



Monday, April 14, 2008

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

RE: RIN 1205-AB55  
Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Proposed Rule [*Federal Register* 73:30, p. 8537ff]

Dear Administrator Dowd:

The United Fresh Produce Association (United Fresh) submits comments on behalf of our members regarding the proposed regulations and request for comments published in the Federal Register on February 13, 2008, by both this Department as well as the Department of Homeland Security (DHS) concerning the temporary agricultural employment (H-2A guest worker) program.

United Fresh includes some 1,200 member companies that distribute and market the large majority of fresh produce sold in the United States. The association is a vertically integrated national trade organization that represents growers, shippers, fresh-cut processors, brokers, wholesalers and distributors of produce, working together with their customers at retail and foodservice, suppliers throughout the distribution chain, and international partners.

As an association, we have several members who participate in this program, both veteran users as well as some new participants. As with most regulations, we believe the proposed regulations have some positive changes and some negative. Listed below are some general items of concern as well as recommendations that our United Fresh members have specifically called to our attention. In addition, as a member of the National Coalition of Agricultural Employers (NCAE), we also incorporate by reference and endorse

the concerns and recommendations expressed in the comments submitted by NCAE. Specific items that are discussed in the NCAE comment letter that are not addressed in our comments below should not be interpreted as meaning that the omitted item is not important to our association. In addition, we commend this Department for making changes to the following rules: 1) expanding the definition of agriculture and allowance for incidental non-ag work, 2) requiring State Workforce Agencies to only refer to H-2A users those individuals that they have verified are authorized to work in the U.S., and 3) providing H-2A employers an opportunity to meet the housing requirement through the use of housing vouchers.

At this time, we call your attention to the following items.

***A. Expanding the required pre-filing recruitment period is burdensome and ineffective.***

The proposed rule requires the employer (ER) to recruit not less than 75 days nor more than 120 days before the date of need for workers, and prior to filing a labor certification application. Currently, regulations require the employer to start recruitment 45 days prior to the date of need. Very few if any domestic workers actually show up for work in circumstances where recruitment begins so far in advance. History has shown that the further out recruitment begins from the date of need the fewer the amount of domestic workers who actually report to the job. Secondly, the nature of this industry provides very little consistency with regards to planning ahead the type of plants to plant, how much to plant, and how much and over what time frame labor is needed. A grower simply does not know these variables this far out before planting. Therefore, expanding the required pre-filing recruitment period would make the program less effective and more costly for the employer without any realized benefit or proof that a) a larger pool of domestic workers would apply or b) a larger amount of domestic workers would actually report to work on the date of need.

Recommendation: We recommend to either maintain the current 45 day requirement or change the recruitment process into a true attestation process as noted in the AgJOBS legislation. (See reference below)

***B. Expanding the advertising requirement will significantly increase the employer's expense will little to no effect on recruitment.***

The proposed rule expands an employer's advertising requirements. Current regulations require employers to advertise at least once. Typically, this advertising is done in either a local newspaper or a newspaper in an area of potential supply, and generally the advertisement must run at least two days. The proposed regulation requires the employer to run a local advertisement for a minimum of three days, one of which must be on a Sunday, and to place advertisements in at least

three other areas of potential labor supply. This will essentially quadruple the cost for the employer. Past experience indicates that farm workers do not read daily newspapers when looking for jobs. In fact, the DOL's National Agricultural Worker Survey reports that 95% of workers, both illegal as well as legal, found out about their job from a friend or relative or learned about it on their own. Thus, the expansion of the advertising requirement in the proposed regulations contradicts the stated purpose of streamlining the H-2A program, and is wasteful, burdensome, and unproductive.

Recommendation: We recommend that the proposed regulations eliminate the advertising requirement completely as it is wasteful, burdensome, and is one additional item of red tape that does not serve any benefit for either the employer or the domestic worker.

***C. While the certification process has changed from being called an "application" process to an "attestation" process, substantively, the process is the same. In addition, maintaining documentation for five (5) years is unnecessary, burdensome, and not common business practice.***

The proposed rule changes the name of the form requesting labor certification from an "application" to an "attestation." Although the "name" for this administrative process has changed, the substantive steps required pursuant to this rule have not changed. Our concern is that the employer is still required to go through the administrative nightmare of keeping up with documentation. Additionally, the proposed rule requires employers to not only acquire sufficient documentation, but also maintain said documentation for a period of five (5) years. Although an attestation does not require the attachment of documents such as housing inspections, copies of State Workforce Agency (SWA) local job orders, etc., these documents must still be secured and filed with the other documentation for at least five (5) years from the date of the certification in order to respond to audits even in the event that a certification is submitted and rejected. This requirement is unreasonable and unnecessary, and will be very difficult for H-2A users to satisfy, particularly in situations where certifications are rejected and there is no need to maintain such records.

