed U.S. workers very rarely apply for H-2A jobs and that when they do, they very rarely complete the work period.[2] In 2012, for example, just 10 U.S. workers of 446,469 unemployed U.S. workers in North Carolina applied for one of the about 7,000 H-2A job openings and completed the season. With unemployment so low in virtually every industry, U.S workers are even less likely to apply for agricultural jobs today. The regulatory costs and denials only serve to harm U.S. farms, which have downstream effects on consumers and almost every other industry.

2. **Require U.S. employers to recruit H-2A workers already in the United States on the same basis as other U.S. workers**. Section 655.135 proposes to alter the H-2A recruitment process by replacing the 50 percent rule with a 30-day rule. This reform would better balance an employer's need for certainty with protections for U.S. workers. However, the rule fails to address a fundamental problem with the H-2A recruitment process—namely, that the current regulations treat H-2A workers already in the country as if they were foreign workers applying for entry for the first time.

   The statute (8 U.S.C. 1188(a)(1)) requires employers to prove that there are not "sufficient workers … at the time and place needed," not simply insufficient "U.S. workers." A better reading of the statute would treat H-2As already present in the United States the same as other U.S. workers *for purposes of recruitment only*. This change would impose a broader requirement on employers to prove that no H-2A workers already in the United States are available to fill the positions.

   This new recruitment mandate has three main benefits for DOL, employers, and workers:

   A. Protect wages: Treating H-2As in the country the same as U.S. workers would allow them to more easily transition from one H-2A employer to another. This would benefit both U.S. and foreign workers by helping to guarantee that H-2As do not receive below market wages from their initial employer.
   B. Reduce overstays*:* Incentivizing employers to hire H-2As already in the country would reduce H-2A overstay risk by helping H-2A workers already here to obtain post-contract employment. Likewise, it would also reduce the number of H-2A workers who need to enter, which would mean that fewer workers would be needed

to fill the same number of jobs. Fewer new workers entering would inherently reduce the total number of overstays as well as the overstay rate.

C. Reduce costs: Fewer new workers would have the benefit of reducing the workload for DHS and the State Department. Employers would also save money on visa, petition fees, and recruitment costs.

3. **Replace the 50 percent rule with the same recruitment rule as the H-2B program.** DOL is currently proposing to reduce the 50 percent rule—requiring the hiring of any U.S. worker up to 50 percent of the work period—with a 30-day rule after the date of need. This is better, but the statute doesn't require the 50 percent rule (8 U.S.C. 1188(c)(3)(B)) and it is senseless and uniquely harmful provision that only applies to H-2A visas, not to any other temporary worker program. Every U.S. worker has the chance to apply for the job before the date of need, and if they do not, requiring employers to hire them despite the job being taken by an H-2A worker makes no sense. The 50 percent rule throws needless uncertainty into the H-2A program, and because U.S. workers who are hired under it so often quit before the end of the season, it has little benefit to U.S. workers and is unfair to employers who advertise the jobs before recruiting H-2As.

   DOL's data indicate that employers hired U.S. workers for just 6 percent of the available jobs under the 50 percent rule. The data further report that "many of these U.S. workers who were hired either did not report to work or voluntarily resigned or abandoned the job shortly before beginning work" (p. 36207). This is exactly the type of uncertainty that businesses cannot afford and that undermine the incentive of employers to hire workers legally through this program. DOL should replace the 50 percent rule with the H-2B program rule, which requires hiring any U.S. worker up to 21 days before the date of need (20 CFR 655.40(c)).

4. **Define "temporary" to include jobs that may be indefinite but have duties that are inherently seasonal or temporary**. The rulemaking defines "temporary or seasonal nature" to mean "where the employer's need to fill the position with a temporary worker will . . . last no longer than 1 year." But the statute (8 U.S.C. 1101(a)(15)(H)(ii)(a)) requires only that the "services" that an H-2A worker provides be "of a temporary or seasonal nature." In other words, it is the "services" that must be temporary or seasonal, not necessarily the employer's need for the worker or the "position" as a whole. Indeed, the words "employer" and "need" are not found in the clause defining an H-2A worker. Obviously, the employer's need for a worker would also make the service of a temporary or seasonal nature, but that should not be exclusively the case. This change would better align the regulation with the statute and would allow for a greater array of employers to use the H-2A program, reducing the incentive to hire illegal labor.

5. **Allow H-2A employment below the Adverse Effect Wage Rate (AEWR)/prevailing wage if U.S. workers receive wages 5 percent above it**. Section 655.120 proposes to keep the requirement that the offered wage rate must be the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. This requirement has emerged from the statutory

mandate that DOL determine that H-2A employment will not "adversely affect" similarly employed U.S. workers (8 U.S.C. 1188(a)(1)(B).

