



NATIONAL COUNCIL OF
AGRICULTURAL EMPLOYERS
ANALYSIS MEMORANDUM

AM_01-08

Date: April 4, 2008

To: NCAE Members

From: Mike Gempler, NCAE President

Subject: Analysis of the Department of Labor and Department of Homeland Security Proposed Amendments to their H-2A Regulations and Suggested Guidelines for Writing Comment Letters

On February 13, 2008 the U.S. Department of Labor (DOL) and the Department of Homeland Security (DHS) published proposed amendments to their H-2A regulations. The full text of the proposed DOL regulations will be found in Vol. 73, No. 30 of the *Federal Register*, beginning on page 8538. The full text of the DHS proposed amendments will be found in the same volume of the *Federal Register* beginning on page 8230. Both proposed rules may be accessed on the Government Printing Office web site at www.gpoaccess.gov/fr/. Enter the beginning page number shown above. Please note that both of these proposed regulations are quite long.

At the request of several members of Congress, both the DOL and the DHS have extended the deadline for receipt of public comments on the proposed regulations until the close of business April 14, 2008. The NCAE encourages all agricultural employers potentially affected by the proposed regulations to examine the proposals and, to the extent possible, provide your own comments. However, recognizing that the proposals are extremely complex and lengthy, this Analysis Memorandum is intended to provide guidance to employers and agricultural organizations about some of the most important issues addressed in the proposals and suggested comments.

Preparing Comment Letters

The purpose of public comments on regulatory proposals is to give the regulatory agency input on how the regulations are likely to affect stakeholders, and to make specific suggestions for needed changes in the regulations. General expressions that the

proposed regulations are “good” or “bad”, without providing specific input on needed changes, are not useful. The regulatory agencies will pay little or no attention to such letters. Unfortunately, both of these proposed regulations, and especially the DOL regulations, are extremely lengthy, detailed and complex. While the NCAE will be preparing detailed, point by point comments on these regulations, most members of the general public will not have the background, time or expertise to do so. Therefore, we are suggesting that you use the guidance in this Memorandum to prepare a comment letter that will reinforce the NCAE’s comments on many of the most important issues in the proposed regulations. It will also be helpful to include in your letter a statement endorsing the NCAE’s comment letter.

In the introductory paragraphs of your comment letter you should describe yourself and/or your business and in your own words indicate how a workable, effective H-2A program is important to you. If you are a present user of the program, describe your use of the program and your general experience, including the number of workers you typically use, the occupation(s) in which you employ them, and the like. If you are a former user of the program and have dropped out of the program, explain why you felt you could no longer use the program. Then go on to discuss the proposed regulations. Include a discussion only of the DOL proposed regulations in the DOL letter, and the DHS proposed regulations in the DHS letter.

How to Address Your Letters

The Department of Labor comment letter should be addressed and identified as follows:

April 14, 2008

Mr. Thomas Dowd
Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N5641
Washington, DC 20210

**RE: RIN 1205-AB55
Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Proposed Rule [Federal Register 73:30, p. 8537ff]**

Ladies and Gentlemen:

The Department of Homeland Security comment letter should be addressed and identified as follows:

April 14, 2008

Chief, Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, NW, Suite 3008
Washington DC 20529

**RE: Docket No. USCIS-2007-0055
Changes to Requirement Affecting H-2A Nonimmigrants: Proposed
Rule [*Federal Register* 73:30, p. 8230ff]**

Ladies and Gentlemen:

How to Transmit Your Comment Letters

Comment letters can be sent by U.S. mail to the addresses shown above. To assure timely delivery, sending the letters by overnight delivery is suggested. As of the time of this guidance memorandum the deadline for receipt of comments is April 14, 2008, and letters must be received (not mailed) by that date.

Both DOL and DHS also accept comment letters submitted electronically. To submit electronically use the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

If submitting the DHS comment letter electronically, the agency to which the comment letter must be directed is the U.S. Citizenship and Immigration Services (USCIS), and the comments must be identified by DHS Docket No. USCIS-2007-0055.

If submitting the DOL comment letter electronically, the agency to which the comment letter must be directed is the Employment and Training Administration (ETA), and the comments must be identified by the Regulatory Information Number (RIN) 1205-AB55.

Suggestions for Comments

We recommend that all agricultural employers, especially those with experience using the H-2A program, make an effort to read both regulatory proposals and identify issues that are of particular concern to the commenter's business. However, we recommend that all commenters include at least the items discussed in this Memorandum in their comment letters.

It is already apparent that some provisions in the proposed regulations that are positive changes from the perspective of H-2A program users are drawing the attention of

program opponents who will file comments opposing these changes. Therefore, it is as important that agricultural employers support the positive elements of the proposed regulations as it is to point out deficiencies and recommend changes.

We also request that commenters include language in their letters endorsing the NCAE's detailed, comprehensive comment letter, and stating that the fact that a specific issue discussed in the NCAE comment letter is not addressed in the commenter's letter should not be interpreted as meaning that the omitted issue is unimportant. Some issues are simply too complex or technical to be included in every commenter's letter.

**U.S. Department of Labor proposed regulations
which need to be explicitly supported.**

- **Expanded definition of agriculture and allowance for incidental non-ag work**

The proposed regulations expand the definition of "agriculture" and therefore the job opportunities that qualify for H-2A employment, in the following ways: (1) by including logging employment; (2) by including duties typically performed on a farm that are incidental to the agricultural labor or services for which the worker was sought; and (3) by including the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for transportation to market, in its unmanufactured state, of any agricultural or horticultural commodity while in the employ of the operator of a farm. (See proposed regulations §655.100(c).)

Item (2) above will permit H-2A workers to performance certain activities which might fall outside the definition of agricultural employment, if they are typically performed on a farm and are incidental in nature. Although the scope of this expansion in the definition of agricultural labor or services will have to be determined by experience, presumably the provision will cover a farm worker who engages in incidental employment in the farm's roadside retail stand, a farm worker who assists in managing "pick your own" activities, and a farm worker who drives a tractor pulling a hay wagon for a hay ride, to cite a few examples of incidental activities customarily performed by farm workers that have disallowed in the past.

Item (3) above removes the current condition, specified in the Internal Revenue Code definition of "agriculture", that more than 50 percent of the commodity which is handled, dried, packed, etc. must be grown by the employer to qualify for H-2A employment.

