May 22, 2015

VIA ELECTRONIC SUBMISSION

The Honorable Thomas E. Perez
Secretary, Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

William W. Thompson, II
Acting Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States.

Dear Secretary Perez and Acting Administrator Thompson:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits the following comments to the Department of Labor (DOL) regarding its proposed rule, which amends regulations under the H-2A program to codify procedures for hiring temporary agricultural foreign workers for job opportunities in sheepherding, goat herding and the production of livestock on the open range.[1]

Advocacy is concerned that this proposed rule will have a significant impact on small herding and livestock businesses operating on the open range. Small businesses have told Advocacy that the higher wages and other provisions of this proposed rule will affect the profitability of their businesses, which operate on small margins. They fear that this may result in these businesses downsizing or closing their operations altogether. Advocacy is also concerned that DOL's Initial Regulatory Flexibility Analysis (IRFA) may underestimate compliance costs for small businesses and does not analyze any regulatory alternatives that may minimize the economic impacts of this rulemaking on small business. Advocacy recommends that DOL publish a Supplemental IRFA to add and analyze this information for public comment.

[1] *Temporary Agricultural Employment of H-2A Workers in the Herding or Production of Livestock on the Open Range in the United States*, 72 *Fed. Reg.* 20300 (Apr. 15, 2015).

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

Since the early 1950s, employers have used the H-2A program to hire foreign workers to herd sheep, goats, and livestock on the open range because of the shortage of U.S. workers that are qualified and willing to do this type of work. However, these occupations have always been treated differently from other H-2A workers by Congress in statutes and by DOL in sub-regulatory guidance documents because of the unique nature of this work.[2] These workers herd animals to graze in remote open range lands for extended periods of time, requiring them to be on call to protect herds up to 24 hours a day, 7 days a week.

On October 7, 2011, four U.S. workers filed a lawsuit in the U.S. District Court for the District of Columbia challenging DOL's special guidance documents that governed sheep and goat herders under the H-2A visa. While the district court dismissed the case, the U.S. Court of Appeals for the D.C. Circuit concluded that DOL's guidance documents were legislative rules subject to notice and comment under the Administrative Procedure Act (APA). DOL is issuing this notice and comment rulemaking to remedy this APA violation.[3]

This proposed rule changes the wage methodology for H-2A workers in these special occupations, which will double to triple the wage rate for these workers.[4] The proposed rule

[2] 72 *Fed. Reg.* at 20301. In the 1950s, Congress enacted statutes specifically authorizing visas for foreign workers skilled in sheepherding due to the lack of U.S. workers available to perform these jobs. Pub. L. 81-587, 64 Stat. 306 (Jun. 30, 1950); Pub. L. 82-307, 66 Stat. 50 (Apr. 9, 1952); and Pub. L. 83-770, 68 Sat. 1145 (1954). Since 1989, DOL has established variances from the regular H-2A regulatory requirements in the form of guidance documents for employers in open range herding. DOL, *Special Procedures: Labor Certification for Sheepherders Under the H-2A Program, Field Memorandum (FM)* 74-89 (1989); *FM 24-01 (2001); Training and Employment Guidance Letter (TEGL)* No. 32-10 (2010); *TEGL* No. 15-06 (2011).

[3] *Mendoza v. Solis*, 924 F. Supp. 2d 307 (D.D.C. 2013); *Mendoza et al. v. Perez*, 754 F.3d 102 (D.C. Cir. 2014).

[4] 72 *Fed. Reg.* at 20301. The wage increases by state can be calculated by comparing Exhibit 1 (Baseline Wage) with Exhibit 5 (Forecasted Monthly AEWRs by State Phased in Over 5 Years).

phases in the wage increases over five years.[5] The rule also defines terms like "open range," and modifies requirements for workers' tools, meals, potable water, expanded cooking facilities and mobile housing.[6]

Small Business Concerns

Advocacy spoke to small herding and livestock operations on the open range that utilize the H-2A program, including small business members of the Mountain Plains Agricultural Services (MPAS), the Western Range Association (WRA), the American Sheep Industry Association (ASI), and the Wyoming Wool Growers Association. Approximately 99 percent of U.S. farms in the relevant industries that utilize this program are considered small businesses, defined as businesses with annual gross revenues of less than $750,000 by SBA.[7] The following comments are reflective of the issues raised during these discussions.

