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November 11, 2010

Mr. Thomas Dowd, Administrator
Office of Policy Development and Research
Employment and Training Administration, USDOL
200 Constitution Avenue, NW.
Room N–5641, Washington, DC 20210

Re: Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Regulatory Information Number (RIN) 1205–AB61; 20 CFR Part 655; 75 Fed. Reg. 61758 (October 5, 2010).

Dear Secretary Solis and Administrator Dowd:

I am submitting these comments regarding the proposed rule, Wage Methodology for Temporary Non-Agricultural Employment – H-2B Program in order to respond to comments filed by the U.S. Small Business Administration, Office of Advocacy.

1. A substantial number of small entities are not affected by this rule.

   The Office of Advocacy cites two court decisions involving fishing quotas[1] to suggest that DOL incorrectly determined that the proposed rule would impact a tiny minority of businesses in the H-2B-using industries. Those cases are distinguishable because, unlike the quota cases, the economic impact of the proposed rule goes far beyond the employers who actually employ H-2B workers. Every employer in a labor market where H-2B workers are employed is affected by the rule because of the unfair advantage that artificially low wages afford H-2B employers. A single example should make this point obvious. A union welding company in Detroit, Michigan that pays its employees the Davis-Bacon Act prevailing wage of $21-24/hr, plus $13-19/hr in fringe benefits (depending on the kind of project) would be seriously undercut in bidding on privately funded projects if its competitors could bring in H-2B workers at approximately one-third the cost. Similarly, a non-union company that pays welders at or above the $18.84/hr arithmetic mean wage in the locality would be hurt if its competitors could pay 25% less than the mean wage.

   Yet under the current rule, that is precisely what happens. The OES Level 1 wage for welders in Detroit is $13.23/hr, about 30% less than the mean. Even the OES Level 2 wage of $16.04/hr was about 15% below the mean. Research conducted at EPI found that nearly 2/3 of H-2B wage determinations in the half dozen

[1] *Southern Offshore Fishing Association v. Daley*, 97-1134-CIV-T-23C, slip op. (Oct. 16, 1998); *North Carolina Fisheries Association vs. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

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occupations that receive the great majority of H-2B visas were at wages 25% or more below the locally prevailing mean. The proposed rule, by correcting this gross unfairness, will have a positive effect on every employer that has to compete with H-2B employers.

For two reasons, the fishing cases, in which the proposed regulatory quota affected only the fishermen who actively fished for or managed to catch fish, do not call into question DOL's determination that the proper universe of affected small businesses includes all who compete for the unskilled labor at issue. First, in *Southern Offshore Fishing Association*, the Commerce Department itself had stated that the universe of regulated fishermen was variously either 150 or 326, rather than the 2,000+ figure it claimed in its IRFA. DOL has shown no such inconsistency here. But the more important reason is that the question in each instance is: how many small businesses are actively competing for the limited resource? In the fisheries cases, the limited resources the government was protecting were sharks and flounders. The rule proposed a quota on fish that could be caught. In the case of H-2B workers, DOL is not proposing a quota; Congress set the quota for H-2B workers by statute.

In this proposed rule, insofar as there is a limited resource, it is unskilled labor willing to work in the locality on a seasonal basis for the prevailing wage. The employers are competing first and foremost for the available local labor, and the proposed rule determines how much must be offered in wages, not just to H-2B workers, but first to U.S. workers. The primary goal of the proposed rule is not to protect the wages of foreign workers but to assure that there are no persons in the U.S. available to do the advertised unskilled labor. If the wage level is set high enough to reflect local standards, U.S. labor will be interested in the work. If the wage is set too low, as it is under the current rule, U.S. labor will not be interested, will not apply, and H-2B employers will obtain cheaper foreign workers. Unlike a shark quota, which has no effect on the thousands of fishermen fishing for other species, the prevailing wage determination has a direct effect on every small business (not just H-2B users) that competes for labor and for contract bids: those who pay the true prevailing wage will be undercut and financially injured if their competitors obtain cheaper labor from abroad. Boats fishing for tuna or red snapper, by contrast, were unaffected by the shark quota.

Where there are genuine labor shortages, it is normal for employers to take additional steps to attract workers, including offering to pay more than they usually would. Employers that take those unusual steps, which have the ancillary benefit of increasing compensation for U.S. workers, are punished by the current rule, which tilts the competitive playing field toward businesses that take advantage of the H-2B visa. Not just the H-2B employer, but every employer that employs workers in the same occupation as the H-2B workers will be affected by

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this rule – and the vast majority will benefit from it. Small businesses, which can least afford to hire lawyers to navigate the visa system and pay international recruiters to find foreign labor, will be disadvantaged the most by a rule that allows H-2B employers to pay an artificially low wage.

2. DOL adequately addressed alternatives to this rule: choosing not to apply for H-2B employees is a viable alternative to the costs imposed by this rule.

The surest sign that employers have alternatives to assuming new costs because of this rule is the fact that the vast majority of employers do not resort to H-2B workers at all. Out of more than half a million construction, landscape service, food and lodging, and other employers in industries in which H-2B workers are employed by some employers, all but a few thousand do without H-2B labor.

It is not necessarily the case, as the Office of Advocacy claims, that "[e]mployers that utilize the H-2B program are unable to attract domestic workers to perform unskilled work."[2] The program requires very little recruitment (three days of newspaper advertising) and requires it in a time period long before the work begins that makes it unlikely that unemployed U.S. workers will learn of and apply for the jobs. My own investigation of the use of H-2B landscapers in suburban Baltimore found that plenty of U.S. workers were willing and able to work as landscapers but the employer made arrangements for H-2B workers that it refused to make for workers in the City of Baltimore or anywhere else in the U.S., such as providing them housing, picking them up for work and returning them each day, and, of course, transporting them to Baltimore from far away.

The statutory requirement that use of H-2B workers not displace U.S. workers does not limit its application to the employer's locality. It permits the admission of H-2B workers into the U.S. only "if unemployed persons capable of performing such service or labor cannot be found in this country."[3] Not "in the locality" but "in this country." Until employers are required to pay recruiter firms to search throughout the U.S. for unemployed persons capable of working as landscapers, etc., rather than simply to advertise for three days in a local newspaper, the assertion that U.S. workers cannot be found will be nothing more than empty rhetoric. H-2B employers do have alternative options available, other than resorting to foreign labor.

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[2] U.S. Small Business Administration, Office of Advocacy, submitted comments, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; 75 Fed. Reg. 61758*, October 27, 2010, page 6, *available at:* http://www.sba.gov/advo/laws/comments/dol10_1027.pdf (last visited November 11, 2010).

[3] Immigration and Nationality Act (INA) §101(a)(15)(H)(ii)(b); 8 U.S.C 1101(a)(15)(H)(ii)(b).

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3. Artificially low H-2B wages necessarily depress U.S. wages.

The Office of Advocacy asserts the non sequitur that "[a]ccepted economic analysis suggests that wage rates are correlated with the skill level of labor."[4] While this is generally true, it is not universally true, and wage rates are correlated with many things, including labor supply and unionization. More to the point, accepted economic analysis also suggests that a labor shortage generally leads to rising wages and oversupply depresses wages. Increased admission of foreign workers increases the labor supply and relieves the pressure on employers to increase wages. In other words, it depresses wages.

The Office of Advocacy cites a Chamber of Commerce and Immigration Works USA survey of 367 employers[5] as evidence that use of H-2B workers does not depress U.S. workers' wages. The study is not available and cannot be evaluated, but its conclusion that higher H-2B admissions are correlated with faster wage growth is implausible.

Research by EPI economist Jared Bernstein in 2008 found a very different trend. From 2000-2007, overall H-2B admissions increased substantially, from about 45,000 to more than 60,000. Wages should increase in shortage occupations as employers are forced to compete to attract the workers they need. Yet in inflation-adjusted terms, wages in 2007 were stagnant or lower than in 2000 in six of the seven occupations most involved in the H-2B program (see the attached table on the next page).

"Extraction occupations" is the exception, thanks to a boom in the mining industry.

Thank you for considering these comments and for making them part of the record of this rulemaking.

Sincerely,

Ross Eisenbrey

Ross Eisenbrey
Vice President
Economic Policy Institute

[4] U.S. SBA Office of Advocacy, submitted comments, page 8.
[5] Id., *see* footnote 38.

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		2000-2001 (in 2007 dollars)		2006-2007 (in 2007 dollars)	
education	occupation	unemprte	hourly wage	unemprte	hourly wage
All	ALL	6.9%	11.31	7.4%	11.07
	food prep related services	7.3%	8.80	7.7%	8.73
	lodging related services	9.6%	9.97	9.8%	9.64
	construction	6.0%	17.66	6.7%	17.47
	motor freight	4.2%	15.79	4.3%	15.31
	packing and material handling	8.9%	12.17	9.7%	11.87
	extraction occ	5.8%	17.83	4.0%	19.51
	grounds maintenance workers	8.0%	11.07	9.4%	11.19
HS or less	ALL	7.6%	11.13	8.0%	10.87
	food prep related services	8.1%	8.70	8.3%	8.54
	lodging related services	10.2%	9.80	10.2%	9.29
	construction	4.9%	17.75	8.7%	17.47
	motor freight	4.3%	15.58	4.5%	15.16
	packing and material handling	9.7%	11.73	10.6%	11.35
	extraction occ	6.4%	17.21	4.3%	19.06
	grounds maintenance workers	8.9%	10.81	9.6%	10.67