



January 31, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Brian Pasternak
Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. 68174 (Dec. 1, 2021)

Dear Secretary Walsh and Administrator Pasternak:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments to the Department of Labor's (DOL) Employment and Training Administration (ETA) on its proposed rule to revise the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for workers under the H-2A visa program.¹

¹ Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. 68174 (Dec. 1, 2021). (hereinafter "2021 Proposed Rule").

Advocacy is concerned that DOL has underestimated the economic impacts of this rule and lacks sufficient transparency about the likely compliance costs for small businesses. DOL's certification that the rule will not have a significant economic impact on a substantial number of small entities is improper and lacks an adequate factual basis. Advocacy recommends that DOL prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) that adequately assesses the small business compliance costs from this regulation. Additionally, DOL should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

1) Background

a) The Office of Advocacy

Congress established the Office of Advocacy under 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). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ 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, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to Advocacy's comments on the proposed rule in any explanation or discussion accompanying the final rule's publication in the *Federal Register* unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

b) The Proposed Rule

Small businesses use the vital H-2A visa program to obtain a supply of foreign agricultural guest workers for temporary and seasonal needs due to the shortage of local U.S. workers. Employers seeking H-2A workers must first apply to DOL for a certification that there are not sufficient workers who are able, willing, and qualified to perform services. Employers must also pay an

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ *Id.*

Adverse Effect Wage Rate (AEWR) determined by DOL that will not adversely affect the wages and working conditions of workers in the United States.⁷

Currently, pursuant to the 2010 Final Rule on the H-2A program, the AEWR for each State or region is published annually as a single average hourly gross wage. The wage is set using the field and livestock workers (combined) data from the Farm Labor Survey (FLS), which is conducted by the U.S. Department of Agriculture (USDA) National Agricultural Statistics Service (NASS).⁸ The current methodology produces a single AEWR for all agricultural workers in a State or region, without regard to occupational classification.

A 2019 DOL proposed rule would have adjusted this methodology to focus on occupation-specific AEWRs in each state using the FLS. If the FLS data was not available for certain occupations, the methodology would be based on data reported by the Occupational Employment Statistics (OES survey, now called the Occupational Employment and Wage Statistics/OEWS survey).⁹ The OEWS survey does not represent farms and ranches, but other establishments that support farm activities. In the rulemaking, DOL expressed concern that the methodology in the 2010 rule, which averaged and combined all field and livestock workers, may have an adverse effect on workers in higher paid occupations, such as supervisors of farmworkers and construction laborers. Due to a series of lawsuits and a failed attempt by the USDA to cancel the FLS survey, the 2019 DOL proposed rule was never made effective.¹⁰

The proposed rule creates a bifurcated AEWR methodology for H-2A workers, creating a single AEWR for field and livestock workers based on the FLS survey which combines six occupations in the FLS survey, including farmworkers and agricultural equipment operators.¹¹ The rule also creates higher wage- and occupation-specific AEWRs for other job opportunities not listed in the FLS survey based on the OEWS survey. This includes truck drivers, farm supervisors and managers, construction workers, and many other occupations in contract employment. The proposed rule will also utilize the OEWS survey in the event the FLS cannot report wages in particular areas (such as Alaska or Puerto Rico) and if the FLS database is ever discontinued.¹² Finally, this rule would also require that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupation when those occupations are subject to different AEWRs.¹³

⁷ Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 CFR A, 8 U.S.C. 1118 (a)(1).

⁸ 20 CFR 655.120(b)(1)(i). This is conducted by the USDA's National Agricultural Statistics Service (NASS). The FLS collects data for workers directly hired by U.S. farms and ranches in each of 15 multistate labor regions, and the single-state regions of California, Florida, and Hawaii.

⁹ Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36168 (July 26, 2019) (hereinafter "2019 Proposed Rule").

¹⁰ See 2021 Proposed Rule, page 68177.

¹¹ See 2021 Proposed Rule, page 68193. The AEWR for the field and livestock workers will be based on the FLS survey and includes the following SOC codes: 45-2041-Graders and Sorters; 45-2091-Agricultural Equipment Operators; 45-2092-Farmworkers and Laborers, Crop, Nursery and Greenhouse; 45-2093-Farmworkers, Farm, Ranch, and Aquaculture Animals; 53-7004-Packers and Packagers; 45-2099-Agricultural Workers, All Other.

¹² See 2021 Proposed Rule, page 68180.

