



April 30, 2019

Honorable R. Alexander Acosta
Secretary
U. S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

In re: Petition to Amend the Regulatory Methodology for Determining Adverse Effect in the H-2A Temporary Agricultural Worker Program

Dear Secretary Acosta:

The National Council of Agricultural Employers (NCAE) is the national trade association focusing exclusively on agricultural labor issues from the employer's viewpoint.

Pursuant to 5 U.S. Code § 553 (e), NCAE respectfully petitions the Secretary to amend the regulatory methodology used in determining whether an alternative wage other than a market-based wage should be required in the H-2A Temporary Agricultural Worker Program. We ask the Secretary to annually measure and publish specific findings as to whether the admission of H-2A workers the previous year had an adverse effect on domestic workers and to demonstrate how the proposed remediation, whether wages and or training, etc., would protect from that effect. We ask the Secretary to determine what wage below which U. S. workers would be adversely affected by employment of H-2A Temporary Agricultural Workers.

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The methodology presently adopted bypasses the statutory requirements for a finding of adverse effect and is thus contrary to law.

The impact of the Department's failure to measure actual effect and to then analyze the best method to remediate it has had serious consequences that threaten the continued viability of the program. Contrary to an adverse effect, requiring a manufactured wage rate only distorts the economic reality of agricultural wages and further disconnects them from the market. The arithmetic is simple.

In fact, preliminary analysis applied to the 2019 AEWR discloses condemning and obvious results.

The AEWR is increasing significantly faster than nonagricultural wages. Whereas the Federal Minimum Wage is \$7.25, every AEWR manufactured for the 2019 calendar year using the 2018 Farm Labor Survey is at least \$11.00. The highest mandatory minimum AEWR is \$15.03, astoundingly more than twice the federal minimum wage! It is highly unlikely therefore that admission of H-2A workers is having an adverse effect on U. S. workers similarly employed but is, in fact, a mechanism for unsustainable wage increases beyond normal market conditions.

For the period 2015 – 2018, the Employment Cost Index (ECI) increased by an average of 2.53%. Defying logic and economic reality, the AEWR increased an average of 4.21% over the same period. This suggests that the increase in agricultural wages contrived by this scheme massively outpaced the wage increases in the balance of the economy. This data suggests that an annual measure would identify only a beneficial effect and thus no AEWR would be necessary for the current year.

And, if we look at the cumulative change in the engineered AEWR for the same period (change in Year 1 + change in Year 2 + change in Year 3), the cumulative increases in six of the AEWR regions were between 14.27% to 18.44%. The cumulative increase in the ECI for the same period was only 7.79%. Again, this result defies the economic reality of the agricultural labor market or any other labor market.

The exploding rate of growth in the AEWR is not a new phenomenon. Since 2010, the AEWR has grown at a rate of 3.30% per year. The ECI has only grown at a rate of 2.08% per year and the Consumer Price Index (CPI) has only mustered growth of 1.78% per year. Unfortunately, for

employers required to pay the mandatory AEW, the echo effect from the flawed use of the AEW methodology in one year is only amplified by its use in each subsequent year.

Regional AEWs fluctuate substantially from year to year and are more than twice as volatile as the national AEW. How can a farm or ranch family who negotiates a forward contracted price with their buyer tied to a CPI change of 1.78%, withstand a year over year increase in their wage input costs of 23%?

A majority of farm laborers earn less than the AEW. Farm labor wages produced under the existing process are skewed by bonuses paid for exemplary performance as well as holiday bonuses. This skewing assures that workers who perform the bare minimum requirements of the task, share in the reward of those who excel.

By improperly including these types of bonus payments in the artificial calculation, the AEW exceeds the median wage by an estimated 8.1% in California, 9.1% in the Pacific Northwest and an astonishing 20% in the Appalachian I region. This is evidence of another arithmetic calamity created by the present bypassing of statutory requirements.

A mandate to raise wages to at least last year's mean causes a wage spiral. If the average wage from one year is used as the mandatory minimum wage for the subsequent year, a wage spiral such as we observe is likely to occur. The mere operation of bypassing the statutory requirements leads to this unsustainable result. A mandate that wages below the prior year's average must be raised will cause wages to rise rapidly and so exceed the market that collapse of the farm business becomes more likely, eliminating the jobs upon which the survey is based.

The only way to counter this unsustainable wage spiral created by bypassing of the statutory requirements is to pay domestic workers less than H-2A workers which is a less than desirable outcome for the domestic workers. Arguably, this would be an adverse effect on domestic workers created only by the way the AEW is calculated and for whom the AEW is imposed to protect.

AEW averages pay across different occupation titles. The AEW is calculated by averaging wages across several occupations but is supposed to be the annual average of the "Field and Livestock Wage". However, this also includes wages for:

- Graders and Sorters
- Agricultural Equipment Operators
- Farmworkers and Laborers, Crop, Nursery and Greenhouse
- Farmworkers, Farm, Ranch and Aquacultural Animals
- Packers and Packagers, Hand
- Agricultural Workers, All Other

Wages differ across crop, livestock, and equipment operator occupations. The USDA reports finding very little difference between these occupations in the Farm Labor Survey (FLS).

However, the Bureau of Labor Statistics (BLS) finds that wages for workers in Farmworkers, Farm, Ranch and Aquacultural Animals jobs are higher than for workers in Farmworkers and Laborers, Crop, Nursery and Greenhouse jobs. The BLS also finds that wages for workers in Agricultural Equipment Operator jobs are higher than for workers in Farmworkers and Laborers, Crop, Nursery and Greenhouse jobs.

This unintended consequence would be avoided by fulfilling the statutory requirements.

This analysis is what the statute requires. It is intended to protect against wage depression, not to guarantee wage inflation in every year. Only an annual analysis of actual effect can meet the requirement of the statute. For that reason, NCAE respectfully petitions the Secretary to amend the regulatory methodology used in determining whether an adverse effect wage rate should be required. We look forward to working with you on this critical issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Marsh", with a stylized flourish at the end.

Michael Marsh
President and CEO