Suggestion for comment:

The NCAE views these expansions in the definition of agriculture as positive changes for two reasons. First, they will provide more flexibility for employers to include duties in H-2A certified job opportunities that reflect the actual duties performed by farm workers. Second, by classifying these activities as "agriculture" this will enable (and require) H-2A workers to be employed in performing these activities rather than H-

2B workers. Under the circumstances where the H-2B program has been rendered virtually useless because of unrealistic cap limitations, inclusion of these activities in agriculture at least provides an option for obtaining legal workers, even though it will entail complying with the requirements and bureaucratic procedures of the H-2A program.

If commenters share the NCAE's view that these changes are positive, they should support these changes in their comments. It will be useful to provide specific examples from the commenters' own operations or experience as to how the changes will render the H-2A program more workable if such examples are available.

- **Verification of employment eligibility.**

The proposed regulations at §655.102(j) require that State Workforce Agencies (SWAs) refer to H-2A employers only those individuals whom they have *verified* are eligible U.S. employers. ("Eligible" is defined as employment authorized.) Thus, SWA's will no longer be permitted to refer workers without regard to their employment authorization status and leave it up to the employer to determine employment eligibility.

Suggestion for comment:

This is a very positive provision which has long been sought by the H-2A user community, and is required by the clear language of the H-2A provisions of the INA. Commenters should be sure to discuss and support this provision in their comments, as the provision is under serious attack from the farm worker advocate community. Obviously, it makes no sense to operate a temporary worker program in a manner that permits undocumented workers to be referred for employment by SWA's to potentially displace legal alien workers.

While supporting the requirement for the SWA's to verify employment eligibility, commenters should also insist that the verification be an affirmative process, not merely a passive process such as that currently in use by most SWA's. Currently most SWA's, at most, tell referred workers they will have to present documents evidencing employment eligibility to the employer, but to fail to examine, must less verify, the authenticity of the documents before referral.

- **Allowing some flexibility in piece rates**

The proposed regulations at §655.104(l)(ii) eliminate the requirement that employers who pay by piece rates can not require productivity standards exceeding those they required in 1977. This is a positive and long overdue change, and commenters are encouraged to support it.

The proposed regulations continue the requirement that if a productivity standard is to be required in a piece rate paid activity it "shall be no more than those normally required by other employers for the activity in the area of intended employment". The

NCAE will recommend that the DOL take a more flexible approach in administering this requirement than has occurred on some occasions in the past, where it has been asserted that if a majority of employers respond in surveys that they do not have a fixed minimum productivity standard, no minimum productivity standard at all can be required by an H-2A employer. We encourage commenters to endorse the recommendations in the NCAE comment letter when discussing the issue of minimum piece rates.

- **Provision of worker housing through a voucher**

The proposed regulations at §655.102(1)(iii) permit H-2A employers to meet the obligation to provide housing for H-2A workers who cannot reasonably return to their usual place of residence each day through a housing voucher mechanism if the governor of the state has not certified that there is inadequate housing in the area of intended employment for migrant farm workers and H-2A workers. The proposed housing voucher provision has a number of technical defects which the NCAE will be seeking to remedy, but commenters should support the general concept of using vouchers to provide housing in lieu of actually providing housing. Point out why a housing voucher option, if improved, will make the H-2A program more usable and effective in your particular locality. Be sure to mention that the provision does contain technical problems that will be discussed by the NCAE.

- **Early housing inspection and occupancy of housing if a timely inspection has not occurred.**

The proposed regulations at §655.104(d)(5) require H-2A applicants to request a housing inspection no earlier than 75 days nor later than 60 days before the employer's date of need. This section also provides that if the housing inspection has not taken place by the statutory deadline for H-2A certification of 30 days before the date of need, the certification will not be withheld. In such cases the SWA will inspect the housing prior to or during occupancy.

Untimely housing inspections are one of the most common reasons for delays in making labor certification determinations. Therefore, the provision in the proposed regulations for making a pre-application housing inspection, and the provision that certification will not be delayed if a timely housing inspection is not made, and that occupancy of the housing is permitted, are important improvements in the program. The intent of these provisions should be strongly supported.

There are a number of technical problems with the housing inspection provisions which the NCAE will address in its comment letter. One of these is the fact that as currently written, if the housing inspection does not take place until after occupancy and a violation is found, the employer will be held liable for the violation, and a panoply of penalties will potentially come into play, up to and including revocation of the temporary labor certification and/or debarment. (See discussion of the consequences of these two actions below.) Among the modifications the NCAE will request is that if the housing inspection does not take place until after certification or occupancy, the employer be

given a specific and reasonable period of time to correct any violations, and that penalties apply only if the employer fails to correct the violation within the specified time frame.

- **Substitution of housing in emergency situations**

The proposed regulations at §655.102(d)(6) provides that if the housing that an employer lists on an approved labor certification application becomes unavailable for reasons outside the control of the employer, the employer may substitute rental or public accommodation housing which meets the applicable standards (i.e. the local or state standards applicable to rental or public accommodation housing) and notify the SWA of the change in writing. Substitution of housing is a per se violation under the current regulations.

Suggestion for comment:

While the language of the provision for substitution of housing contains some technical specifications which the NCAE will be requesting be modified, the overall provision is a significant program improvement. Commenters should point that out and support the provision in their comment letters, while noting that some technical changes in the language are necessary that will be recommended by the NCAE.

Provisions which need to be substantially modified or withdrawn.

- **Additional advertising requirements**

The proposed regulation (at §655.102(d) and (j) and §655.103) substantially expands H-2A employers' advertising requirements. Current regulations require employers to advertise at least once. Typically, this advertising is done in either a local newspaper or a newspaper in an area of potential supply area, and typically the advertisement must run at least two days. The proposed regulation requires the employer to run a local advertisement for a minimum of three days, one of which must be on a Sunday, and to place advertisements in at least three other areas of potential labor supply. This is a quadrupling of the advertising requirement. The requirement (under most circumstances) that the local advertisement include a Sunday, will likely result in more than a quadrupling of the advertising cost.

Suggestions for comment:

The substantial expansion of the advertising requirement in the proposed regulations contradicts the stated purpose of streamlining the H-2A program, and is wasteful, burdensome and unproductive. Even the advertising required under the current regulations, which occurs close to the date when seasonal job opportunities are available, is notoriously unproductive. The advertisements often cost hundreds to in excess of a thousand dollars, given the extensive required content, and routinely result in no responses. Quadrupling this advertising requirement, and requiring that the advertising be placed several months in advance of the time when the seasonal job opportunities are

available, as required in the proposed rule, make no sense. This wastefulness is often compounded by the fact that numerous virtually identical ads are appearing at the same time in the same area of intended employment and newspapers.