¹³ *Id.*, page 68183.

c) Small Business Concerns with the Rule

Small businesses rely on the H-2A visa program to obtain vital agricultural guest workers for American farms, as there is a shortage of U.S. workers to grow our nation's food supply and specialty crops. The H-2A visa program is already burdensome and expensive, as it requires employers to pay transportation, housing, and other costs in addition to wages for its H-2A workers.

Small businesses have told Advocacy that this proposed rule adds to those costs and will shut many small businesses out of the H-2A program. The proposed changes will significantly increase the wages for H-2A workers, add administrative costs by requiring extra petitions for each job category, and force changes to the ways these small businesses manage their workforce. This proposed rule is also unworkable for most small businesses, as they have fewer workers to dedicate to temporary and intermittent job tasks like trucking or construction.

2) The Proposed Rule Will Have a Significant Economic Impact on a Substantial Number of Small Businesses

The Regulatory Flexibility Act (RFA) requires that regulatory agencies prepare an initial regulatory flexibility analysis (IRFA) to accompany every proposed rule unless the agency can certify that a proposed regulation will not have a significant economic impact on a substantial number of small entities.¹⁴ If an agency certifies the rule, it must provide a factual basis for this certification. An agency's certification is subject to judicial review.¹⁵ Given the increases to wages, management, and administrative costs, DOL's certification that the rule will not have a significant economic impact on a substantial number of small entities is improper and lacks an adequate factual basis.

a) DOL has Underestimated the Increases to Wage and Administrative Costs Associated with the New Wages.

In DOL's RFA section, the agency estimates the total annualized wage impacts of the proposed rule is \$4,347, on average.¹⁶ Advocacy is concerned that this significantly underestimates the economic impacts of this rule on small businesses. This rule will impose significant financial burdens on affected small entities, as it adds \$5 to \$11 per hour in wage costs for jobs such as truck driving even when the employees are not engaged in that activity a majority of the time.

DOL has failed to account for thousands of dollars in administrative costs for employers that must file additional petitions for workers in other job classifications. Under H-2A regulations, government fees are calculated per application. DOL charges a \$100 application fee plus \$10 per certified worker for each labor certification, and United States Citizenship and Immigration Services (USCIS) charges \$460 per immigration petition. Under the current H-2A program, an

¹⁴ 5 U.S.C. § 603, 605.

¹⁵ 5 U.S.C. § 611.

¹⁶ See 2021 Proposed Rule, page 68198.

employer would only pay these fees once because all its workers have the same wage under the general field and livestock job classification. Under this proposed rule, an employer would pay these government fees multiple times, once per job classification like field and livestock, truck driving, and construction. In addition, small businesses utilize H-2A agents and attorneys to help them complete these applications at a cost of thousands of dollars per application. DOL's analysis fails to add the costs to manage and categorize their H-2A workforce into discreet job categories, track employee tasks, update their HR software and accounting, and train their workforce to inform them of these changes.

In its current version, the proposed rule creates a bifurcated wage system for H-2A workers. The rule creates a single AEW for field and livestock workers based on the FLS survey, and higher wage- and occupation-specific AEWs for other jobs not listed in the FLS survey based on the OEWS survey such as truck drivers, farm supervisors and managers, and construction workers. DOL's rule requires that employers pay the highest applicable wage if the job opportunity can be classified within more than one occupation when subject to different AEWs. To minimize costs, employers would have to segregate their workforce into job categories and pay some positions the regular FLS AEW, and others a higher AEW based on OEWS wages for other positions like trucking and construction.

For example, the proposed rule will result in wage increases of \$5.35- \$11.76 per hour for the new trucking AEW based on the OEWS database, depending on the state. In Maine, the AEW for trucking would increase 34 percent from \$15.66 to \$21.01, or an extra \$321 per week per worker (for a typical 60-hour work week). In Wyoming, the AEW for trucking would increase 80 percent from \$14.68 to \$26.44, or an extra \$705.60 per week per worker (for a typical 60-hour work week).¹⁷ Small businesses were also concerned that this rule may require them to raise the wages of corresponding U.S. workers or raise the wages of their general workforce.

Advocacy spoke to one H-2A agent who analyzed the impact of this proposed rule on a few of their small business clients, including the impact of the increased wages and administrative costs. In one example, a small farmer in Wisconsin paying eight H-2A workers the current 2022 AEW of \$15.37 would convert two of his workers (or 25 percent) to a higher trucking AEW of \$23.80. In this scenario and in a typical 60-hour work week, the farmer would be paying an additional \$44,393 in compliance costs. In another example, a small farmer in New Mexico paying 32 H-2A workers the current AEW of \$14.79 would convert eight of his workers (or 25 percent) to a higher trucking AEW of \$20.71.¹⁸ In a typical 60-hour work week, this farmer would be paying an additional \$124,235 in fees.

¹⁷ Labor Certification Process for Temporary Employment of Foreign Workers in Agriculture in the United States: Adverse Effect Wage Rates for Non-Range Occupations in 2022, 86 Fed. Reg 71282 (Dec. 15, 2021), also available at: <https://www.govinfo.gov/content/pkg/FR-2021-12-15/pdf/2021-27119.pdf>. This lists the current 2022 AEWs for all the states based on FLS data. Occupational Employment and Wage Statistics, Occupational Employment and Wages, May 2020, SOC 53-3032-Heavy and Tractor-Trailer Truck Drivers, Annual mean wage of heavy and tractor-trailer driver, by state, also at: <https://www.bls.gov/oes/current/oes533032.htm>. This lists the AEWs for the trucking industry under the OEWS, which is the AEW for this industry if this rule is finalized as proposed.

¹⁸ See Note 17.

b) Small Farms Are Concerned that the Rule is Unworkable and Disrupts the Operation of their Farms.

Advocacy is concerned that the bifurcated wage structure in this proposed rule will force farms to change how they manage their workforce and will segregate H-2A workers into independent job positions. For example, a farmer would have to apply for one H-2A worker for field work and another H-2A worker for construction work. This categorization may not be feasible for busy small farms who have fewer employees and less work that can be dedicated to tasks like construction and truck driving. Managers overseeing routine tasks by employees will result in a significant increase in management payroll costs.

One small specialty crop farmer told Advocacy that smaller farmers depend on workers to wear many hats to effectively maintain operations. If forced to segregate drivers into separate job orders, they would become very inefficient workers because driving encompasses a small portion of their job. For profitability, it is vital that every employee contributes 100 percent of their time towards the end product. This farmer stated that an H-2A worker may only drive a truck for five minutes to the field to obtain the crop harvest, and then do other jobs such as harvesting and packaging the crops for market.

Other small farmers told Advocacy that farm work lacks the predictability of an office job. The inherent unpredictability of the agriculture industry requires flexibility in assignments. One small farmer in Idaho and Wyoming with 30 H-2A workers stated that employees' roles and schedules change daily depending on who shows up to work. Advocacy spoke to a small Christmas tree farmer in North Carolina who has approximately 40 H-2A workers. While most of these H-2A workers perform farm work in the nursery and with the crops, these workers occasionally perform some maintenance work such as fixing a fence, changing a tire, or driving a semi-tractor truck to move the trees. Advocacy spoke to a small seed potato farmer in Nebraska who has 44 H-2A workers who perform work as graders and sorters and agricultural equipment operators. These workers periodically fix the machines they operate daily, and often drive over one hour to remote fields, where they work operating other equipment and grading and sorting potato seeds.

The Christmas tree farmer told Advocacy that they cannot find U.S. workers to do these short-term jobs in trucking and construction in their rural county of 10,000 people. Based on this labor shortage, other farm workers are being asked to fill in the gap in short-term and construction trucking needs. The American Trucking Associations estimates that in 2021 the truck driver shortage hit a historic high of just over 80,000 drivers. The figure is the difference between the number of drivers currently in the market and the optimal number of drivers based on freight demand.¹⁹

A farmer who runs a nursery in central Virginia with over 100 H-2A workers stated that the proposed rule would likely create disharmony among workers as they would notice a person who does mostly the same job that they do getting paid more. This is a serious consideration because

¹⁹ Am. Trucking Ass'ns, Inc., *Driver Shortage Update 2021*, (Oct. 25, 2021), https://www.trucking.org/sites/default/files/2021-10/ATA%20Driver%20Shortage%20Report%202021%20Executive%20Summary.FINAL_.pdf

these employers provide the housing for H-2A workers, and they live together and compare paychecks. Additionally, other farmers mentioned that they will likely have to raise the wages of their workers who have similar jobs.

c) Substantially Higher H-2A Wages May Make U.S. Farms Less Competitive.

