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U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2312
Washington, DC 20210

Submitted via www.dol.gov/regulations/regreview.htm

**Re: Reducing Regulatory Burden; Retrospective Review under
E.O. 13563, 76 Fed. Reg. 15224 (Mar. 21, 2011)**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the request for information on the Department of Labor's (DOL) implementation of Executive Order 13563, "Improving Regulation and Regulatory Review," issued by the President on January 18, 2011.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. 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, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the implementation of Executive Order 13563 as it pertains to the regulations of the Department of Labor at Titles 20 and 29 of the Code of Federal Regulations, and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

The Abbreviated Comment Period Is Inadequate for the Submission of Meaningful Remarks

Although we applaud DOL for reaching out to the public to solicit information and comments on the retrospective review of existing regulations, we point out that the short comment period is grossly inadequate for the provision of thoughtful and considered remarks. The President's Executive Order was issued on January 18, 2011, directing agencies to develop and submit to the OMB's Office of Information and Regulatory Affairs (OIRA), a preliminary plan for periodic review of

existing regulations within 120 days (May 18, 2011). The Executive Order was followed by a February 2, 2011 memorandum from OIRA providing additional guidance to agencies, and requesting draft plans within 100 days (May 13, 2011). While the time period for plan submission seems disproportionate to the monumental undertaking assigned to the agencies, DOL neglected to publish notice of its request for public comment until March 21, 2011, and as a result, has provided a very short window for comment.

The Department is embarking upon a significant and important project, the results of which have the potential for far-reaching impact on the lives of individuals and the economic interests of U.S. employers. Given the abbreviated comment period, it is difficult to provide extensive, meaningful remarks at this time and we hope to engage in additional dialogue with DOL as the regulatory review period moves forward.

What Process Should be Used to Prioritize Existing Regulations for Retrospective Review?

The Regulatory Flexibility Act requires agencies to conduct a decennial review of existing regulations. 5 USC §610. As it has done here, the Department should solicit input from the public when conducting its periodic reviews. However, in order for DOL to receive meaningful and thoughtful comments, an adequate comment period—a minimum of 90 days—must be provided. In order to reduce the burden on both the agency and the public, the Department should also consider staggering its periodic reviews and requests for public input according to the various Titles of the Code of Federal Regulations (CFR) (e.g., Title 5, Title 20, Title 29, etc.). Moreover, proposed regulations that result from the reviews should be published in the Federal Register with a full 120-day comment period to achieve the highest level of public participation.

The Department should conduct its regulatory review in a methodical manner with a focus on substance. Factors to consider in selecting and prioritizing rules should include (1) the impact/benefit to the public; (2) significant economic considerations; (3) historical context; (4) nexus to the underlying statute/congressional intent; and (5) national interest considerations.

Regulations that Should Be Modified, Streamlined, Expanded or Repealed

Though DOL regulations appear in a number of Titles under the CFR, our focus is on the regulations pertaining to the Employment and Training Administration's Office of Foreign Labor Certification, found at 20 CFR Parts 655 and 656, and Wage and Hour Division, found at 29 CFR Part 501. The list of regulations that we have identified herein, for review, modification, expansion or repeal, is not exhaustive, and we look forward to future opportunities to provide additional comments and suggestions regarding the existing regulations.

- **20 CFR §655.730(b): Labor Condition Applications.** The regulations state that “[i]ncomplete or obviously inaccurate LCAs will not be certified by ETA.” The

regulation should provide examples of obvious inaccuracies and clarify that an unverified Federal Employer Identification Number (FEIN) is not an “obvious inaccuracy,” and is not a lawful ground for denying an otherwise approvable ETA 9035. The regulation should also explain that the title or name of a prevailing wage survey is not an “obvious inaccuracy,” and is not a lawful ground for denying an otherwise approvable ETA 9035. Employers have reported LCA denials, not because of an obvious error on the LCA, but because ETA does not recognize the name of a valid, published survey or wage source. This is not an obvious error, and should not be a reason to deny an otherwise approvable ETA 9035. More importantly, the denial of an LCA due to the survey name conflicts with 20 CFR §655.731(a)(2)(A)(2), which authorizes an employer to rely on “other legitimate sources” of wage information. By removing the name of the survey as a basis for denial, LCAs will be processed more efficiently, and DOL will not interfere with the employer’s regulatory right to select other appropriate wage sources.

- **20 CFR §655.734 and §655.735: Labor Condition Applications and Short-Term Placement.** While the goal of providing notice at each H-1B workplace is laudable, the implementation of the notice rules and determining when the “short term” placement rule applies is incredibly complex and burdensome for employers. For example, the employer of an H-1B worker may place the worker at another worksite for up to 30 days, provided there are no other LCAs in place for that location. In effect, this means that an employer who has offices in New York and Los Angeles, with LCAs in place at each location, could be required to file an LCA *each* time an H-1B worker travels to one of the other worksites for a meeting. These workers are not actually “relocating” to the new worksite (as they continue to report to their home office and location), and they have no impact on U.S. workers employed at the other location. The notice obligation should be simplified, so that employers need only post an LCA at a new worksite when the assignment will exceed 60 days in a calendar year. Further, no such notification should be required if the new worksite is in the same Metropolitan Statistical Area (MSA).
- **20 CFR Part 656: Specify Labor Certification Processing Times in the Regulations.** Permanent labor certification cases that are processed without audit are often completed within weeks of submittal to DOL, while cases in the DOL audit queue may take two years (or longer) to be processed. This vast discrepancy in adjudication timeframes is disruptive to employers, creates uncertainty in the program, and creates significant costs for employers.
- **20 CFR Part 656: Reinstate “Harmless Error.”** The “harmless error” standard should be reinstated to allow Certifying Officers to approve cases that may have technical violations, but are substantively compliant with the regulations. Harmless error was available under the previous version of the regulations. Reinstatement of this provision would improve DOL workflow efficiencies and reduce costs for employers.
- **20 CFR §656.12: Improper Commerce and Payment.** Revoke the prohibition on the alien paying attorney fees, as this interferes with attorney-client relations, and is outside the scope of DOL’s regulatory authority on labor certification. Further, in

light of the ban on labor certification substitution, and the addition of an expiration date on approved labor certifications, there are already substantial protections against fraud without interfering with the attorney-client relationship.

