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Introduction

Chairman Walberg, Ranking Member Woolsey, and Members of the Committee, thank you for the invitation to appear before the Education and Workforce Committee's Subcommittee on Workforce Protections to discuss workforce issues in the Agricultural industry. As you know I will focus on the U.S. Department of Labor's role and administration of the H-2A temporary agricultural guest worker program, a program designed to serve a critical workforce need for agricultural employers. I am Jane Oates, Assistant Secretary for the Employment and Training Administration at the U.S. Department of Labor.

DOL's Role in the H-2A Program

The Immigration and Nationality Act assigns specific responsibilities for the H-2A program to the Secretary of Labor. The Department's primary concerns with regard to its statutory mandate are maintaining a fair and reliable process for employers with a legitimate need for temporary, foreign, agricultural workers and enforcing necessary protections for U.S. and temporary foreign workers.[1] The non-enforcement duties are delegated to the Employment and Training Administration, specifically the Office of Foreign Labor Certification. The Department's Wage and Hour Division has been delegated responsibility for enforcing the terms and conditions of the work contract and worker protections.

Among the responsibilities delegated to the Office of Foreign Labor Certification is the important responsibility of ensuring that U.S. workers are provided first access to temporary agricultural jobs and that U.S. and temporary foreign workers are provided with appropriate worker protections. The U.S. Department of Homeland Security may not approve an H-2A visa petition unless the Department of Labor has certified that there are not sufficient U.S. workers qualified and available to perform the labor requested in the visa petition and that the employment of the temporary foreign worker(s) will not have an adverse effect on the wages and working conditions of similarly employed workers in the U.S. The Department of Labor ensures this important statutory responsibility is met through applying the applicable regulatory standards in the acceptance and processing of employer-filed H-2A applications.

Regulatory History

[1] 75 Fed. Reg. 6884, 6903 (Feb. 12, 2010)

The Immigration Reform and Control Act of 1986 (IRCA) established a separate H-2A program for temporary agricultural guest workers. The first H-2A regulations were issued by the Department in 1987 in accordance with IRCA.[2] The Department's H-2A regulations remained largely unchanged from the 1987 rule until 2008, when the Department issued regulations that significantly revised the program.[3] The 2008 Final Rule among other changes, substituted an attestation-based application process, in which the applicants merely asserted that they have met regulatory requirements, such as having obtained workers' compensation insurance and requested a housing inspection, for the long-standing evidence based program model, in which the applicant actually produces documentation of having met such requirements prior to the Department granting a labor certification. Numerous other substantive changes to the program were made, including a significant reduction in the role that State Workforce Agencies (SWAs) play in the processing of job orders, the mechanism by which employers seek domestic workers through our nation's labor exchange system.

In 2009, the Department undertook an exhaustive review of the policy decisions underpinning the 2008 Final Rule as well as a review of our actual program experience. During this review, the Department focused on access to these jobs by U.S. workers, individual worker protections, and program integrity measures. This review also examined the process for obtaining labor certifications, the method for determining the program's prevailing wage rate which, by statute, must avoid an adverse effect on the wages of similarly employed U.S. workers, and the level of protections afforded to both temporary foreign workers and domestic agricultural workers.

The Department determined that the 2008 Final Rule did not adequately satisfy its statutory mandate to protect U.S. workers and the regulation failed to allow for sufficient, robust, and meaningful enforcement of the terms of the approved labor certification and other regulatory requirements. In September 2009, the Department published a Notice of Proposed Rulemaking designed to address the findings from its review.[4] Nearly 7,000 interested parties submitted comments. The Department's H-2A rulemaking process concluded with the publication of a Final Rule on February 12, 2010, which had an effective date of March 15, 2010.[5]

2010 Final Rule

The 2010 Final Rule, in many ways, reflects a return to processes and procedures that were in place between 1987 and 2008. Regulatory improvements include enhanced mechanisms for enforcement of the worker protection provisions that are required by the H-2A program to properly carry out the Department's statutory obligation to protect U.S. workers from any adverse effect due to the presence of temporary foreign workers in U.S. labor markets. Among other provisions, the 2010 Final Rule requires employers to document compliance with the program's prerequisites for bringing H-2A workers into the country, rather than merely attesting to compliance. This return to the requirement that was in place before the 2008 Final Rule was necessary because, even with employers making assurances on their applications that they would comply with specific provisions, the Department continued to see high rates of violations of

[2] 52 Fed. Reg. 20496 (June 1, 1987)
[3] 73 Fed. Reg. 77110 (Dec. 18, 2008)
[4] 74 Fed. Reg. 45906 (Sept. 4, 2009)
[5] 75 Fed. Reg. 6884 (Feb. 12, 2010)

fundamental requirements, such as meeting housing safety and health standards. The 2010 Final Rule also returns to the long-established use of the USDA Farm Labor Survey as the basis for determining the program's Adverse Effect Wage Rate or AEWR. The employer must pay H-2A workers and domestic workers performing the same work the highest of the AEWR, the agreed-upon collective bargaining wage, the Federal or State minimum wage or the prevailing hourly wage or piece rate. In addition, the 2010 Final Rule reinstates the requirement that the SWA inspect and approve employer-provided housing before the Department issues an H-2A labor certification, extends the H-2A program benefits to workers in corresponding employment to ensure that all similarly employed workers are not paid a lower wage and fewer benefits than a temporary foreign worker (thereby creating an adverse effect that the statute prohibits), and strengthens the Department's revocation and debarment authorities.