The Labor Department should take note of its own data. Given that job opportunities outnumber the legal domestic labor force by at least 2 to 1, and likely more like 4 to 1, farm workers, domestic and alien, do not search “help wanted” ads to learn about employment opportunities. The DOL’s National Agricultural Worker Survey reports that 95% of workers (illegal as well as legal) found out about their job from a friend or relative or learned about it on their own. Only 3% were recruited by a grower, foreman, or labor contractor. Less than 1% were referred by an employment service, public or private. (Note that H-2A help wanted advertisements are required to refer applicants to a State Workforce Agency, for referral to the employer.) The proportion who learned about their job from a help wanted advertisement was apparently too small to report.

The current INA, which was written more than 20 years ago, requires H-2A employers to engage in positive recruitment, but does not specify specific recruitment activities and, in particular, does not require advertising. In order to streamline and rationalize the H-2A recruitment process, the proposed regulations could more readily justify eliminating the advertising requirement than increasing it.

- **Precertification recruitment**

The proposed DOL H-2A regulations at §655.102 require that H-2A applicants begin recruitment of U.S. workers not later than 75 days, nor earlier than 120 days, before the date workers are needed, and prior to the filing of a labor certification application and prior to the DOL’s review and approval of the employer’s job offer. In contrast, the current H-2A program regulations require filing a labor certification application not more than 45 days before the date of need, and do not require the employer to conduct positive recruitment until the terms of the employer’s job offer have been accepted by the DOL.

In effect, the proposed regulations advance the minimum start date of the H-2A application process from 45 days in advance of the date of need to more than 80 days before the date of need. This change overturns more than 20 years of effort by agricultural employers and the Congress to reduce the advance application deadline. In 1987, in an attempt to reform the H-2A program Congress reduced the advance application deadline from 80 to 60 days before the date of need. More recently Congress further reduced the advance application period to 45 days before the date of need.

The proposed regulations require that the employer’s job offer be posted by the State Workforce Agency (SWA) not later than 75 days before the date of need and that the employer advertise the job opportunity. In order to comply with this deadline an employer will first have to (1) develop a job description, (2) seek and obtain an adverse effect wage determination from the DOL, and (3) develop and obtain acceptance of a job

offer from the SWA. Thus, the employer will have to start the application process well in advance of the 75 day deadline for posting of the job offer.

The proposed regulations require employers to file a detailed report of recruitment, listing all applicants and referrals for the job and whether the applicant or referral was hired or the lawful job-related reason for not hiring, with the employers application for labor certification. Presumably the employer will be denied certification for each job opportunity for which a qualified applicant has applied.

There are substantive reasons for not requiring the application process to start long before the date of need. First, employers may not know that far in advance whether they will need to apply for H-2A certification and undertake the increased costs and obligations of the program. Second, in many cases employers will not know critical details of their production plans that far in advance, such as the specific crops they will be producing, likely starting and ending dates of employment, and the number of workers needed. Finally, recruiting of seasonal agricultural workers that far in advance of the actual start of employment is notoriously unproductive, and when it does result in work commitments by prospective workers, these commitments are notoriously unreliable.

The advance application process in the proposed regulations also has a serious problem in that it establishes requirements for acceptable job offers that are subjective and subject to DOL discretion, but requires the employer to conduct the required recruitment before the terms and conditions of the employer's job offer are approved by the DOL. The rule is silent on what happens if, after the employer conducts the pre-employment recruitment, the DOL fails to approve the employer's job offer. Current program practice would suggest that the recruitment would be considered invalid, and would have to be repeated. This circumstance introduces an unacceptable degree of uncertainty into the process.

The proposed regulation provides that the employer's obligation to employ qualified domestic workers ends on the date the employer's foreign workers begin traveling to the place of employment, or three days before the employer's date of need, whichever is later. The requirement to continue employing qualified domestic workers who apply through the first 50 percent of the employment period on the application (the so-called "50-percent rule") is not included in the proposed regulation, although the preamble to the proposed rule leaves the door open to reinsert the 50-percent rule in the final regulation. Many H-2A users have long considered the 50-percent rule as unfair and unreasonable. No other temporary or permanent worker program has even a remotely corresponding requirement. However, to the extent that the pre-application recruitment requirements are a trade-off for eliminating the 50-percent rule, it is not at all clear that this represents an improvement.

Suggestions for comments.

Commenters must consider whether they regard the newly-imposed pre-application recruitment requirements to be more workable than the current program

requirements, which require an employer to apply not fewer than 45 days before the date of need, require advertising and other domestic recruitment on the basis of an accepted job offer. The NCAE believes that the application deadline should be not advanced, explicitly or implicitly. The NCAE also does not believe the 50-percent rule should be imposed on H-2A users, and the obligation to accept domestic referrals should terminate not later than 3 days before the date of need. However, if the DOL insists on extending the advance application period, they should at least provide the employer with the option of applying not more than 45 days before the date of need, doing post-acceptance recruitment, and continuing to accept referrals pursuant to the 50 percent rule. In so doing, employers who want to have the assurance of an accepted application before conducting recruitment, as in the current program, will have that option.

- **Expansion of debarment.**

In the proposed regulations the DOL gives itself significantly expanded authority for enforcement of compliance with H-2A requirements and penalties for non-compliance. While monitoring and enforcing compliance with program requirements is necessary to assure the integrity of the program, the expansion in enforcement options in the proposed regulation borders on harassment and overkill. With respect to the proposed regulations for debarment of violators from future participation in the H-2A program, it appears to exceed the authority granted the Department in the INA.

With respect to debarment, the INA provides [include cite] that the Secretary of Labor may not issue a certification if “the employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer *at any time during that period* substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers”. [emphasis added] The maximum period for which an employer may be barred from future certifications under this provision is 3 years. This language makes clear that a determination of a violation cannot be made until after notice and opportunity for a hearing. It further makes clear that the violation that is the basis for a denial of labor certification (i.e. debarment) must have taken place within the two years previous to the debarment. The current regulations provide that debarment decisions are made by the Employment and Training Administration, and can be initiated on the basis of information developed by the ETA or information transmitted from the Wage and Hour Division.