1) New Definition of "Open Range" May Disqualify Small Businesses from H-2A Program

Small herding operations are concerned that they may not qualify to use the H-2A program due to the definition of "open range" in the proposed rule, which limits the usage of fences and barriers that a herding operation may use.[8] A recent survey of MPAS members found that over 36 percent believed that they would not qualify under this definition of "open range."[9] Small operators commented that the practice of herding has changed since the program was first utilized in the 1950's. Herders must now graze their animals on public and private lands that are less "open"; they are seeking a more flexible definition because they encounter more fencing depending on the topography of the state. Small herders have told Advocacy that fencing is used to mark boundaries and to protect crops or property. For example, one small herding operation in Montana grazes its sheep on noxious weeds in nearby fracking operations that are fenced in. Another small herder in Oregon uses electric fencing to control lambs in aftermath grazing pastures which are next to other crops.

2) IRFA Underestimates Number of Workers and Other Costs of Rule for Small Businesses

Small herding operations have expressed the most concern that this proposed rule will double to triple the wages for H-2A workers in these occupations. For example, H-2A herder wages in California would increase by over 100 percent, from approximately $1600 to $3200 per month in 2020. H-2A herder wages in Wyoming would increase by over 200 percent, from approximately $750 per month to $2400 a month in 2020.[10]

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[5] 72 *Fed. Reg.* at 20310. Each year until 2020, the monthly wages applicable to H-2A employers would increase by 10 percent (i.e., 60 percent in 2016, 70 percent in 2017).
[6] 72 *Fed. Reg.* at 20300.
[7] The relevant industries include the following: Beef Cattle Ranching and Farming (112111), Dairy and Cattle and Milk Production (11212), Sheep and Goat Farming (1124), Animal Aquaculture (1125), and Other Animal Production (1129). U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes (July 2014).
[8] 72 *Fed. Reg.* at 20339.
[9] MPAS Survey of Members on H-2A Definitions (May 2015).
[10] 72 *Fed. Reg.* at 20316-20318; *see* Exhibits 1 and 6.

DOL's IRFA estimates compliance costs for small businesses based on the assumption that H-2A employers in herding occupations on the open range hire one or three H-2A workers. For small entities that apply for one H-2A worker, DOL estimates that the total average annual cost is approximately $21,000 [for sheep and goat herding operations], which represents 8.5 percent of annual revenues; and almost $25,000 [for livestock operations], which represents 9.9 percent of annual revenues. For small entities that apply for three H-2A workers, the total average annual cost is approximately $49,000 [for sheep and goat herding operations], which represents 19.5 percent of annual revenues; and $60,000 [for livestock operations], which represents 24.1 percent of annual revenues.[11]

DOL's IRFA may underestimate the cost of this rule for small herding operations because these small employers may hire more H-2A workers than DOL has estimated. For small businesses that hire more than three workers, the cost of this rule could be higher than 19-24 percent of revenues. A survey by the Colorado Wool Growers Association showed that that its members who responded hired an average of five H-2A workers per employer.[12] A recent phone survey by MPAS showed that its members who responded hired an average of 4.2 H-2A workers per employer.[13] Small herding companies are also concerned that the proposed rule does not estimate the compliance costs to purchase mobile housing units (estimated to be $20,000 per unit) and extra workers' compensation insurance due to increased wages.[14]

3) Proposed Wage Increases Significantly Reduce or Eliminate Profitability

According to the ASI, hired labor constitutes 40 percent of total operating costs for sheep ranchers. Because labor constitutes such a high percentage of operating costs, increasing the labor rate by double or triple as required by this proposed rule may significantly deteriorate the profitability of these sheep operations utilizing the H-2A program.[15] ASI estimated the budget of a typical Idaho sheep rancher with 1,000 sheep, and found that increasing wages by a factor of three (as required by this proposed rule for this state) would result in a 111 percent loss in returns on investment and an 80 percent loss in income above operating costs.[16] Advocacy spoke to a small sheep herding operation in Oregon who stated that his payroll for H-2A workers would

[11] *Id.* at 20334.
[12] Colorado Wool Growers Association, *The Real Wage Benefits Provided to H-2A Sheep Herders and the Economic Cost to Colorado Ranchers*, (Mar. 5, 2010). (*Colorado Wool Growers Report*). This was a phone survey in which 44 out of 47 ranchers participated.
[13] MPAS Phone Survey of Members (May 2015). MPAS completed a telephone survey of members; they received responses from 214 of 275 members.
[14] 72 *Fed. Reg.* at 20312. The proposed rule states that mobile housing units may only be shared for no more than three consecutive days. Small businesses state that they often have two workers staying in a mobile home for more than three days, and therefore they would have to purchase extra mobile housing units.
[15] ASI, *H-2A Herder Program Recommendations* to DOL, (5/1/15) (ASI Recommendations) *available at*: http://amhealthmaster.http.internapcdn.net/AMHealthMaster/DOCUMENT/SheepUSA/Shiflettdolmay2015.pdf
[16] *Id.* For example, ASI evaluated the budget of a typical Idaho sheep rancher with 1,000 sheep, and found that this type of operation normally gets a total return of $60 per sheep, or an approximately $60,000 return on investment of 1,000 sheep. This type of operation would have an income of over $83,000 above its operating costs. After this proposed rule triples the wages in Idaho, the same producer would incur a -111% loss in return on investment, or -$6 per head of sheep or $-6,000 per 1000 sheep. This operation would lose 80 percent of its income above operating costs, only making a little less than $17,000.

increase from around $35,000 in 2015 to over $66,000 in 2020; he could not pay this amount because his average profit margin for the past four years is $25,000 a year.