The Department believes that the enforcement provisions in the 2010 Final Rule achieve a reasonable balance between meeting the seasonal workforce needs of growers while simultaneously protecting the rights of agricultural workers, including U.S. workers hired as part of the H-2A process, H-2A temporary foreign workers, and workers already employed in corresponding employment with that employer. This level of enforcement is necessary to protect workers from potential abuse by employers who fail to meet the requirements of the H-2A program and to ensure that law-abiding employers with a legitimate need for temporary workers have a level playing field.[6]

The 2010 Final Rule's enhanced enforcement provisions allow the Department to sanction those employers who fail to meet their legal obligations to recruit and hire U.S. workers or fail to offer required wages and benefits to workers. Enhanced civil money penalties do not impact those employers who play by the rules. These penalties impact violators who disregard their obligations, and they provide the Department with an effective tool to discourage potential abuse of the program and to deter violations, discrimination, and interference with investigations. The increase in monetary penalties demonstrates the Department's commitment to strengthening the necessary enforcement of a law that protects workers who are unlikely to complain to government agencies about violations of their rights under the program.[7]

In addition to stronger mechanisms for enforcement of the requirements of the H-2A program, the 2010 Final Rule also strengthened certain worker protections to ensure that the program's underlying statutory requirement is being met – that the employment of the temporary foreign worker in such labor or services does not adversely affect the wages and working conditions of workers who are similarly employed in the U.S. These protections include clarifying the rules to ensure employers do not pass on fees associated with recruitment to the workers being recruited, recovering back wages in the event a U.S. worker is adversely affected by an improper layoff or displacement, reinstating U.S. workers who are displaced by a temporary foreign worker in violation of the program's requirements, and ensuring that corresponding workers who are employed by an H-2A employer performing the same work as the H-2A workers are paid at least the H-2A required wage rate for that work.

[6] 75 Fed. Reg. at 6940 (Feb. 12, 2010)
[7] 74 Fed. Reg. at 45926 (Sept. 4, 2009)

The Department takes seriously the need to ensure that job duties for agricultural occupations in H-2A are not presented in such a way as to inhibit the recruitment of U.S. workers. The standard applicable to the H-2A program since its inception in 1987 requires the Department to compare the jobs in H-2A applications to those open with employers not seeking H-2A workers. If the employers of non-H-2A workers do not commonly seek those qualifications or require those special skills sought by an H-2A applicant, the application will be questioned. Employers seeking solely to eliminate potential U.S. workers will be denied the opportunity to hire temporary foreign workers, in keeping with the Department's statutory obligation to ensure that U.S. workers receive preference for these jobs.

The 2010 Final Rule also created an online registry of H-2A jobs to make it easier for U.S. workers to access information about and apply for temporary agricultural jobs. This online registry became available in July, 2010 and offers a range of customizable searches, giving users the ability to view, print, or download information about agricultural jobs easily and without the need to file a request under the Freedom of Information Act. Since the online job registry became available in July, 2010 over 5,300 job orders requesting approximately 90,500 agricultural workers have been posted, leading to substantially greater access for U.S. workers to these available jobs.

Outreach and Education

Despite the similarity of the 2010 Final Rule to the 1987 rule, the Department planned and implemented extensive stakeholder meetings and briefings designed to familiarize program users and others with the regulatory changes. For example, the Department undertook a number of steps to educate the employer community about the H-2A application process and program requirements. Well-publicized public briefings were held in San Diego, California; Dallas, Texas; and Raleigh, North Carolina between February 2010 and March 2010, during the period between the Final Rule's publication date and its effective date. Almost 200 parties representing large numbers of growers and agricultural associations attended these briefings.

The Department also conducted a national webinar[8] for program participants that was publicized widely, including in the Federal Register.[9] Weekly consultations were held with the SWAs to provide guidance on the implementation of their responsibilities in the recruitment of U.S. workers and these consultations continue today. The Department established a public e-mail box dedicated to receiving questions related to the Final Rule. Responses to some of these inquiries have been posted as Frequently Asked Questions (FAQs) to make answers to commonly-asked questions and clarifications easily accessible to all stakeholders via the OFLC website.[10] Future plans include the publication of a user's manual aimed at assisting smaller employers understand the legal obligations of the program. The Department also continues to meet with different groups and constituencies to explain the H-2A program's requirements and answer questions.