The proposed regulations provide that both the Employment and Training Administration and the Wage and Hour Administration can make debarment determinations. Further, they interpret the word “determination” to mean merely the assertion of a violation, not a determination after notice and an opportunity for a hearing, as specified in the INA. The proposed regulations therefore provide that only the allegation of a violation, not a final determination, must be made within 2 years of the alleged occurrence of the violation.

Suggestion for comment:

Certainty and prompt closure are important to program users. DOL's regulations cannot change statutory language. A determination of a violation can only be made after notice and an opportunity for a hearing, and the determination must be made with respect to a violation that occurred during the previous two years to serve as a basis for future debarment.

Further, the NCAE will strongly object to expanding debarment authority to the Wage and Hour Division. One of the major ongoing problems with the administration of the H-2A program is inconsistency between the Wage and Hour Division and the Employment and Training Administration in the interpretation of the requirements of the H-2A regulations. Authority for exercising the debarment tool should remain solely with the agency that makes decisions with respect to labor certifications, namely the ETA.

- **Addition of “revocation of certification” and the denial of effective due process in the revocation process.**

The proposed regulations at §655.117 set up a new scheme for “revocation” of labor certification determinations. Under the current regulations (§655.114) revocation of a labor certification occurs only upon revocation of an admission petition by the DHS pursuant to 8 CFR 214.2(h)(5)(xi). However, the proposed DOL H-2A regulations set forth a process independent of DHS action for revoking labor certifications, and the DHS proposed regulations add a provision for automatic revocation of a DHS petition if a labor certification is revoked. The effect of the revocation of a petition is to immediately terminate the employment authorization of the aliens that have been accorded status pursuant to that petition, in effect leaving the employer without a legal work force.

The justification offered for adding a process for revoking labor certifications is that this process provides the DOL with an additional tool for assuring compliance and penalizing noncompliers. It is hard to make the case that such an additional tool is necessary. The DOL has already substantially increased both the penalties for non-compliance and the bases upon which non-compliance can be asserted. It has added an entirely new document retention and compliance audit process. It has expanded its authority for debarring non-compliers from future labor certifications. As suggested above, the further addition of a petition revocation procedure is unnecessary, and amounts to overkill and harassment.

The revocation process also denies employers effective due process. The proposed procedure requires the DOL to provide the employer with a notice of intent to revoke and provide an opportunity to submit rebuttal evidence. If the DOL then determines to revoke the labor certification, the DOL must offer the employer an opportunity to appeal the revocation to an administrative law judge. Notwithstanding this appeal procedure, the proposed regulation provides that the revocation becomes effective immediately upon the DOL's determination to revoke, and the revocation is in effect during the pendency of the employer's appeal. Taken together with the automatic petition revocation provision in the proposed DHS regulations, this means that the

employer's ability to continue employing the H-2A workers is automatically terminated, even during the pendency of the appeal.

Suggestion for comment:

The proposed regulations provide ample tools for penalizing non compliers, and the addition of a revocation of a labor certification is unnecessary and should be removed from the regulations. The DOL always has the option of providing any evidence which it believes justifies revocation of a petition to the DHS for their action under 8 CFR 214.2(h)(5)(xi). At least the DHS process allows the employer an effective due process option before making petition revocation effective.

- **Increased certification fees**

The proposed regulations increase the fee for issuance of a labor certification (proposed §655.109(g)) from \$100 to \$200 per application plus from \$10 to \$100 per worker. It also eliminates the current \$1000 cap. Even ignoring the elimination of the \$1,000 cap, this is a 7-fold increase in the certification fee based on FY 2007 program usage. The preamble to the proposed rule provides exactly one sentence of justification for this increase, stating that the new fees “comport with statute’s expectation that the fee recover ‘the reasonable costs of processing’ H-2A applications.” The Department fails to explain what costs it took into account, nor how a more streamlined processing process could lead to a 7-fold increase in costs. It also fails to explain how the costs of processing can increase \$100 per worker as more workers are requested, when the underlying applications would be identical regardless of the number of workers requested.

It is useful to note that the DHS, which undertakes extensive accounting to justify increases in petition costs and provides the basis for its fees in the Federal Register, can manage to adjudicate an H-2A petition for \$320 regardless of the number of workers requested. Under the DOL’s new fee structure, the average fee for an H-2A labor certification, based on FY2007 usage data, will exceed \$1800, nearly 6 times the cost of adjudicating an H-2A petition at the DHS.

Suggestions for comments:

If commenters believe, as the NCAE does, that a sevenfold increase in certification fees and an average certification fee exceeding \$1800 (compared to \$263 at present) is excessive, they should insist that before DOL increase its fees it do as the DHS does and provide detailed information in the Federal Register as to what activities it is including in the “costs of processing” an H-2A application, and what these costs are. If the cost of processing an application under the new “streamlined” procedure really is 7 times the cost of adjudicating a petition, perhaps the DOL should consider this as evidence that it has not effectively streamlined the process. We believe this is the case. In spite of the fact that the DOL refers to their new application process as an

“attestation”, it is virtually indistinguishable from the current application review process, and remains exceedingly labor intensive. It is far from an “attestation” process as utilized in the H-1B program.

- **New Adverse Effect Wage Rate methodology**

The proposed regulations retain the requirement that H-2A employers pay the highest of three wage standards: (1) the applicable federal, state or local statutory minimum wage, (2) the prevailing wage for the occupation in the area of intended employment, if such a prevailing wage has been determined by the SWA, or (3) an administratively established “Adverse Effect Wage Rate” (AEWR).

In the preamble to the proposed rule the DOL asserts that the wages and working conditions of agricultural workers are depressed by the presence illegal aliens in the agricultural work force, but does not offer any independent analysis to support this proposition. It fails to explain why an AEWR, in addition to a prevailing wage, is required to avoid the employment of H-2A workers from depressing the wages of domestic agricultural workers, but no such adverse effect wage rate is necessary to prevent wage depression by H-2B and H-1B aliens or immigrants permanently admitted for employment. All these categories of aliens are admitted subject only to the prevailing wage. All categories of aliens are subject to the same statutory criterion -- that their employment not depress the wages and working conditions of U.S. workers. The NCAE agrees with the overwhelming opinion of economists who have studied the impact of alien admission, both legal and illegal, and find no statistical evidence that the admission of the aliens has significantly impacted domestic wages.

Having concluded that an AEWR is necessary, the DOL attempts to make the case that it should change the methodology for establishing the AEWR by replacing the United States Department of Agriculture’s Quarterly Farm Wage Survey data with wage data derived from the Bureau of Labor Statistics’ Occupational Employment Survey (OES). The OES data set the DOL proposes to use to establish AEWRs for agricultural occupations is the same data set it currently uses to set prevailing wages for non-agricultural occupations in other immigration programs. The data can be accessed at <http://www.flcdatacenter.com/>.

In the preamble to the proposed rule the DOL presents a lengthy discussion of why it regards the OES data as superior to the USDA data is establishing AEWRs “that appropriately reflect market realities and labor costs”. A full discussion and comparison of the USDA Quarterly Farm Wage Survey program and the OES wage survey program would be too lengthy and complex to present in this guidance document. Suffice it to say that the Department’s description of the OES occupational survey program is incomplete, and no discussion of how this data is manipulated for the purpose of establishing prevailing wages is provided. A more complete and balanced description of the two data sources will be presented in the NCAE comment letter.

The NCAE believes that there is no substantive rationale for the AEW, and therefore at a fundamental level the discussion of which data source is superior for the purpose of establishing an AEW is beside the point. As a reflection of actual market wages for specific activities in specific areas of intended employment, neither the OES or USDA data source as presently constituted is appropriate. However the NCAE believes that the wage setting procedure in the proposed rule, based on the OES data, will present many H-2A users with serious administrative problems. Taken as a whole, the minimum wages likely to result from the methodology in the proposed regulations, based on the OES survey data, will be as harmful to the future viability of U.S. agriculture as those set by the current methodology based on USDA farm wage data.

Suggestions for comments:

The threshold question that DOL must adequately address is whether, under current labor market conditions (not those that prevailed decades ago when an AEW was first instituted and when the legal precedents the Department now cites were written), a separate adverse effect wage rate standard, in addition to the prevailing wage and applicable statutory minimum wage, is necessary to effect the statutory requirement that the employment of H-2A aliens not adversely affect the wages and working conditions of similarly employed domestic workers. The NCAE believes that there is no valid economic justification for a separate AEW standard in addition to the prevailing and statutory minimum wage. The NCAE believes that the employment of H-2A workers should be subject only to a prevailing wage standard. Further, the NCAE believes that the prevailing wage finding methodology currently in use by the DOL as set forth in ETA Handbook 385, when correctly applied, results in the determination of correct prevailing wages for specific agricultural activities in specific areas of intended employment. The NCAE does not believe the OES data system accurately reflects prevailing wages in specific agricultural activities.

The NCAE will point out the substantial evidence that calls into question the justification for an AEW in addition to a prevailing wage. This evidence includes but is not limited to the following:

Over the past two decades the share of domestic consumption of virtually every labor intensive agricultural commodity produced by U.S. producers has declined. In many cases the declines have been dramatic. Within the past decade, the U.S. shifted from being a net exporter to being a net importer of labor intensive agricultural commodities. This has occurred notwithstanding the huge increase in alien employment in U.S. agriculture. If these aliens had not been available, it is clear that the result would have been an even more rapid decline in U.S. competitiveness, not an increase in domestic farm wages. The wage levels and commodity prices at which domestic producers can be competitive are set based on global competitive commodity prices. The available supply and cost of domestic farm labor determines the domestic and global market share of U.S. producers, not domestic farm wage rates. If fewer aliens were available for agricultural work in the U.S., then U.S. producers would be producing less

agricultural production at approximately the same wages and commodity prices as at present. Fewer alien workers would not have resulted in higher domestic farm wages.

Notwithstanding the huge increase in alien employment in U.S. agriculture in the past two decades, the hourly earnings of farm workers in the U.S. have increased at a more rapid rate than the hourly wages in the non-farm economy, where the presence of aliens is proportionally much lower. This is inconsistent with a conclusion that the employment of aliens in agriculture has depressed wages.

Neither the current average USDA combined field and livestock worker wage nor the OES wage data are appropriate for setting minimum wages for employment in H-2A certified occupations. The DOL describes in the preamble to the proposed rule some of the shortcomings of the current USDA wage data for AEW purposes. For reasons that will be discussed more fully in the NCAE's comment letter, the proposed OES data does not reflect wages paid to farm workers in the United States, and the claims the Department makes for the superiority of the Occupational Employment Survey (OES) data over the USDA data base are spurious. Commenters may wish to point out that the reasons the OES survey data are flawed as a measure of farm wages include but are not limited to the fact that they (1) specifically exclude wages paid by farmers, (2) do not collect wage data, but merely tabulate the number of workers paid hourly rates within broad wage categories, (3) fail to account for piece rate paid workers, (4) contrary to the Department's claims, include no information whatsoever that reflects skill or experience, (5) are not available on a timely basis, and (6) do not reflect acceptable levels of statistical precision at the local labor market levels at which they are proposed to be applied.

The NCAE will strongly urge the DOL to withdraw its AEW proposal and replace it with a prevailing wage requirement, determining prevailing wages in a manner consistent with DOL's current prevailing wage determination procedures. The NCAE will strongly urge the DOL to further study the question of an appropriate wage standard for H-2A certified occupations, including consultation with experts, stakeholders and the U.S. Department of Agriculture, including ways in which the USDA farm wage survey may better provide wage data to meet the DOL's state goal of appropriately reflecting farm labor market realities and labor costs. If the DOL does not immediately eliminate the AEW requirement, the NCAE will urge the Department to allow employers to pay either an AEW based on the current USDA methodology or request a wage determination from the DOL based on the proposed new OES data system.

- **Elimination of process for emergency applications**

The current regulations (§655.101(f)) include provisions for acceptance of "emergency" applications filed after the filing deadline when sufficient U.S. workers are not available in emergency situations. The proposed regulations eliminate such a provision. A provision allowing the filing of applications after the filing deadline will be even more necessary under the proposed regulations, because the *de facto* deadline for

meeting application requirements is much further in advance of the date of need than at present.

Suggestions for comments:

It is critically important that the proposed regulations include an effective and workable provision for the acceptance and consideration of emergency applications filed after the deadline. If an emergency application is filed in an area of intended employment and for a job opportunity for which employers have already been certified within the same time frame, such applications should be certified immediately, as there is already evidence that U.S. workers are not available. A reasonable condition for the certification of such applications might be an extended post-application recruitment, so that the availability of the emergency procedure does not create an incentive to avoid preseason recruitment.

