



Monday, April 14, 2008

Chief, Regulatory Management Division  
US Citizenship and Immigration Services  
U.S. Department of Homeland Security  
111 Massachusetts Avenue, NW, Ste 3008  
Washington, DC 20529

RE: Docket No. USCIS-2007-0055  
Changes to Requirement Affecting H-2A Nonimmigrants: Proposed  
Rule [*Federal Register* 73:30, p. 8230ff]

Dear Chief:

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 Labor (DOL) 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.

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

### **1. *Prohibition on Fees Collected from Aliens***

The proposed rule states that as a condition for approval of an H-2A petition, no fee or other compensation (either direct or indirect) may be collected from a beneficiary of an H-2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service in connection with an offer or condition of H-2A employment. If it is determined that the petitioner has collected, or entered into an agreement to collect, such fee or compensation or that the petitioner is aware that the beneficiary has paid or agreed to pay an facilitator, recruiter, or similar employment service, in connection with obtaining the H-2A employment, the H-2A petition will be denied or revoked on notice. This is problematic because many employers who are H-2A users depend on their current workers to find additional or replacement workers. This is usually accomplished by workers' calling relatives to ask for names of people who might be interested in H-2A work. This method of recruitment is strictly by word-of-mouth and difficult for an employer to contract. An employer could potentially be in violation of the rule if it were later determined that one of these informal agreements resulting in a worker being charged by another worker. In addition, facilitation of the visa application process by foreign agents, compensated by the alien beneficiaries, is a well known, legal and longstanding practice. It has been a customary practice for decades for aliens to pay for the services of these facilitators in assisting them with consular procedures.

Recommendation: United Fresh recommends that the Department should allow reasonable fees for recruitment and facilitation of admission, or at the very least, further define "beneficiary of an H-2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service" so that situations such as the one reference above do not preclude an employer from receiving an approved petition.

### **2. *Elimination of a Process for Filing Petitions***

The proposed regulations remove the current option for an employer to file a petition with a denial of labor certification and present countervailing evidence to DHS. The preamble to the proposed rule states that this option is being eliminated because the DOL provides an appeal procedure for denials. However, the INA vests the authority for making decisions on the admission of H-2A workers solely with this Department, not the DOL.

The language of the INA requires that an employer must apply for certification from the DOL Secretary, but stops short of requiring certification as a condition for admission. Furthermore, the DOL's proposed regulations fail to provide a process for an employer requesting a redetermination of need if domestic workers fail to report on the date of need. Under DOL's proposed amendments, domestic recruitment occurs prior to an application for a labor certification rather than after the application is filed (as in the case with the current program). Under DOL's proposed rule, the employer will not be permitted to apply for labor certification or the application will be denied if workers apply or are referred during the preapplication period.

Recommendation: United Fresh recommends that the DHS include a provision in its final regulations that permits filing a petition for the admission of H-2A workers and present countervailing evidence under any circumstance where the DOL Secretary either denies a labor certification application or fails to act on such an application in a timely manner.

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

A handwritten signature in black ink, appearing to read "Tom Stenzel". The signature is fluid and cursive, with a large initial "T" and "S".

Thomas E. Stenzel  
President and CEO