Small businesses have told Advocacy that, due to the shortage of available domestic workers, the H-2A program is their only option to obtain workers and stay in business. The AEWR was created to protect the wages and working conditions of similarly employed U.S. workers. However, the domestic agricultural workforce the program is intended to protect is extremely limited and not close to the amount of labor demanded by the industry. The number of H-2A positions requested and approved has increased more than fivefold in the past 15 years, from just over 48,000 positions certified in fiscal year 2005 to just over 275,000 in fiscal year 2020.²⁰ The National Council of Agricultural Employers (NCAE) recently surveyed all 50 State Workforce Agencies (SWAs) and requested data on how many domestic referrals were made of the more than 97,000 jobs advertised under the H-2A program during the period of March 1, 2020 and May 15, 2020. Only 337 domestic applicants applied for 97,000 job openings.²¹

The AEWR wages are already increasing at a significantly higher rate than non-agricultural labor, where the federal minimum wage is still \$7.25 per hour. H-2A employers must pay a 2022 Adverse Effect Wage Rate of between \$11.99 and \$17.51 per hour to H-2A workers and those domestic workers in corresponding employment. This rule will significantly increase these wages.²² According to the NCAE, these wages do not account for additional required benefits such as housing, transportation, visa expenses and subsistence, which can total an estimated \$4.00 to \$8.00 per hour.²³

The high wages mandated in the H-2A visa program have contributed to an increase in foreign produce imports, which may only increase because of this rule. According to NCAE, agricultural wages in Mexico average \$1.50 per hour and Canadian agricultural laborers receive between \$9.45 and \$12.52 per hour in U.S. dollars for work in fruits and vegetables.²⁴ These lower foreign labor costs have contributed to a steady increase in the volume of agriculture imports from countries with cheaper labor. According to the USDA, between 1998 and 2020, the volume of fresh vegetable imports increased nearly 200 percent. In 2020, 77 percent of the U.S. fresh vegetable import volume came from Mexico. The conditions in Mexico of significantly cheaper labor and relative proximity to large U.S. markets put small U.S. farms at a significant

²⁰ U.S. Dep't of Agric., Farm Labor, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> (last visited January 25, 2022).

²¹ Telephone interview with Michael Marsh, President and CEO, National Council of Agricultural Employers (NCAE) (Jan. 20, 2022).

²² See Note 17.

²³ See Note 21.

²⁴ *Id.*

disadvantage.²⁵ Advocacy is concerned that the wage increase from this regulation will further imbalance the competitive disadvantage of small U.S. farms in the domestic produce market.

3) DOL Must Analyze Alternatives in an IRFA

The proposed AEW rule will have a significant economic impact on a substantial number of small entities. DOL must present significant alternatives for regulatory relief as part of an IRFA as required by § 603(a) of the RFA. DOL should consider significant alternatives proposed by stakeholders whose comments are published on the proposed rule's public docket.²⁶

Notably, small businesses have recommended that DOL adopt the "primary duty" test to determine which AEW should be paid to H-2A workers when a job opportunity can be classified with one or more occupation and when those occupations are subject to different AEWs. The primary duties test is a provision used to determine whether an employee is considered an exempt and was recently utilized for potential reforms of the H-2A program in the Farm Workforce Modernization Act of 2021.²⁷

Under the primary duty test, employees who spend more than 50 percent of their time performing certain work will generally satisfy the primary duty requirement."²⁸ The term "primary duty" means the principal or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's whole job.²⁹ For the H-2A program, small businesses have commented that their H-2A workers spend most of their day on field and livestock work, and only intermittently do minor jobs like truck driving and construction work. In this situation, field and livestock work would be considered their primary duty and they would be paid the AEW based on the FLS survey.

Conclusion

Small businesses rely on the H-2A visa program to obtain vital agricultural guest workers for American farms, because there is a shortage of local workers to grow our nation's food supply and specialty crops. Advocacy is concerned that DOL has significantly underestimated the economic impacts of this rule and is not transparent about the compliance costs for small businesses. DOL's certification that the rule will not have a significant economic impact on a substantial number of small entities is improper and lacks an adequate factual basis. Advocacy recommends that DOL prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) that adequately assesses the small business compliance costs from this

²⁵ Wilma V. Davis and Gary Lucier, U.S. Dep't of Agric., U.S. Fresh Vegetable Imports From Mexico and Canada Continue To Surge (2021).

²⁶ 5 U.S.C. § 603.

²⁷ H.R.1603, 117th Cong. (2021). "(3) MULTIPLE OCCUPATIONS.—If the primary job duties for the job opportunity described in the petition do not fall within a single occupational classification, the applicable wage rates under subparagraphs (B) and (C) of paragraph (1) for the job opportunity shall be based on the highest such wage rates for all applicable occupational classifications.

²⁸ 29 C.F.R. § 541.700- Primary duty.

²⁹ *Id.*

regulation and considers significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at Janis.Reyes@sba.gov.

Sincerely,

/s/

Major L. Clark, III
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Office of Advocacy
U.S. Small Business Administration

/s/

Janis C. Reyes
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Copy to: Sharon Block, Acting Administrator
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