- **Elimination of provisions for “master applications”.**

One of the most important streamlining measures adopted when the current H-2A regulations were written in 1987 was the provision for an association acting as an agent for its farmer members to file “master applications” where associations were filing applications for their members covering virtually identical job opportunities. [See Federal Register 52:104, p. 20498] The procedures for processing such master applications are set forth in the current ETA H-2A Handbook, ETA Handbook No. 398. [See, for example, ETA Handbook No. 398, p. I-9] These master application procedures are utilized by associations acting as agents for their grower members requiring workers in virtually identical applications. The association files a single “master application” together with a list of the individual grower members who are associated with that application, the number of workers requested by each member, and other member-specific information. The master application significantly reduces the paperwork and bureaucratic burden for both the associations and its members, and the DOL.

Over the years since the master application procedures were promulgated the DOL bureaucracy and SWA’s have degraded the efficacy of the master application provision by mandating more individual treatment of each application. Recently the DOL National Processing Centers further significantly reduced the efficacy of the master application by requiring associations to list the names and addresses of each individual member associated with a master application in the required advertising for the application, rather than merely listing the association. This hugely expanded the size and cost of the required advertisements, as master applications can have several dozen to more than a hundred individual members associated with a single application.

The proposed regulations appear to terminate the master application process, rather than continuing and improving it, as the stated intention of streamlining the regulations would suggest is appropriate. The degrading of the master application process which has occurred in recent years, and its complete omission from the proposed amended regulations, is a retrogression that will make the program significantly more

difficult and expensive for small growers to use, and is contrary to the stated purpose for the regulatory changes.

Suggestion for comment:

Commenters should note that most users of the H-2A program are small growers with a small work force who depend on the assistance of a grower's association acting as their agent. For example, the average number of job opportunities certified per employer was 10.25 in FY 2007. Given that there were a number of very large labor certifications for hundreds of workers per employer, this means that the *typical* employer among the 7,491 H-2A certified employers had far fewer than 10 workers. Many of these were employers in the same area of intended employment seeking workers for virtually identical job opportunities.

If DOL should retain and improve the master application process and fully incorporate it into the H-2A regulatory structure, rather than merely into the administrative guidance documents. This streamlining should include the essential components of the original master application process, which included the filing of one application on behalf of multiple employers seeking workers in virtually the same occupation, permitting the association to place the required advertisements and conduct the required positive recruitment on behalf of all participants in the master application (without the exorbitant and unnecessary expense of listing every individual employer in required advertising), permit referral of workers to the association for all job opportunities covered by the master application, and allow the association to place workers in the job opportunities covered by a master application.

Commenters should emphasize that the master application process must apply to applications filed by associations *acting as agents for their individual members*. Associations acting as joint employers with their individual members already have the benefits of the master application process by virtue of being joint employers. The provisions of the proposed regulations applying to applications by joint employer associations are separate and distinct from the master application process described here, and one *does not* replace the need for the other.

- **Absence of allowance for diversity of operations and business necessity in job qualifications.**

The proposed regulations in several places require that H-2A job opportunities include only duties, requirements, and/or standards of performance normally or typically required in such occupations. (See, for example, proposed §655.104(b), §655.105(i), §655.109(b)(4) and (4)(vi)). Similar language in the current H-2A regulations has been the basis for frequent disputes between applicants and the DOL by employers producing specialized products, utilizing unusual production techniques or otherwise seeking to distinguish their products in the marketplace.

Suggestion for comment:

Commenters should insist that job requirements, combinations of duties, or other factors that may make a specific application unique must be acceptable if justified by business necessity. Elements of a job order clearly contrived for the purpose of disqualifying domestic workers should not be acceptable, but nothing in the INA requires that a specific employer perform any job in exactly the same way as other employers may perform that job to qualify for alien labor.

- **Requiring employers to bear costs of recruiting and facilitation of admission of aliens**

The proposed regulations (proposed §655.105(o)) require H-2A applicants to attest, in part, the following: “In connection with this attestation, the employer is required to contractually forbid any foreign labor contractor whom they engage in international recruitment of H-2A workers to seek or receive payments from prospective employees.” The proposed regulations do not define the term “recruitment”, so it is unclear whether the activities of facilitators who contact workers requested by employers to determine their availability and willingness to come to the United States to work, and/or who assist foreign workers to secure necessary documentation and apply for H-2A visas to work as H-2A workers, would be encompassed within this prohibition. The DHS proposed regulations (at proposed §214.2(h)(5)(xi)) specifically prohibit facilitators as well as recruiters from receiving payments from workers.

Recruitment of alien workers and facilitation of the process for visa application and admission, are a necessary part of the process for most aliens to secure employment in the United States. Facilitation of the visa application process by foreign agents, compensated by the alien beneficiaries, is a well known, legal, and longstanding practice. The procedures for efficient processing of large number of non-immigrant alien visa applicants through the U.S. consulates have, in fact, become dependent on these facilitators. The Department describes this provision in the preamble to the proposed rule as a prohibition against “cost-shifting”. In fact, it is a provision which will have the sole purpose and effect of shifting the cost of this function from visa applicants to U.S. employers.

Suggestions for comment:

It is not possible to justify this proposal as streamlining the program or making it more usable to employers. Further, there is no basis in the INA for requiring U.S. employers to pay the costs associated with assisting foreign workers to secure documents to gain admission and work authorization in the United States. This provision will add costs and bureaucratic burdens for employers, and expose them to penalties and litigation. This proposal constitutes DOL buy-in to a highly questionable and controversial legal theory advanced by opponents of the H-2A and other foreign worker programs that even Secretaries of Labor under previous Democratic administrations have been unwilling to embrace. It should be removed from the proposed regulations. Instead, the DOL should clarify that the costs of recruitment, facilitation, and transportation and subsistence to the

U.S. place of employment are costs that benefit both workers and employers, and therefore are not the exclusive responsibility of either party.

- **Elimination of provision for redetermination of need**

The current H-2A regulations (§655.106(h)) include provisions for requesting a “redetermination of need” if a labor certification is denied in whole or in part based on the availability of U.S. workers and then the workers fail to report for work or fail to perform the work and are terminated for cause. The proposed regulations delete this provision. An employer has no apparent recourse under the proposed regulations for filling job opportunities that are vacant because an applicant failed to report or was terminated for cause. Given the greatly extended pre-application recruitment period in the proposed regulations, and the fact that workers may be making “commitments” to H-2A jobs up to 120 days before the job starts, provisions for quickly filing vacancies when workers fail to report or are terminated for cause will be even more important, not less so.