[8] Although the webinar is no longer available online, a PowerPoint briefing for stakeholders is available on the Office of Foreign Labor Certification's website at: http://www.foreignlaborcert.doleta.gov/h2a_briefing_materials.cfm.
[9] 75 Fed. Reg. 13784 (Mar. 23, 2010)
[10] www.foreignlaborcert.doleta.gov

Program Implementation

The H-2A program continues to be the source of legal temporary foreign workers for our nation's agricultural community. Thus far in FY 2011, more than 4,788 H-2A agricultural labor applications have been processed with 4,443 (93 percent) of applications certified for approximately 74,000 workers. Each year, more than 70 percent of all H-2A applications are filed during the peak filing period from December through April. Despite the tight processing deadline of 15 calendar days and a large filing volume, 67 percent of all H-2A applications in FY 2011 have been processed timely.

Since the implementation of the 2010 Final Rule, the Department has been focused on ensuring that the program is meeting the needs of both U.S. workers and employers. In order to ensure that the H-2A program is efficient and effective for employers with a legitimate need for temporary foreign workers, the Department continues to provide employer assistance and to implement program improvements. For example, the current regulations require the Department to evaluate each application on a case-by-case basis to determine if the application meets regulatory requirements. In the event that deficiencies are found, the employer is provided with an opportunity to make the corrections necessary to permit the application to be accepted for further processing. Once an employer has corrected the deficiencies, the application is accepted for processing and the employer is provided instructions for completing the application process by undertaking the required recruitment and providing required documents. Through this process, the Department is guiding employers as they become familiar with the application process and identifying for employers the documents and information necessary to enable the Department to issue a final determination.

Recognizing that the program's appellate process could create delays and uncertainty around processing timeframes, the Department designed a more flexible process and determined that where employers have not originally timely submitted the required documents, such as recruitment reports and proof of workers' compensation insurance, we have added some small amount of additional time for the receipt of these documents. This allows employers seeking certification additional time to comply with program requirements and receive a certification rather than a denial and subsequent appeal and experience time delays in getting their H-2A workers. The Department has already seen an increase in the ability of employers to comply within the revised time frame and this trend continues.

In certain instances, at the end of the case review, the Department will issue partial, rather than full, labor certifications. Since the implementation of the new Final Rule, the most common reasons for partial certification include issues such as insufficient housing capacity for the full number of workers requested, hiring commitments made to U.S. workers, and the apparent unlawful rejection of U.S. worker applicants. The most common reason for denials has been the employer's failure to provide the documentation required to issue a labor certification, even with the additional time permitted, such as proof of workers' compensation, which is a mandatory statutory requirement. Another common reason for denial is the employer's failure to provide appropriate housing that meets the Department's standards. Each employer must provide a

recruitment report, evidence of workers' compensation, and compliant housing in order to receive certification.

Recent Program Developments

The Department also notes that it has initiated a series of administrative improvements to the H-2A program that it hopes will improve the program's transparency and customer responsiveness. Some of these improvements include a dedicated e-mail box at the Chicago National Processing Center to receive questions from growers about the H-2A program. A set of "filing tips" based upon our actual program experience, which provides reminders of actions to help employers comply with the program's requirements. These "filing tips" are already available on the Office of Foreign Labor Certification's web site. Additionally we intend to design and develop a new web-based filing system for the H-2A program to improve access to our services and allow growers to check an application's status electronically.

The Office of Foreign Labor Certification also intends to post State Workforce Agency-conducted survey results on key issues, such as the acceptability of experience requirements and other prevailing practices, so growers and other individuals interested in the H-2A program can review this information at any time. This is particularly important since State Workforce Agency prevailing practice surveys and determinations of normal and accepted job requirements are used to determine the acceptability of wages, benefits and working conditions on an employer's H-2A application. Unfortunately we have recently found that many users of the H-2A program are not fully familiar with how we make these determinations and that the source of data comes from the workforce agencies in their own state.

Conclusion

The H-2A program serves the American people by helping those employers who have a legitimate need for temporary, foreign workers. The H-2A program as you know though is only one component of the Department of Labor's efforts for rural America. I would like to encourage the Agriculture industry as well as this Committee to discuss with the Department how we can increase domestic worker participation in agriculture industry to help reduce unemployment levels in rural America.

The Department will continue to focus on maintaining a fair and reliable H-2A process while enforcing necessary protections for both U.S. and nonimmigrant workers. To do so is good not only for workers but also for law-abiding employers. The Department is confident that as program users become more familiar with requirements, overall program compliance will continue to increase and any delays attributed to failure to follow the program's rules will continue to decrease.

Mr. Chairman and Members of the Committee, thank you again for the opportunity to discuss the U.S. Department of Labor's role in addressing workforce issues faced by the agricultural industry. I look forward to answering your questions.