Advocacy communicated with small herding operations on the open range in California, Colorado, Oregon, Montana, Utah and Wyoming who also reported that these increased wages would result in their profits being reduced or eliminated; every business predicted that they would reduce their operations or close their operations within a few years. In the recent MPAS Survey, nearly every one of the 214 respondents commented that they would downsize or shut down their operations because of the high wage increases in this rulemaking.[17]

4) H-2A Employers Also Pay for Living Expenses for Workers

Small H-2A herding operations on the open range are concerned that this rule requires them to pay their H-2A workers a similar pay as regular field workers and livestock workers. DOL does not acknowledge that these herding operations pay a higher living wage of base pay plus living expenses such as food, housing, clothing, tools, medical expenses and paid vacation. A 2010 economic study conducted by the Colorado Wool Growers Association found that although the base pay for H-2A herders in Colorado was $750 a month (or $4.69 per hour), a calculation of the actual wages when including living expenses was $1,638 a month (or $10.24 per hour). This study found that herders that operate in the H-2A program may be able to take home more of their base salary than regular minimum wage workers because they do not have to pay for living expenses.[18]

5) Small Herding Operations Have a Difficult Time Hiring U.S. Workers

Small businesses have told Advocacy that they have a difficult time recruiting U.S. workers for this type of work. In 2014, MPAS processed member applications for 1,000 H-2A positions and only two U.S. workers responded to the recruitment ads—one was not interested in the job and the other was hired and quit before completing his contract.[19] In 2012, the Western Range Association processed applications for nearly 1,000 H-2A sheepherders. Out of that number, there were only 22 U.S. workers who responded to the recruitment ads, and only two workers (who were former H-2A workers) met the qualifications and were hired. [20] Although California increased the wages for herders to $1,600 in 2001, employers there have not experienced an increase in applicants or hiring for these types of jobs. Since 2011, MPAS has only had 18 U.S. worker applicants for the job of sheepherder and goat herder in California. Of these 18 applicants, 10 were not qualified due to inexperience and eight were not interested in the job.[21]

[17] MPAS Phone Survey of Members (May 2015).
[18] *Colorado Wool Growers Report*. According to this report, a rural minimum wage worker making $1,160 a month (or $7.25 an hour) would only have $169 per month remaining after paying for other living expenses. In this report, this is contrasted with the base salary of H-2A workers, which is $750-$1600 a month. Small herding operations believe that these workers can take home more of this base pay.
[19] WRA and MPAS, *Association Descriptions* (May 2015), *available* at: http://amhealthmaster.http.internapcdn.net/AMHealthMaster/DOCUMENT/SheepUSA/04_23_2015_Description_of_Services_for_WRA_and_MPAS.pdf.
[20] *Id.*
[21] Telephone interview with Kelli Griffith, Executive Director of MPAS (Apr. 27, 2015).

6) IRFA Does Not Analyze Alternatives that Minimize Small Business Impacts

Under the RFA, an IRFA must contain a description of any significant regulatory alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.[22] Despite the high costs of this rulemaking, DOL's IRFA does not include alternatives to the rule that minimize the economic impact on small entities. DOL's proposed rule adopts a 5-year phase-in of H-2A wages. DOL's IRFA only analyzes two alternatives to this rule which would make the rule more expensive, to phase-in the wages over three years and not include any phase-in of wages. Advocacy recommends that DOL evaluate the regulatory alternatives provided by small businesses in the comment period which may minimize the significant economic impacts of this rulemaking.

<u>Conclusion</u>

Advocacy is concerned that this proposed rule will have a significant economic impact on small herding and livestock businesses operating on the open range, and may deteriorate the profitability of their businesses that operate on small margins. Advocacy recommends that DOL publish for public comment a Supplemental IRFA analyzing the compliance costs of this rule and any recommended small business alternatives that may minimize the economic impact of this rulemaking. For additional information or assistance please contact me or Janis Reyes at (202) 619-0312 or Janis.Reyes@sba.gov.

Sincerely,

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Acting Chief Counsel for Advocacy

Janis C. Reyes
Assistant Chief Counsel

Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

[22] 5 U.S.C. § 603(c).