Suggestions for comments:

The amended regulations must include provisions for rapid certification of job opportunities that are vacant or become vacant because applicant or employee failed to report for work, absconded, or were terminated for cause.

- **Language of the labor dispute attestation**

The proposed regulations include inconsistent language with respect to labor disputes. This conflicting language could potentially be harmful to the program. In the proposed §655.105(c) the employer is required to attest that “there is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment.” The proposed §655.109, which sets forth the circumstances under which a labor certification will be granted, requires that “the job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute.” The later statement corresponds with the language of the labor dispute assurance in the current H-2A regulations (at §655.103(a)).

The problem with the labor dispute language in the proposed attestation statement is that because agricultural employment is not covered by the National Labor Relations Act there is no official process for determining the existence of a labor dispute in an agricultural employment setting. Farm worker advocates have asserted on occasion in the past that even a single worker who applies for the job (and who must be hired if qualified and eligible, under the H-2A regulations), can then walk off the job objecting to the terms or conditions of employment and create a “labor dispute” which blocks the employer’s entire labor certification. This was a matter of great concern during the development of the current H-2A regulations in 1987, and the language of the current regulation, which complied with an administrative law judge decision interpreting the

INA, was carefully crafted to make clear that if a worker walks off the job claiming a labor dispute, only the job opportunity vacated by that worker, and not the entire application, is barred from certification.

Suggestion for comment:

Commenters should insist that the language of the existing labor dispute assurance, which is reiterated in the proposed §655.109, be substituted for the labor dispute language in the proposed §655.105(c), so that a single worker claiming a labor dispute will not be able to block an entire occupation from receiving H-2A certification.

U.S. Department of Homeland Security Proposed Regulations

- **Elimination of a Process for Filing Petitions In the Absence Of or With A Denial of Labor Certification**

The proposed regulations (at §214.2(h)(5)(I)(A)) removes the current option for an employer to file a petition with a denial of labor certification and present countervailing evidence. The preamble to the proposed rule states that this option is being eliminated because the Labor Department provides an appeal procedure for denial of labor certification.

The Labor Department's procedure for appealing a denial of labor certification is not newly created by the amended regulations. Its availability has not, and will not, eliminate the need to file petitions without a labor certification. Under the Labor Department's revised labor certification scheme it will become even more necessary.

Suggestion for comment:

The INA vests the authority for making decisions on the admission of H-2A workers solely with the Department of Homeland Security, not the Secretary of Labor. The language of the INA requires that an employer must *apply* for certification from the Secretary of Labor, but clearly stops short of *requiring* certification as a condition for admission.

The NCAE believes the language of the current §214.2(h)(5)(i)(A) providing for the filing of a petition without a labor certification and presenting countervailing evidence for a denial, far from being unnecessary, is too restrictive. The current language of §214.2(h)(5)(5)(I)(A) provides for petitioning without a labor certification *only* in the circumstance where a labor certification has been denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor has denied an appeal. Section 216(e)(2) of the INA contains no such limitation. The NCAE believes the provision for filing a petition without a labor certification should be allowed in *any* circumstance where the Secretary of Labor denies a labor certification, *or fails to act on an application in a timely manner*.

It should be noted that the Labor Department's proposed amended H-2A regulations omit any process for an employer requesting a redetermination of need if domestic workers fail to report on the date of need. Under the Labor Department's proposed amendments, domestic recruitment occurs *prior* to an application for a labor certification rather than after the application is filed, as is the case in the current program. It appears that under the DOL's proposed rule, if workers apply or are referred during the preapplication period, the employer will not be permitted to apply for a labor certification in the first place, or the application will be denied because of the availability of domestic workers. If the regulations are finalized in this manner, an option for filing a petition with the Department based on evidence that qualified, domestic workers are not available will become even more critical, not less.

The DHS should include a provision in its final regulations that permits filing a petition for the admission of H-2A workers and present countervailing evidence under *any* circumstance where the Secretary of Labor either denies a labor certification application or fails to act on such an application in a timely manner.

- **Notification of failure to report and early departure**

The proposed regulations at §214.2(h)(5)(vi)(B)(1) requires employers to notify the DHS in writing, within 48 hours, if an H-2A worker fails to report for work within 5 days after the employment start date stated on the petition; the employment of an H-2A worker terminates more than 5 days before the employment end date stated on the petition; or an H-2A worker absconds from the worksite.

Suggestion for comment:

As a threshold matter, the NCAE believes the Department should take into consideration that for an employer to document compliance with the time frames required by this regulation, all notifications will have to be sent certified mail or by other means providing the employer with evidence of the date of notification. This means that these notices will entail considerable expense. Keeping the number of notifications to the minimum necessary for effective administration of the program should be the Department's goal.

The NCAE believes the requirement to make such notification within 48 hours is too limited. In many circumstances it may be impossible for the employer to know with certainty within 48 hours that the required condition obtains. We understand the necessity for prompt action in such circumstances, but believe that notification within 5 days is a more reasonable time frame.

Secondly, we believe the time frames for reporting late arrivals and early departures are too limited. The front end criterion "fails to report for work within 5 days *after the employment start date stated on the petition*" is unworkable. Under current circumstances, given delays in the receipt of labor certifications, delays in approval of petitions, and delays in scheduling consular appointments, a very large proportion of *all*

H-2A aliens are not at the work site within 5 days of the employment start date on the petition, which is the employment start date on the underlying labor certification. Furthermore, even without admission delays beyond the control of the petitioner, it is often necessary to delay at least for some period the admission of some aliens on an approved petition because of the unpredictability of the appearance and performance of domestic workers who are recruited or referred after the date of labor certification, because of weather, or for other reasons.

We believe the purpose of the notification requirement is to provide the Department with timely information about aliens who abscond after admission and before reporting to the employer's work site. We strongly recommend that the Department require notification if an alien fails to report for work within 5 days *of the date the employer schedules the worker to apply for admission* unless the employer is notified by the Department or the alien that the alien was refused admission.

