



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

September 24, 2019

Adele Gagliardi
Administrator
Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Avenue NW
Room N-5641
Washington, D.C. 20210

Submitted via www.regulations.gov

Re: DOL Docket No. ETA-2019-0007
Regulatory Information Number (RIN) 1205-AB89
DOL Notice and Request for Comments:
Temporary Employment of H-2A Foreign Workers in the United States

Dear Ms. Gagliardi:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced notice and request for comments published in the Federal Register on July 26, 2019.¹ The notice of information collection solicits comments on proposed regulatory revisions regarding the certification of temporary or seasonal agricultural employment, and obligations relevant to employers of these workers.

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to the H-2A regulations and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government. AILA is excited to see the productive changes proposed by the Department of Labor (DOL) and welcome any responses to our comments below.

1. Mandatory Electronic Filing and Electronic Signatures

In the proposed revisions, DOL puts forward a requirement for the electronic filing (e-filing) of Applications for Temporary Employment Certification and job orders for most employers and, if

¹ 84 Fed Reg. 36168 (July 26, 2019)

applicable, their authorized representatives. The DOL's proposed regulations require electronic filing of ETA-9142A, the ETA-790/790A, and all applicable required documentation—with the notable exception for employers that are unable or limited in its ability to use or access electronic forms as result of a disability or lack of access to a means for e-filing. AILA believes that this proposed change is a productive one.

2. Revisions to the Adverse Effect Wage Rate and Prevailing Wage Methodologies

The DOL's proposed regulations alter the way the adverse effect wage rate is calculated. The new method looks to calculate the wage per distinct agricultural occupation, as reported by the Farm Labor Survey (FLS). This is a significant change from the previous method, which aggregated the annual hourly gross wages for field and livestock workers.

AILA believes this change in calculation will more accurately reflect economic realities and will produce reasonable wage rates. We also appreciate the clarity with which the DOL put forth alternatives to the wage calculation methodology in the event the FLS does not report on a particular occupation. However, the rule does require employers to increase their wage rates upon the issuance of a new adverse effect wage rate (AEWR). This forces employers to calendar the AEWR. This might be burdensome for smaller employers, unfamiliar with what this process entails.

In order to help alleviate this burden, AILA recommends that DOL issue AEWR wage change notifications indicating a higher wage to program users on a yearly basis. AILA opposes any mid-contract adjustment in wages. In the H-2A program, an employer advertises wages and benefits available to employees who are to work under the Labor Certification contract period. A mid-season increase in the established wage for the contract period would create business uncertainty to H-2A employers who have hired workers under an established wage rate. It also creates hardship to small, seasonal employers to make substantial changes to payroll mid-season.

3. Change the Definition of Agriculture to Include Reforestation and Pine Straw Activities

AILA supports the DOL's inclusion of reforestation and pine straw activities within the definition of agricultural labor or services and commends the DOL's decision to do so.

4. Allow Staggered Entry of Workers on A Single Application

The DOL's proposed regulations also permit the staggered entry of H-2A workers into the United States for up to 120 days after the first date of need identified on the certified ETA-790/790A job order.

AILA is supportive of such a change and agrees that accommodating changing weather and production conditions improves efficiency for both employers and the agencies associated with the H-2A process.

Staggered entry of H-2A workers in the United States makes sense for seasonal and agricultural employers. Agricultural employers predict start dates of need for H-2A seasonal employees based on typical yearly seasonal needs of the industry. However, because agricultural needs are driven by weather, it is difficult to predict an exact start date. A staggered entry for H-2A employees makes sense for agricultural employers and we are thankful to DOL for proposing this change.

5. The 30-Day Rule

The Department of Labor's proposed regulations replaces the 50 percent rule with a 30-day rule requiring employers to provide employment to any qualified, eligible U.S. worker who applies for the job opportunity until 30 calendar days from the employer's first date of need on the certified ETA-790/790A. This is in contrast to the current 50 percent rule, which mandates that employers must continue to employ eligible and qualified U.S. workers that apply for a position for up to 50 percent of the work contract.

AILA believes this change is a productive one and believes it will, as mentioned, be less disruptive to agricultural operations and employers that utilize the H-2A program.

Conclusion

AILA appreciates the opportunity to comment on the proposed revisions to the H-2A regulations. We look forward to a continuing dialogue with the DOL on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION