



August 4, 2020

Honorable Eugene Scalia
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 Scalia:

The National Council of Agricultural Employers (NCAE) is the national trade association focusing exclusively on agricultural labor issues from the employer's viewpoint. NCAE has approximately 300 members nationwide and represents the majority of employers participating in the H-2A temporary agricultural worker program.

Pursuant to 5 U.S.C. § 553(e), NCAE respectfully petitions the Secretary of Labor to amend the regulatory methodology used in setting wages for the H-2A temporary agricultural worker program, to comply with the statutory requirements of 8 U.S.C. § 1188(a)(1)(B). Specifically, the statute requires the Secretary to certify whether the employment of aliens in agricultural labor will "adversely affect the wages and working conditions of workers in the United States similarly employed." The current and proposed regulations do not include this Congressionally mandated determination, instead assuming that there is "adverse effect" without actually finding it, thus bypassing the statutory requirements and contrary to law.

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We ask the Secretary to measure annually and publish specific findings as to whether the admission of H-2A workers the previous year had an adverse effect on the wages and working conditions of 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.

NCAE has previously petitioned the Secretary on this issue receiving assurance it would be addressed in rulemaking. It was not and, consequently, we are again petitioning for relief.

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, analysis applied to the 2020 AEWR discloses condemning and obvious results.

The AEWR is increasing significantly more rapidly than nonagricultural wages. Whereas the Federal Minimum Wage is \$7.25, every AEWR manufactured for the 2020 calendar year using the 2019 Farm Labor Survey is at least \$11.71. The highest mandatory minimum AEWR is \$15.83, astoundingly more than twice the federal minimum wage! This is during a period of sustained growth in the usage of the H-2A program of more than 10% annually. 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 – 2019, the Employment Cost Index (ECI) increased by an average of 2.54%. Defying logic and economic reality, the AEWR increased an average of 4.48% over the same period. This suggests that the increase in agricultural wages contrived by this scheme massively outpaced wage increases in the balance of the economy. This data suggests that an annual measure would identify only a beneficial effect from H-2A employment on the employment of domestic workers 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 19.80% to 26.53%. The cumulative increase in the ECI for the same

period was only 10.54%. Again, this result defies the economic reality of the agricultural labor market or any other labor market.

The exploding rate of growth in the AEW is not a new phenomenon. From FY2010 through FY2019, participation in the H-2A program increased by 326%. During that same period, the AEW has grown at a rate of 3.55% per year. The ECI has only grown at a rate of 2.13% 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. This situation is further exacerbated by the fact that surveys including H-2A wages are not excluded from the Farm Labor Surveys compiled by the USDA that the Department of Labor utilizes to establish AEWs.

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 up to 23%?

Complicating this matter is that the Notice of Proposed Rulemaking issued by the Department a year ago for which comments were submitted in September 2019, did not address this critical issue. The final rule due from this rulemaking has yet to be issued.

An analysis of actual impact and a finding of adverse impact is precisely what the statute requires. The process is intended to protect against wage depression, not to guarantee wage inflation. Only an annual analysis of the existence 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,

Michael Marsh

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President and CEO

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