Similarly, the back end criterion is unreasonable and burdensome. The work of many aliens ends in the normal course of events more than 5 days before the ending date of employment shown on the petition. The ending date on the petition is the ending date on the labor certification application. This date must be estimated a minimum of 45 days before the *start* of employment, which may be up to 11 months before the season actually ends. Therefore there is a great deal of uncertainty in specifying the ending date on a labor certification application. An employer must put the *latest* likely ending date of employment on its labor certification application or risk either the expense of extending the petition or not having enough labor to complete the work.

The labor certification regulations recognize that the ending dates on labor certification applications are the last likely date of employment by requiring that employers guarantee employment for only three-quarters of the work period shown on the labor certification application, not for the full period of employment shown on the application. A substantial proportion of H-2A workers will complete their work and be returned home or transferred to a new petition more than 5 days before the scheduled ending date of employment on the labor certification and petition, and will require notification if this provision is not changed.

We strongly recommend that employers be required to notify the Department of departure only if a worker abandons employment before being terminated by the employer or if the worker's termination occurs before fulfillment of the three-quarters guarantee period required by the Department of Labor's labor certification regulations. This will accomplish the purpose of notifying the Department of all cases of premature or unscheduled termination, without unnecessarily creating a requirement to notify on virtually all terminations.

- **Liquidated Damages**

The proposed regulations at §214.2(h)(5)(vi)(B)(3) increases the penalty for failing to make timely notification of early departure from \$10 to \$500.

Suggestion for comment.

The NCAE believes that \$500 liquidated damages is unreasonable for failure to comply with the notification requirement. This is especially true if the failure to comply is merely a failure to notify within the required time frame as opposed to failure to notify at all. For the reasons explained above, it may sometime be difficult to determine with precision when a worker has absconded or failed to report. Especially if the Department does not extend the notification period from 48 hours to 5 days, there could be many instances where untimely notification was unavoidable or merely technical. We urge the Department to reduce the liquidated damage assessment to no more than \$50.

- **Prohibition on Fees Collected From Aliens**

The proposed regulations at §214.2(h)(5)(xi) states that as a condition for approval of an H-2A petition, no fee or other compensation (either direct or indirect) may be collected from a beneficiary of an H-2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service in connection with an offer or condition of H-2A employment. If a Service Center director determines that the petitioner has collected, or entered into an agreement to collect, such fee or compensation or that the petitioner is aware that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service, in connection with obtaining the H-2A employment, the H-2A petition will be denied or revoked on notice.

Suggestion for comment:

As a threshold matter, the NCAE is aware that recruitment and facilitation of the admission of nonimmigrant aliens into the United States for employment can provide opportunities for unscrupulous persons, especially nationals of foreign countries, to take advantage of individuals seeking employment in the United States. However, recruitment of alien workers and facilitation of the process for visa application and admission, are a necessary part of the process for an alien to secure employment in the United States.

Facilitation of the visa application process by foreign agents, compensated by the alien beneficiaries, is a well known, legal, and longstanding practice. The procedures for efficient processing of large number of non-immigrant alien visa applicants through the U.S. consulates have, in fact, become dependent on these facilitators. Furthermore, it has been customary for decades for aliens to pay for the services of these facilitators in assisting them with consular procedures. The Department's proposed regulation has the sole purpose and effect of shifting the cost of this function from the visa applicant to the U.S. employer. There is no basis in any statute applicable to the Department of Homeland Security for this cost shifting.

The Department should allow reasonable fees for recruitment and facilitation of admission.

- **Revocation of Approval of Petitions.**

The proposed regulations at §214.2(h)(11) amend the regulations for revocation of petitions to automatically revoke a petition if the Labor Department has revoked the underlying labor certification. Revocation of a petition terminates the employment authorization of the employer's workers.

Suggestion for comments:

The NCAE strongly object to this provision. We believe that proposed regulations of the Department of Labor for revoking labor certifications are without legal basis and unreasonable. Among other fundamental flaws, the Department of Labor's proposed labor certification revocation regulations deny employers' effective due process by providing for revocation of a labor certification even during the pendency of an employer's appeal of the revocation, and before a final determination that the revocation is proper.

Petition revocation makes it impossible for the employer to legally continue in business, even while the employer is pursuing its due process rights. The Department of Homeland Security should not empower the Labor Department's flawed process for revocation of labor certifications by imposing the additional sanction of automatic petition revocation.

- **Authorization of Employment Upon Filing of a Petition for Change of Employer or Extension of Stay.**

The proposed regulations at §214.2a.12 provides that H-2A aliens for whom an extension of stay has been filed by a new employer while they are in H-2A status will be granted employment authorization upon filing of the extension petition for a period of 120 days or until the petition for an extension of stay has been adjudicated, whichever occurs first, but only if the new employer is a participant in good standing in the E-Verify program. Current regulations provide that employment authorization is not granted until a petition for an extension of stay is approved.

Suggestion for comment.

The NCAE strongly supports granting employment authorization for a limited period upon filing a petition for an extension of stay. The current regulation is unrealistic and unworkable because it takes too long to adjudicate an extension of stay for a named beneficiary to obtain an approved extension before the alien's previous period of admission expires. In part, this is because of the length of time to adjudicate extension petitions and in part because it is not practical to file a named beneficiary petition for an extension until shortly before the alien's prior stay expires. The alien will often not be certain of his or her willingness to extend until close to the expiration of the previous employment. Furthermore, it is not certain until close to the ending date of employment

which aliens will be available for particular extensions based on the actual ending date of their previous employment.

However, the requirement that the employer filing the extension of stay must be a “participant in good standing” in the E-Verify program to take advantage of the employment authorization based on an extension of stay is likely to significantly reduce the utility of the provision. The reality is that most agricultural employers who share workers and make use of extensions of stay are very small employers. These employers typically hire very few or no workers except through the H-2A program. They have little or no occasion to use the E-verify program, and probably little facility with it. They will have even less reason to use the program given the current Department of Labor requirement that the employment authorization of referrals to H-2A employers be verified before referral. Verification of employment authorization for DOL referrals would duplicate the verification already conducted by the referring State Workforce Agency office.

If the purpose of this requirement is to assure that the H-2A workers being transferred are employment authorized, it is doubtful the proposal will accomplish this because there will be no documentation in the DHS records at the time of hire indicating the worker’s new employment authorization. While the NCAE supports the E-verify program, we do not believe making participation in the E-Verify program a precondition for temporary employment authorization of extending H-2A workers is a useful means for encouraging participation in the program, and will limit the utility of this regulation.