



September 24, 2019

BY ELECTRONIC SUBMISSION

Adele Gagliardi, Administrator
Office of Policy Development and Research, Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5641
Washington, DC 20210

*In re: DOL Docket No. ETA-2019-0007
RIN 1205-AB89
Temporary Agricultural Employment of H-2A Nonimmigrants in the United States
[Federal Register 84:144, p.36168ff]*

Dear Administrator Gagliardi:

This letter presents the comments of the National Council of Agricultural Employers on the above referenced proposed rule.

The National Council of Agricultural Employers (NCAE) is the national association focusing on agricultural labor issues from the employer's viewpoint. Established in 1964, NCAE members are farmers and ranchers involved in labor intensive agricultural production, associations, agents, farm labor contractors and others whose business interests revolve around agricultural employer issues. NCAE advocates legislation, regulation, and federal policies to keep agricultural employers ethically and economically sustainable in the global marketplace.

NCAE's members employ and pay approximately 80 percent of all agricultural labor payroll in the United States. The vast majority of employers utilizing the H-2A temporary agricultural

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worker program are members of the NCAE or NCAE member associations, and the NCAE and its members have extensive expertise in the operational and regulatory aspects of the program. NCAE has a standing H-2A Committee which meets weekly to address issues and concerns regarding the H-2A program. NCAE has a long history of advocating for H-2A employers and improvement in the H-2A program as addressing the needs of agricultural employers for legal labor.

On May 24, 2018, the Cabinet Secretaries of Labor, Homeland Security, State and Agriculture issued a joint press release that stated in part:

“... our Departments are working in coordination to propose streamlining, simplifying, and improving the H-2A temporary agricultural visa program – reducing cumbersome bureaucracy and ensuring adequate protections for U.S. workers.

The Trump Administration is committed to modernizing the H-2A visa program rules in a way that is responsive to stakeholder concerns and that deepens our confidence in the program as a source of legal and verified labor for agriculture – while also reinforcing the program’s strong employment and wage protections for the American workforce.”

The current proposed rule is the Department of Labor’s response to the joint press release. We greatly appreciate the Secretary’s sincere effort to streamline its H-2A regulations. We appreciate the efforts of the Department to effectuate the announced directive in a meaningful way, and request that the modifications suggested below be given serious consideration in further improving the program.

General Comment

The US employed 2.4 million hired agricultural workers on America’s farms and ranches in 2017, according to the USDA’s Census of Agriculture. Too few domestic workers applied for the available positions and, given the relatively low unemployment rate, H-2A workers were the lynchpin protecting American agricultural employers from having crops rot in the fields.

The H-2A program is a critical part of the nation’s national security profile as a nation that is unable to feed itself is at considerable risk.

US farmers and ranchers face challenging times in the global marketplace. The cost of agricultural production in various locations outside our borders hinders US competitiveness.

Consequently, today more than half of the fresh fruit and a third of the fresh vegetables consumed in America, are produced somewhere else. Even though American agriculture is nonpareil, the lack of a domestic agricultural workforce willing to plant, harvest and cultivate

crops for the domestic market has forced American farmers and ranchers to augment their labor needs with temporary foreign workers under the H-2A program. Of course, relatively low US unemployment likewise spurs the shortage of domestic workers interested in short term seasonal labor.

The H-2A program, like many government programs, is not the simplest to navigate. Some of the regulations and, the costs associated with them, deter or prevent farmers and ranchers from participating. Thankfully, some of the streamlining efforts undertaken by the Department of Labor in this and other recent rulemakings, should relieve some of the impediments within the program.

Farmers and ranchers will often point to the added costs participation in the program imposes on their operations. Agricultural operators in Canada and Mexico (the sources of much of America's imported food) face much lower costs for agricultural labor than we do in our swath of North America. For instance, agricultural wages in Mexico range from \$7 to \$15 per day. Following conversion to US dollars, Canadian ag laborers receive between \$8.47 and \$11.36 per hour for work in fruits and vegetables.

Comparatively, US employers must pay a 2019 Adverse Effect Wage Rate of between \$11.13 and \$15.03 per hour to H-2A workers and those domestic workers in corresponding employment. And, those US wages do not account for an estimated \$3.00 to \$6.00 per hour in additional program costs such as housing, transportation, visa expenses and subsistence.

Specific Comments

The following are the specific comments of the NCAE on the provisions of the proposed rule, set forth in the order in which they are presented in the proposed rule. We have no specific comments on provisions not addressed below.

20 CFR § 655.102 – Transition procedures.

NCAE supports the elimination of “informal special procedures”. *NCAE* also supports the provision of procedures for handling applications for animal shearing, beekeeping, custom combining and reforestation under H-2A.

