



VIRGINIA AGRIBUSINESS COUNCIL

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October 20, 2009

Mr. Thomas Dowd, Administrator
Office of Policy Development & Research Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave., NW, Room N-5641
Washington, D.C. 20210

RE: RIN 1205-AB55- Temporary Agricultural Employment of H-2A Aliens in the United States; Proposed Rule

Dear Mr. Dowd:

On behalf of the members of the Virginia Agribusiness Council, we submit the following comments concerning the proposed action of the US Department of Labor (DOL) for regulation of Temporary Agricultural Employment of H-2A Aliens in the United States (RIN: 1205-AB55). The Virginia Agribusiness Council represents the agriculture and forest producers, suppliers, marketers, processors, and commodity associations who make up the number one industry in Virginia. As the "unified voice of Virginia agriculture and forestry" the Council has a combined membership of over 40,000 persons.

Many Virginia agribusinesses rely on the availability of legal immigrant labor. Farmers need laborers to perform arduous, seasonal work in tobacco, fruit and vegetable fields, nurseries, and greenhouses. The DOL proposed regulation does not enhance a system for legal, skilled, affordable, and accessible foreign and domestic workforce for the agribusiness industry. In fact, the proposed rules will potentially drive more producers away from utilizing the H-2A program due to the increased and costly regulatory burdens now placed upon these program employers. Instead of streamlining and simplifying regulatory processes to encourage agricultural businesses to utilize this program, these changes go in the opposite direction.

While the current H-2A program seeks a balance between the needs of employer with those of US and H-2A workers, the proposed rule appears to be primarily focused on protecting US and H-2A workers from program violations. The preamble of the proposed regulations criticizes the current H-2A program regulations (in place for less than one year) for not increasing H-2A program usage. However, this decrease may in large part be due to the regulatory uncertainty for many farmers caused by the December 2008 finalization of the current rules, coupled with DOL's issuance of a rule in late May 2009 to suspend the new H-2A program, and a subsequent injunction issued in late June 2009 by the US District Court in North Carolina. In addition, the program criticism does not take into account labor demands that have changed due to changes in crop production.

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Our members are concerned with the following specific provisions of the proposed regulations:

Reinstatement of the USDA Farm Labor Survey data to calculate the AEW

This proposed change not only raises the average AEW in Virginia by an estimated 25%, it also establishes the AEW as the minimum wage rate for H-2A employees and US workers performing agricultural labor in Virginia. The proposed combination of wage rates for supervisory, skilled, and unskilled labor in effect artificially raises the wage rate for unskilled labor. This additional increase in wages is not the only benefit provided by the employer to the H-2A employees. Participation in the program becomes quite costly when the expense of transportation, housing, and other worker benefits required by the program are added in.

Increasing transportation and subsistence fees paid for by H-2A program employers

The new requirement to pay added transportation fees (not from the origin of recruitment but from the H-2A worker's home), and expansion of the types of visa costs subject to reimbursement, combined with the wage rate increases, will add significant financial burdens to this program for H-2A employers.

Streamlined attestation and application process eliminated

Current regulations allow for a more efficient and timely processing of employer applications by creating a streamlined attestation process. The proposed elimination of this streamlined process to be replaced with a partial return to a certification process that allows the certifying officer to decide whether the adequate labor market test has been performed is a major step backward. Coupled with the elevated penalties for non compliance, many of the benefits of streamlining government programs for H-2A employers would be eliminated with this change.

Reinstatement of the "50 Percent Rule"

The "50 Percent Rule", the requirement for H-2A employers to hire any domestic worker who applies through 50% of the H-2A contract period, was removed in the current regulations. However, this protection for US domestic workers was replaced by expanded domestic worker recruitment period from 60 to 75 days from the date of need, and acceptance of U.S. workers through 30 days after the date of need. In sharp contrast, and of great concern, is the proposed regulation's return to the "50 Percent Rule", along with the expanded domestic worker recruitment period. The current 30 day rule is sufficient to protect displacement of US workers from H-2A workers, and does not create the penalization of both the H-2A worker and H-2A employer that is the result of the "50 Percent Rule".

Addition of reforestation and pine straw activities to the definition of agricultural labor and services

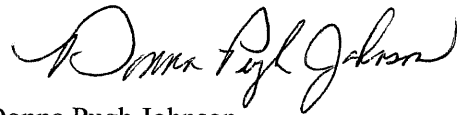
In effect, reforestation workers previously admitted under the H-2B worker program would become H-2A workers, and thus, employers who will need this workforce will become subject to the many rules and regulations of the H-2A worker program. It is unclear as to how the proposed rule change to add reforestation and pine straw activities to the H-2A

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program will affect the H-2B program, or if it will in fact, create further confusion for these employers as to use of any foreign worker visa program. While a positive step will be no limitation in the amount of worker visas issued each year, as in the H-2B program, inclusion into the proposed H-2A program is full of regulatory and financial burdens for employers.

The proposed regulations lack balance that is critically needed to assure US and H-2A program workers are protected, while providing agribusiness employers a legal, skilled, affordable and accessible workforce that includes foreign workers. DOL's proposed regulations will increase the cost of compliance for H-2A program employers, and the regulatory burden for participating employers, rather than streamlining these processes. We urge your diligent efforts to find this necessary balance in either rewriting the regulations or returning to the current regulations.

Sincerely,

A handwritten signature in cursive script that reads "Donna Pugh Johnson".

Donna Pugh Johnson
President