Recommendation: We support the attestation process as proposed in the AgJOBS legislation, which would allow an employer to first file an application with USDOL and a job offer for domestic workers. If the application meets the requirements of the program and there are not obvious deficiencies it must be accepted by USDOL. The employer then agrees to satisfy certain conditions (i.e. housing, transportation, wages, etc.), and performs domestic recruitment at least 14 days before its date of need. Seven days after the filing date, USDOL reviews the employer's

application and approves it, and the employer then petitions DHS for approval of the H-2A workers. This process has been agreed to by growers, farmworkers and received bipartisan support in Congress, and we believe this procedure is fair, efficient, and reasonable. Consistent with the Fair Labor Standards, we recommend that the employer maintain records sufficient to respond to an audit for a time period not to exceed three (3) years from the date of the certification. In the case where certifications are rejected, we do not understand why there would be a need to maintain those records at all. This is wasteful, time consuming, and serves no purpose. However, to the extent that this Department finds that record keeping is necessary for rejected certifications, we recommend a period of no more than ninety (90) days for auditing purposes.

***D. Allowing working housing through vouchers will make the H-2A program more usable as long as technical problems are remedied.***

The proposed rule allows employers to satisfy the housing requirement by providing H-2A workers entitled to housing a housing voucher if certain conditions are met. While we support the general concept and believe this to be a positive step in making the H-2A program more usable and effective, there are some technical problems that need to be resolved in order for the voucher to be utilized in this program. United Fresh defers to NCAE to address those problems and supports the remedies proposed by NCAE's comments.

***E. Increase of certification fees is excessive.***

The proposed regulations increase the fee for issuance of a labor certification from \$100 to \$200 per application plus from \$10 to \$100 per worker. The \$1000 cap is also eliminated. The concern is that the increase is unreasonable and will prevent current as well as potential users from participating in the program. The preamble to the proposed rule provides only one sentence of justification for the proposed increase, stating that the new fees "comport with statute's expectation that the fee recover the reasonable costs of processing H-2A applications." The Department fails to explain what costs it took into account, nor how a more streamlined process could lead to a significant increase in costs. It also fails to explain how the costs of processing can increase \$100 per worker as more workers are requested, when the underlying applications would be identical regardless of the number of workers requested.

Recommendation- United Fresh recommends that the fee should remain at current levels, and if DOL insists in an increase of fees, then the Department should provide detailed information in the Federal Register as to what activities it is including in the "costs of processing" an H-2A application, and what these costs are. In essence, if the increase is due to the Department's effort to streamline the process, then perhaps the

Department should consider this as evidence that it has not effectively streamlined the process at all. In addition, the fees should be capped at a reasonable amount as currently in effect.

**F. *The proposed wage standard needs further reform.***

The proposed rule replaces the USDA farm labor survey program with the the Bureau of Labor Statistics' Occupational Employment Survey (OES) data base. However, the requirement remains in tact that H-2A employers pay the highest of three wage standards: 1) the applicable federal, state or local statutory minimum wage, 2) the prevailing wage for the occupation in the area of intended employment, if such a prevailing wage has been determined by the SWA, or 3) an administratively established "Adverse Effect Wage Rate" (AEWR). United Fresh supports the position of NCAE and other groups that there are no valid economic justifications for a separate AEWR standard in addition to the prevailing and statutory minimum wage. The current prevailing wage methodology in use by the DOL as set forth in ETA Handbook 385, when applied correctly, results in the determination of correct prevailing wages for specific agricultural activities in specific areas of intended employment. Further, United Fresh does not believe the OES data system accurately reflects prevailing wages in specific agricultural activities. The reasons the OES survey data are flawed as a measure of farm wages include but are not limited to the fact that they (1) specifically exclude wages paid by farmers, (2) do not collect wage data, but merely tabulate the number of workers paid hourly rates in broad wage categories, (3) fail to account for piece rate paid workers, (4) and do not reflect acceptable levels of statistical precision at the local labor market levels at which they are proposed to be applied.

Recommendation: United Fresh recommends that the employment of H-2A workers be subject only to a prevailing wage standard, and the prevailing wage standard should be determined in a manner consistent with DOL's current prevailing wage determination. If the DOL does not eliminate the AEWR standard, United Fresh recommends the DOL to allow employers to pay either an AEWR based on the current USDA methodology or request a wage determination from the DOL based on the proposed new OES data system.

On behalf of the members of United Fresh, we thank you for the opportunity to submit these comments.



Thomas E. Stenzel  
President and CEO