However, this requirement imposes an inflexible mandate on employers even in a situation where they could afford to pay U.S. workers more than the AEWR or prevailing wage if they were given the option to pay H-2As less. If this situation occurs, DOL's mandate harms U.S. workers. DOL should grant employers the flexibility to decide whether to choose to pay inflated wage rates to U.S. workers or pay the AEWR/prevailing wage to H-2As. This flexibility would translate into higher productivity for U.S. farms.

DOL already prohibits displacing U.S. workers, but it could strengthen this requirement for employers opting for the more wage flexible wage option by requiring that employers employ at least the same number of U.S. workers as in the prior year. This would mean that the total number of U.S. workers benefiting from the higher wage floor would have to remain the same.

Finally, under this proposed change, U.S. employers would have less reason to prefer illegal workers posing as U.S. workers over H-2As. Eliminating this preference would benefit U.S. workers because DOL can intervene to protect the wages of U.S. workers under the H-2A program but cannot do so when employers hire illegal immigrants.

6. **Make the AEWR/prevailing wage determination based on four wage levels**. The statute (8 U.S.C. 1182(p)(4)) unambiguously requires that wage surveys "provide at least 4 levels of wages commensurate with experience, education, and the level of supervision." The agency rejects this approach as "arbitrary" (p. 36183) because they "are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula." But the statute explicitly foresees this possibility and instructs the agency to create the four tiers even if they are mathematically constructed. Moreover, employers do not arbitrarily determine wages. There will always necessarily be a strong relationship between a worker's skills and the worker's wage, so there is nothing improper about estimating skill levels using wages.

7. **Require the AEWR/prevailing wage only for newly-hired U.S. workers**. A major disincentive for employers to participate in the H-2A program is that they must pay the AEWR to all current U.S. workers in corresponding employment if they hire even a single H-2A worker. DOL proposes to maintain this rule. In its final rule of December 18, 2008 (73 FR 77109), however, DOL limited this requirement only to newly employed U.S. workers on the grounds that "U.S. workers who were already employed by the H–2A employer at the time the labor certification application was filed, however, cannot possibly be adversely affected by the subsequent hiring of H–2A workers who are paid higher wages" (73 FR 8556).

In 2010, DOL reversed course, but did so without rebutting this fundamental fact. Instead, it cited the fact that current U.S. workers could quit and demand to be rehired under the H-2A offered wage (75 FR 6886). While this is true, DOL has a duty only to enact rules that protect U.S. workers from *harm*, not to artificially inflate the agricultural wages, which is the effect of this rule.

8. **Eliminate the AEWR and use the metropolitan area-based prevailing wage.** H-2A is the only program that uses the AEWR, and AEWR is not required by statute and was not used in many states prior to 1986 for the H-2 program. The AEWR rate differs from the prevailing wage partly by taking statewide averages instead of occupation specific wages in a metropolitan area. Using the statewide averages distorts wages throughout the country—depressing the wage estimates for workers in urban areas and inflating them for workers elsewhere where the market wage is lower. Surveys of the metropolitan area are simply more accurate than statewide surveys.

   This is an especially big problem for the forestry industry, which will now be subject to a statewide prevailing wage for the first time as a result of it being moved into the H-2A program from the H-2B program, which doesn't use state-wide averages. DOL admits the authority to prevent this damage from occurring (p. 36183) but chooses not to exercise it based on its belief that statewide averages will "protect against wage depression," even though forestry has successfully hired guest workers under the H-2B program for years using metropolitan-specific wage surveys. DOL should maintain its current H-2B wage calculations for forestry.

9. **Allow the employer to use statistically valid private wage surveys to establish the AEWR/prevailing wage, as has been the case under the H-2B program (20 CFR 655.731).** This would save federal resources and allow for more accurate surveys relevant to the locations and occupations of interest. It is irrationally arbitrary for DOL to allow private wage surveys for H-2B employers, but not for H-2A employers.

10. **Calculate farm construction labor wages based on surveys of farm laborers**. The most problematic component of DOL's proposed revision to the AEWR is that it will calculate farm construction worker wages based on the Occupational Employment Statistics (OES) surveys of "non-farm establishments" (p. 36182). DOL suggests that farm construction is the same as non-farm construction so using OES is acceptable despite it not measuring the wages of farm construction workers, but this is incorrect. Farm construction is far less complex than non-farm construction, which is precisely why wages for non-farm construction workers are so much higher than those on farms. DOL could alleviate this problem by adopting the reforms above: allowing private wage surveys of construction agricultural workers or by implementing the legally mandated four-tiered wage structure.