- **20 CFR §656.17(e)(1)(B)(1): Advertisements in Newspapers or Professional Journals.** Remove (or reduce) the requirement of placing advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment, as this requirement is costly and ineffective. If DOL's goal is broad exposure of the available position, online recruitment would be substantially more effective than two print advertisements. If a print advertisement must be required, reduce the requirement to no more than one advertisement.
- **20 CFR §656.18(b)(3): Optional Special Recruitment and Documentation Procedures for College and University Teachers.** The regulation currently requires that one ad be placed in a national professional journal. This regulation should be amended to allow the use of an electronic publication. The requirement of a hard copy journal ad does not reflect "real world" recruitment for special handling occupations, which is now done almost exclusively on an electronic basis.
- **20 CFR 656.20(b): Audit Procedures.** This regulation provides that an application may be denied if there is a substantial failure by the employer to provide required documentation after an audit notification. This should be amended to allow for harmless error, such as a scrivener's error, or omission of documents due to a clerical error. This provision is unforgiving when it comes to mistakes, omissions or misunderstandings, and violates principles of fundamental fairness, particularly when audits can take up to 2 years from the date of filing.
- **20 CFR §656.21(b): Supervised Recruitment.** The supervised recruitment regulation mandates at least one print advertisement, and "any other measures required by the CO." This allows DOL to set supervised recruitment requirements on each case individually, making it an unpredictable cost for employers, and creating unnecessary work for the agency. A clearly delineated standard (i.e., one 3-day advertisement, 30 day SWA job order, 30 day online advertisement) for supervised recruitment would reduce employer costs and improve adjudication efficiency.
- **H-2A Regulation Changes.** The H-2A program regulations are extremely complex and many of the current regulatory interpretations seem designed to complicate the process, rather than support the program's intended goal of allowing U.S. employers to hire foreign agricultural workers on a short-term basis. The following are specific recommendations for changes to the H-2A program that would bring greater clarity, increase efficiency, and reduce the workload for agencies in adjudicating these applications.

Definitions

- **20 CFR §655.103; 29 CFR §501.3.** Define corresponding employment so that only workers hired for the work described in the job order at the time and place

required qualify as being in corresponding employment. Eliminate the “any duty” rule and replace it with a materiality standard.

Pre-Filing Process

- **20 CFR §655.121(b).** Create an effective system for resolving SWA-CNPC conflicts.
- **20 CFR §655.134(c).** Expand the range of circumstances under which emergency processing of applications is appropriate.
- **20 CFR §655.141(a) & (b).** Clarify that CNPC must notify an employer of all deficiencies in an application in the first Notice of Deficiency to prevent CNPC from repeatedly changing its rationale for refusing to accept an application.
- **20 CFR §655.151.** Revisit the use of newspaper advertising as a recruitment method in light of its expense and ineffectiveness.

Assurances

- **20 CFR §655.120(b).** Provide that the wage rate that an employer must pay is the legally-mandated wage at the time of certification, i.e., when the market test is complete.
- **20 CFR §655.122(b).** Provide that an employer may require that a prospective employee have any qualification required by law to make clear that H-2A compliance and compliance with other legal obligations do not conflict.
- **20 CFR §655.122(b) (See also 8 USC §1188(c)).** Ensure that all substantive standards, e.g., entry level qualifications for agricultural workers, are in the regulations (to the extent that is consistent with the statute).
- **20 CFR §655.122(j)(1).** Eliminate unnecessary information from the data required to be on the pay stub.
- **20 CFR §655.122(n).** Conform the penalty for failing to notify DOL of the departure of a domestic worker before the end of the work contract to the amount imposed by DHS for its analogous obligation.
- **20 CFR §655.122(n).** Specify in the regulation exactly where and how to provide DOL notice of the departure of a domestic worker before the end of the work contract.
- **20 CFR §655.122(p).** Clarify that deductions from wages involve actual subtractions from wages, rather than nominal or de facto subtractions over which the employer has no control.

- **20 CFR §655.135(d).** Eliminate the 50% rule and return to a 30-day period.
- **20 CFR §655.135(j).** Conform the H-2A regulations' treatment of "recruitment fees" to that of DHS; distinguish clearly between payments made by a prospective worker for assistance and payments made to secure consideration for a job.

Appeals Process

- **20 CFR §655.171.** Provide a five business day deadline for preparation and submission of the administrative file to the Office of Administrative Law Judges when an employer seeks review from the OALJ.
- **20 CFR §655.171.** Provide that an ALJ, as an incident to his or her authority to issue final orders on behalf of the Secretary, may order that an application be certified in whole or in part.
- **20 CFR §655.171.** Require expedited processing of any appeals that are remanded.

Wage and Hour Division

- **29 CFR §501.9.** Eliminate the surety bond requirement.
- **29 CFR §501.16.** Limit the available remedies for alleged violations to those specified in 8 USC §1188(i)(2): the imposition of penalties in administrative proceedings and seeking injunctive or specific performance of regulatory obligations.

Conclusion

We appreciate the opportunity to comment on this request for information and look forward to a continuing dialogue with the Department during the regulatory review process.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION