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Advocacy: the voice of small business in government

June 4, 2013

VIA ELECTRONIC SUBMISSION

Janet Napolitano
Secretary
U.S. Department of Homeland Security
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Washington, DC 20529-2120

Michael Jones
Acting Administrator
Office of Policy, Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: *Wage Methodology for the Temporary Non-Agricultural Employment-H-2B Program; Part 2, 78 Fed. Reg.* 24047 (April 24, 2013).

Dear Secretary Napolitano and Mr. Jones,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments on behalf of small business to the U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) regarding its interim final rule (IFR) entitled, *Wage Methodology for Temporary Non-Agricultural Employment-H-2B Program, Part 2*.[1] DOL and DHS are jointly issuing this rule in response to a court order, which vacated portions of DOL's current prevailing wage determination; this is the calculation of the wage level that an employer must pay foreign workers under the H-2B visa program.[2]

Advocacy is concerned that this interim final rule, effective immediately, will suddenly increase the wages that small businesses must pay to hire foreign workers under the H-2B visa program mid-season. Small H-2B employers have told Advocacy that this rule will have significant economic impacts on their businesses because they operate on narrow

[1] *Wage Methodology for the Temporary Non-Agricultural Employment*, H-2B *Program; Part 2*, 78 *Fed. Reg.* 24047 (April 24, 2013).

[2] *Comite de Apoyo a Las Trabajadores Agricolas v. Solis*, 2013 WL 1163423426 (E.D. Pa. 2013) [hereinafter *CATA v. Solis*].

margins and have already signed seasonal contracts based on the lower DOL wage rates. Advocacy urges DOL to consider alternatives to this rulemaking, recommended by small entities in the docket, which would meet the agencies' objectives without jeopardizing small business.

The Office of Advocacy

Advocacy was established pursuant to 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), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[3] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[4] gives small entities a voice in the 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.[5] 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.[6]

Regulatory Background

The H-2B program allows non-agricultural employers facing a shortage of U.S workers to hire temporary low skilled workers from foreign countries. To petition DHS for an H-2B visa, an employer must first receive a DOL certification that: 1) the employer has tried to recruit U.S. workers and 2) the employer will pay its H-2B workers and any recruited U.S. workers in accordance with a DOL prevailing wage determination (PWD).[7]

DOL has issued a series of guidance documents and rules over the years discussing the method of calculating the prevailing wages for low-skilled H-2B workers, based on data from the Occupational Employment Statistics (OES) wage survey compiled by the Bureau of Labor Statistics:[8]

- In 1995 and 1998 guidance documents, DOL issued PWDs using two levels or tiers to calculate H-2B wages: an entry-level wage and an experienced wage.
- In 2005 guidance, DOL issued PWDs using four tiers to calculate H-2B wages to reflect skill levels in these occupations, adopting similar language from the H-1B visa program.

[3] 5 U.S.C. § 601 et seq.
[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).
[5] Small Business Jobs Act of 2010 (PL 111-240) § 1601.0
[6] *Id.*at § 3(c).
[7] 78 *Fed. Reg.* at 24048.
[8] 78 *Fed. Reg.* 24051-24056.

- In 2008, DOL finalized an H-2B rule codifying this 2005 guidance using four tiers to calculate H-2B wages from the OES survey.[9] In 2010, the United States District Court for the Eastern District of Pennsylvania held that DOL improperly promulgated the 2008 wage methodology based on skill levels; however, the 2008 rule was allowed to remain in effect until DOL finalized another rule.[10]
- In 2011, DOL issued a new H-2B wage rule which calculated the prevailing wage under the OES survey using one tier—the arithmetic mean wage rate for each occupation. [11] DOL estimated that the wage rule increased the wages for H-2B workers by $1.25 to $9.72 per hour. The 2011 H-2B rule has never been effective, due to a temporary restraining order that was issued to block it from taking effect.[12] Additionally, multiple Congressional actions have barred DOL from using any funds "to implement, administer or enforce" the 2011 rule until September 30, 2013.[13]
- On March 21, 2013, the United States District Court for the Eastern District of Pennsylvania vacated the 2008 H-2B rule and ordered DOL to issue a new rule within 30 days.[14] There was a lapse of over a month where neither the 2008 rule nor the 2011 rule was effective; DOL and DHS cancelled processing any H-2B petitions during this period.
- On April 24, 2013, DOL issued an Interim Final H-2B rule effective immediately, which calculated the prevailing wage utilizing a one-tier system, based on the arithmetic mean wage for each occupation in the OES survey. DOL estimates that the average wage increase for H-2B workers is $2.12 per hour or 21.4 percent.[15]

Advocacy Involvement in the Wage Rules

Advocacy has submitted four comment letters regarding DOL's rules implementing wage increases and new process requirements, citing small business concerns that these changes will have a significant economic impact on a substantial number of small businesses.[16]

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[9] 78 *Fed. Reg.* at 24051. The 2008 rule allowed employers to choose any of the following to calculate prevailing wage: an OES wage rate, a Davis-Bacon Act (DBA) or Service Contract Act (SCA) wage, a collective bargaining wage (if applicable), or an approved employer survey.

[10] *CATA v. Solis*, No. 09-cv-0240 (E.D. Pa. Aug. 30, 2010).

[11] 78 *Fed. Reg.* at 24051. Under this rule, an H-2B employer had to choose between the highest of the OES wage rates, any wage rates established by the Davis-Bacon Act (DBA), the McNamara-O'Hara Service Contract Act (SCA), or a collective bargaining agreement.

[12] *Bayou Lawn & Landscape Service v. Solis*, No. 11-cv-0445 (N.D. Fl. Sept. 26, 2011).

[13] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Programs for the Fiscal Year ending Sept. 30, 2012, and for Other Purposes, Pub. L. 112-55, Sec. 546. (Nov. 18, 2011); Conference Report 112, 284, at pg. 271 (Nov. 14, 2011); Cong. Rec. H7528; Consolidated Appropriations Act, 2012, Pub. L. 112-74, Sec. 110 (Dec. 23, 2011).

[14] *CATA v. Solis*, 2013 WL 1163423426 (E.D. Pa. 2013).

[15] 78 *Fed. Reg.* at 24059. The 2013 IFR permits, but does not require, employers to also utilize wages from a collective bargaining agreement (CBA), a Service Contract (SCA) or Davis Bacon Act (DBA) wage, or wage from a private survey. The 2011 rule required an employer to select the highest of these wages.

[16] Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary and Thomas Dowd, Administrator, U.S. Department of Labor (October 27, 2010) [hereinafter *SBA Comment Letter*], at: http://www.sba.gov/content/letter-dated-102710-department-labor-employment-and-training-administration; *SBA Comment Letter* (March 17, 2011), at: http://www.sba.gov/content/letter-dated-031711-department-labor-employment-and-training-administration; *SBA Comment Letter* (May 17, 2011), at: http://www.sba.gov/content/letter-dated-51711-department-labor-employment-and-training-administration;

Advocacy has been told by small business that the wage increases in the 2011 H-2B rule would hurt seasonal small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do low-skilled and temporary work. These small businesses were concerned that they may have to reduce their operations or close completely if the 2011 rule were in place. Advocacy urged DOL to adopt small business alternatives that would meet the agency's objectives without jeopardizing small businesses, such as phase-ins of these new wages and a different calculation of prevailing wage.

Small Business Concerns with the Interim Final Rule

Small businesses have expressed concerns directly to Advocacy that this interim final rule will immediately increase the wages that employers must pay to hire foreign workers under the H-2B visa program mid-season. These small business employers believe that these immediate changes will disrupt their business operations because they have already signed contracts based on lower labor costs, operate at narrow margins and are dependent on these foreign workers.

The IFR's economic analysis estimates that this rule will result in at most a $2.12 or 21 percent increase in the average hourly wage for H-2B workers.[17] However, a nationwide survey by the H-2B Workforce Coalition of H-2B employers who have received prevailing wage determinations under the new rule shows that on average employers are facing a $2.94 per hour wage increase and an average increase of 32.3 percent in H-2B wage rates.[18] Small businesses have reported that these increased wages based on a one-tiered wage rate that averages all of the wages for a particular occupation do not reflect an entry-level wage for low-skilled labor. Therefore these businesses cannot pass on these extra labor costs or compete with regional or international competitors. The following comments highlight stories from H-2B small employers, who shared how the IFR's increased wages and additional costs and burdens have impacted their businesses:

Landscape industry

Advocacy spoke to representatives from the American Nursery and Landscape Association (ANLA) and the Professional Landcare Network (PLANET),[19] who stated that small landscape businesses will be unable to pay or pass on the new higher labor rates under this IFR because they have already signed seasonal contracts with clients based on lower DOL prevailing wage determinations. The landscape industry is the largest user of the H-2B program.

One small landscape employer in Louisiana felt "blindsided" by the new regulations; the employer had relied upon an earlier, lower Department of Labor prevailing wage determination in the months of planning for the company's seasonal labor needs and now

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SBA Comment Letter (July 6, 2011); at: http://www.sba.gov/content/letter-dated-0762011-department-labor-employment-and-training-administration.

[17] 78 *Fed. Reg.* at 24058.

[18] H-2B Workforce Coalition, *H-2B Final New Wage Rule Impacts By State (283 samples)* (May 24, 2013) (forthcoming)[hereinafter *H-2B Workforce Coalition Survey*].

[19] Telephone calls with representatives from ANLA and PLANET (April and May 2013).

the "rules have changed in the middle of the game." This employer has already received 65 H-2B workers, but will have to increase the wage rate for his workers by 18-28 percent when notified by DOL in the next few weeks. This owner cannot pass on these costs to his clients with binding contracts and he may be liable for back wages for the weeks already worked by these workers. This abrupt increase in labor costs will mean that this company may have to operate with no profits this year and may go out of business. Another small landscape employer in Denver will face a 34 percent increase in wages for H-2B workers (from $9.60 to $12.90 an hour); he believes that he will also have to increase the wages of his entire U.S. workforce due to this new "entrance wage." For example, a U.S. worker working on a landscape project will want to make just as much as an H-2B worker doing the same work; and a landscape supervisor will likely insist on making more than the entry-level H-2B worker.

Other landscape companies have not yet received their H-2B workers, because the processing of H-2B applications was halted for over a month at both DOL and DHS. For example, one small landscape employer in Missouri has already lost a $100,000 contract to mow a golf course because his workers have not yet arrived due to the H-2B rule suspension; this employer is losing future work orders with these clients. This small business employer faces a 17 percent increase in wages for its 12 H-2B workers, which will add $60,000-70,000 in costs to his current yearly labor cost of $350,000. This employer reported that they do not expect to see any profits this season, and may be forced to close because of these losses.

Seafood/Meat Processing industry

Advocacy has also heard from small businesses in the seafood and meat processing industry regarding the potential impacts of this IFR. David Veal, Executive Director of American Shrimp Processors, estimates that the wages for his small business members will increase from $8 per hour to around $11-13 per hour for H-2B workers.[20] Additionally, he believes that his members will be required to pay higher wages for all other U.S. workers, as the new H-2B wage is effectively the new minimum wage for these businesses. He stated that the shrimp processing industry's profit margin has been no more than one percent, and many of his members have operated in the red in recent years due to natural and manmade disasters such as hurricanes and oil spills; he worries that this rule will be the "straw that broke the camel's back."

A small shrimp processor employer from Mississippi was caught off-guard by a 43 percent increase (from $8.36 to $11.92 an hour) in wages for his H-2B workers, but does not have time to react due to the short fishing season. This employer lost $200,000 just in the three weeks that he did not receive workers due to the H-2B rule suspension. This business owner does not expect to make a profit this season, and also may go out of business because he cannot compete with foreign shrimp processors at these high labor rates. A small Louisiana shrimp and chicken processor employer expects an increase of seasonal salaries in excess of $100,000 for his 50-55 seasonal employees, and $100,000 for his 150 full-time staff. This business owner also stated that it is very difficult to find seasonal workers in rural areas that are willing to undertake hard labor like shrimp and chicken processing.

[20] Telephone call with David Veal, Executive Director of American Shrimp Processors (April 2013).

Lodging

Advocacy spoke to two small lodging companies who have not been able to secure H-2B housekeeping staff during their busiest season of the year due to the suspension of the H-2B rule. A small vacation home rental employer in North Carolina normally hires 28 H-2B workers to clean her over 300 cottages and lodging rooms in March, but this employer has not yet received her needed workers. The small business employer stressed that she is highly dependent on the H-2B visa program to operate, as there is no local workforce due to its remote location. This employer will have to also incur a 35 percent increase (from $8.12 to $10.99 per hour) in wages due to the new rule. This employer's lack of housekeeping staff is negatively affecting the quality of her service and business operations; all of her staff members and managers are now cleaning hotel rooms during this busy vacation season. Another small hotel employer in Maine had to drop out of the H-2B application process due to the delays in receiving her four housekeeping staff because of the suspension of the H-2B rule. This employer has had to schedule her U.S. staff to work a six day work week in these difficult and labor-intensive housekeeping jobs, and had to pay high overtime rates. She also has difficulty procuring U.S. workers for this work due to a small local workforce.

Conclusion

Advocacy has heard concerns from small businesses that this interim final rule will increase wages mid-season, creating significant economic impacts on small H-2B employers who operate at narrow margins and have already signed contracts based on lower DOL wage rates. Small businesses are concerned that they may have to reduce their operations or close completely due to the increased wages in this IFR. Advocacy urges DOL to consider significant alternatives to this rulemaking recommended by small entities in this docket, such as different calculations of prevailing wage determinations, which would meet the agencies' objectives without jeopardizing small businesses.

Sincerely,

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Janis C. Reyes
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cc: Dom Mancini, Office of Information and Regulatory Affairs