



April 16, 2018

VIA ELECTRONIC CORRESPONDENCE

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Kirstjen M. Nielsen
Secretary
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Dear Secretary Acosta and Secretary Nielsen:

The U.S. Small Business Administration's Office of Advocacy submits the following comments to the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS), to inform the agencies of small business feedback and recommendations to promptly approve any increases in worker capacity under the H-2B visa program if authorized by Congress and the President.¹

¹ The Office of 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 RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 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. 5 U.S.C. § 601 et seq.

The Small Bus. 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 written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so. Small Business Jobs Act of 2010 (PL 111-240) § 1601.

Background

The H-2B visa program allows employers facing a shortage of U.S. workers to hire temporary foreign workers to complete non-agricultural jobs. The Immigration and Nationality Act (INA) sets the annual statutory cap for H-2B visa program at 66,000; 33,000 H-2B visas may be issued the first half of the fiscal year (October 1 to March 1) and the remaining 33,000 visas will be available for employers seeking to hire H-2B workers during the second half of the fiscal year (April 1 to September 30).²

On January 1, 2018, the DOL's Office of Foreign Labor Certification received approximately 4,498 applications covering 81,008 H-2B visa worker positions requesting an April 1, 2018 start date. Due to this unprecedented number of applications that exceed the 33,000 worker cap for this half of the year, DOL instituted a lottery program to choose which applications would be granted a temporary labor certification.³

Feedback from Advocacy's Regional Regulatory Reform Roundtables

As a result of President Trump's Executive Orders, 13771 and 13777, Advocacy has begun an effort to hear first-hand from small businesses across the country about specific federal regulatory burdens facing their businesses.⁴ Under the Regulatory Flexibility Act (RFA), agencies are required to consider the impact of their regulations on small entities when promulgating federal regulations.⁵ The RFA and consideration of small business economic impacts is a good place to start when an agency is selecting rules that are being reviewed for reform or elimination. Since June 2017, Advocacy has held Regional Regulatory Reform Roundtables in fourteen states across the country to hear firsthand from small businesses facing regulatory burdens.⁶

Advocacy received feedback from small business owners utilizing the H-2B program at multiple roundtables and via electronic feedback.⁷ On October 4, 2017, Advocacy submitted comment letters to DOL and DHS with a list of small business concerns and recommendations for regulatory reform; one of the items on this list was reform of the H-2B visa.⁸

² *Labor Certification Process for the Temporary Employment of Aliens in Non-Agricultural Employment in the United States; Notice*, 83 Fed. Reg. 3189 (Jan. 23, 2018).

³ *Id.*

⁴ *Reducing Regulation and Controlling Regulatory Costs*, Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); *Enforcing the Regulatory Reform Agenda* Exec. Order No. 13777, 82 FR 12,285 (Feb. 24, 2017).

⁵ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁶ U.S. Small Bus. Admin., Office of Advocacy, *Regulatory Reform*, <https://www.sba.gov/advocacy/regulatory-reform>. (containing transcripts of Small Business Regulatory Reform Roundtables).

⁷ Advocacy heard from small businesses utilizing H-2B visas in Lexington, Kentucky; Overland Park, Kansas; Glen Allen, Virginia; Boston, Massachusetts; Manchester, New Hampshire; and Houston, Texas. We also heard from multiple small businesses utilizing the H-2B visa at a Regulatory Forum in Randolph, New Jersey. Advocacy also received regulatory reform comments online from small businesses utilizing the H-2B visa.

⁸ U.S. Small Bus. Admin., Office of Advocacy, Letters to Secretary R. Alexander Acosta and Acting Secretary Elaine Duke on Regulatory Reform (October 4, 2017),

https://www.sba.gov/sites/default/files/advocacy/Advocacy_RRO_Letter_DOL.pdf;

https://www.sba.gov/sites/default/files/advocacy/Advocacy_RRO_Letter_DHS.pdf.

- Small businesses at these roundtables highlighted the critical need for H-2B visa workers to meet increases in demand for workers. For example, we heard from a Kentucky small business representative in the thoroughbred industry who noted that horse breeding is very labor intensive and is facing a labor shortage. We heard similar concerns about labor shortages and the need for H-2B workers from seasonal small businesses in industries in areas such as landscaping, housekeeping, amusement and recreation, seafood, and agriculture.
- Participants at Advocacy’s roundtables are concerned that they cannot find available American workers to fill their seasonal staffing needs. For example, one Houston small business in the landscaping industry sought to hire 40 American workers to start in April 2018. However, only seven people contacted the business in response to recruitment, and only one person completed the necessary steps to be hired (but never showed up to work). Seasonal businesses lacking the necessary workers may be unable to fulfill contracts, and would turn away customers or lay off American workers whose jobs are supported by H-2B workers.
- Small farm owners seek changes in the eligibility of agricultural workers in the H-2A and H-2B visa programs. The H-2A visa program, which has no statutory limits for the numbers of workers, is for agricultural workers who perform agricultural labor or services such as the harvesting of the crop. The H-2B visa program, which has the annual worker limit of 66,000, is for non-agricultural workers; but agricultural workers who package the crops must utilize this program. Small farm owners seek to use the H-2A program for all of their workers on the farm. Advocacy also heard from small business that own dairy farms who expressed concern that they could not participate in either the H-2A or the H-2B program, as their labor needs were not considered seasonal. At our New Jersey Regional Forum for the agricultural industry, one fruit farmer was able to successfully obtain H-2B workers in the new visa lottery system but noted that their neighbor who has a turkey farm was unable to obtain the necessary workers. Those small businesses that are denied these visas have few options for their workforce.

Recommendations and Conclusion

- Small businesses at Advocacy’s roundtables recommend that DOL and DHS promptly approve any increases in worker capacity under the H-2B visa program if authorized by Congress and the President.
- Small businesses seek certainty in obtaining a critical workforce in the H-2B visa process. Roundtable participants recommend that DOL and DHS consider other regulatory reform changes that help small businesses utilize this program, such as making the application process less burdensome, less costly and more predictable.

The Office of Advocacy looks forward to working with your agencies to reduce the burden of federal regulations on behalf of the small businesses that have asked us to be their voice in this regulatory reform process. Advocacy is happy to meet with you or your representative to detail these concerns. I have provided the contact information for Assistant Chief Counsel Janis Reyes below. Thank you for considering small business impacts as a vital part of your regulatory reform efforts and for including the Office of Advocacy as a part of the process.

Sincerely,



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