11. **Make the labor certification an attestation-based process**. DOL proposes to maintain the current H-2A labor certification process. In its final rule of December 18, 2008, however, DOL instituted an attestation-based process for labor certification whereby employers attested to their intention to comply with the terms of the H-2A program

without requiring DOL to review the evidence of each individual employer. It would enforce program requirements only after the fact through audits of employers. This system is far more efficient to employer, less costly to employers and DOL to operate, and incentivizes employers to use the system to hire legal H-2A workers rather than hiring illegal immigrant workers.

DOL subsequently rescinded this process in 2010. Yet every argument for the attestation-based process that DOL provided in its proposed rulemaking of February 13, 2008 (73 FR 8538) remains accurate. DOL stated that it would "help to bring the program into compliance with longstanding statutorily required processing timelines" partly by "dramatically reduc[ing] the number of incomplete applications that currently consume valuable processing time" (p. 8545). DOL did not dispute this fact in 2010 or at any other time. DOL stated that it would help in "protecting U.S. workers from the adverse effects resulting from the employment of illegal workers." DOL did not dispute this fact in 2010 or at any other time.

DOL claimed only that it "feels that there are insufficient worker protections in the attestation-based model" based on "anecdotal evidence" from less than a single year of implementation (74 FR 45908). DOL found several specific violations technical violations of the recruiting requirements in an unspecified number of cases in 2009. It made no effort to show that violations increased in that year or that these violations would not have been uncovered under an audit-only system. Ultimately, the benefit of an audit-only system—efficient, less-costly processing—outweighs the hypothetical risk to the wages of U.S. workers.

12. **Allow employers to deduct housing from H-2A wages**. DOL proposes to continue to the mandate to provide housing "at no cost" to H-2As (p. 36192). Employers should ensure their workers are not homeless, but the statute (8 U.S.C. 1188(c)(4)) only requires that employers "furnish" housing. It does not require that they provide it "at no cost." This additional requirement erroneously inflates the costs of employing H-2As because employers do not have to provide housing to U.S. workers who commute to the jobsite. Inflating the cost for H-2As ultimately makes illegal employment more attractive to employers, undermining the purpose of the program.

13. **Define agriculture to include right-of-way vegetation management as agricultural employment**. DOL proposes (p. 36176) to include forestry into the H-2A program but excludes right-of-way vegetation management. These two industries rely on the same workforce, so separating them will harm both industries because, under current H-2B rules, workers can transfer between H-2B employers without affecting the H-2B cap. However, under the proposed rule, a transfer between H-2A to H-2B will now have visa cap implications for H-2B, often preventing some or all transfers. This is harmful because transfers from forestry to right-of-way reduce travel costs for both industries, save the first employer from paying a trip home, and the second from paying for a trip here.

Moreover, the change is bad policy for the additional reason that it could force employers to hire new workers from outside of the country rather than those already here, imposing additional burdens on the government and unnecessarily creating a larger pool of people who could overstay their visas.

DOL claims that it cannot move both industries to H-2A because "although right-of-way vegetation management involves similar activities as performed in reforestation (i.e., brush clearing and tree trimming), the result of these activities is the destruction of vegetation, not cultivation." But the H-2A statute (8 U.S.C. 1101) is clear that DOL has discretion to define agriculture however it wants, and "management" of vegetation can surely meet the definition. Certainly, many agricultural duties require the destruction of vegetation – such as reducing weeds.

14. **Reduce bond amounts required of H-2A labor contractors if they have a 5-year record of paying their wages without needing DOL to resort to the bond to cover worker's wages.** DOL proposes to maintain the requirement that H-2ALCs provide surety bonds (p. 36203). The statute includes no special regulations of H-2ALCs, but because they have become a much more important part of the H-2A program in recent years, and because they are less capitalized than other agricultural businesses, DOL has determined that they should pay surety bonds in case they cannot meet their obligations. The problem is that DOL treats all H-2ALCs as if they are all equally likely to default on their obligations. Proven H-2ALCs should be exempt from these requirements.

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[1] Alex Nowrasteh and Andrew C. Forrester, "H-2 Visas Reduced Mexican Illegal Immigration," Cato Institute, July 11, 2019, https://www.cato.org/blog/h-2-visas-reduced-mexican-illegal-immigration.
Michael Clemens and Kate Gough, "Can Regular Migration Channels Reduce Irregular Migration? Lessons for Europe from the United States," Center for Global Development, February 2018, cgdev.org/sites/default/files/can-regular-migration-channels-reduce-irregular-migration.pdf

[2] Michael Clemens, "International Harvest: A Case Study of How Foreign Workers Help American Farms Grow Crops – and the Economy," Partnership for a New American Economy and the Center for Global Development, May 2013, https://www.cgdev.org/sites/default/files/international-harvest.pdf.