However, *NCAE supports* retention by the Secretary of the ability to develop “formal special procedures”, should a situation require.

20 CFR § 655.103 (b) – Overview of this subpart and definition of terms. Definitions.

Area of intended employment. The Secretary proposes a minor amendment to replace “place of the job opportunity” and “worksite” with “place(s) of employment” consistent with the proposed inclusion and definition of “place(s) of employment” in this section. The proposal would also

allow the Certifying Officer to continue using the term “area of intended employment” to assess whether each place of employment is within normal commuting distance from the first place of employment or, if designated, the centralized “pick-up” point to every other place of employment identified in the Application and the job order.

The Secretary also invites comments on whether it should further revise the definition of area of intended employment and possible use of objective factors in making determinations regarding the definition.

The *NCAE* is concerned regarding the scope of the proposed definition of “place of employment.” We believe the term is far too broad and untenable in practice, particularly for employers in industries that require travel or work to be performed on an incidental basis at locations not known to the employer in advance.

For example, truck drivers making deliveries of crops/commodities to storage or market, or nursery workers installing the nursery’s own horticultural products on private or public property.

The Board of Alien Labor Certification Appeals (BALCA) has addressed this issue on numerous occasions, holding that such locations are not “worksites” for purposes of the area of intended employment analysis. The NCAE concurs with and supports that conclusion.

In several cases, BALCA adopted and applied the H-1B definition of “place of employment,” which, under certain conditions, excludes locations where work is performed for short durations. See 20 CFR 655.715. In our opinion, this is a reasonable and helpful framework.

We therefore believe BALCA case precedent should be formally codified and, the *NCAE* recommends the Department adopt the same or similar framework into the H-2A regulations in order to provide clarity and certainty to affected H-2A employers.

The definition of area of intended employment continues to create difficulty for agricultural employers. The use of Metropolitan Statistical Areas (MSA) and the commute times within those areas has little to do with how agriculture operates and how agricultural workers get to those jobs. It should be noted that there is a requirement in the regulation that employers provide transportation to the worksites from either the housing in which the workers reside or the designated pick-up point, so the commute time for H-2A domestic corresponding workers is from their home to the housing or pick-up point.

Unlike other industries, agricultural workers have traditionally been transported by the employer to wherever the work is available, not limited by MSA commute times that can vary widely depending on traffic patterns and other variables. Further, as each MSA will have widely varying commute times, a Farm Labor Contractor (FLC) will not be able to contract with a farmer with any degree of certainty that the contracted farm will be within an arbitrary commute time for that specific MSA.

The preamble to the rule notes that the Area of Intended Employment is “an essential component of the labor market test” and necessary to determine the availability of US workers for the job. However, as transportation to the worksite is required of the employer, the worksite has no bearing on the availability of the US worker nor their commute time since they will have the opportunity to be transported to the worksite from the housing or pick-up point. Therefore, the housing or pick-up point, rather than the worksite, is the determining factor of the Area of Intended Employment’s labor market test.

As the worksite has no bearing on recruitment of domestic workers and their commute times, the only issue is the Department’s concern for compliance monitoring. Understandably, there is a need to have some control over the geographic reach of single applications for FLCs. However, a simpler and more easily understood restriction of the Area of Intended Employment could be described as commute time that is normal and common but a minimum of 2 hours from the housing or designated pick-up point. This would prevent any misunderstanding of whether a specific farm will fit an MSA’s commute time and better conform to the realities of agricultural employment.

The Secretary is also proposing a significant change to the application of Area of Intended Employment. The proposed rule states that Area of Intended Employment applies not only to Farm Labor Contractors but also to fixed site growers. That has never been the case.

It is understandable that the Secretary would apply Area of Intended Employment to Farm Labor Contractors as their agricultural businesses operate very differently from that of a fixed site grower. An FLC is likely to be servicing several different fixed site growers in many different locations and the Secretary wishes to monitor compliance in those cases. However, while a fixed site grower may have multiple locations, the compliance monitoring issue does not apply since the Secretary’s team will go to a known location to perform its monitoring process. This significant change should be removed, and the Area of Intended Employment should remain applicable only to Farm Labor Contractors.

Corresponding employment. The proposed rule contains no change from current law regarding corresponding employment. The NCAE believes that not all work performed on a farm or ranch is corresponding employment.

The NCAE recommends that the Secretary develop a *de minimis* exception from the finding that a worker is in corresponding employment such that in order to find that someone is in corresponding employment, the worker must be doing essentially the same job on a full-time basis.

Furthermore, NCAE members have expressed that the imposition of findings of corresponding employment on high school students undermines the internship and apprenticeship programs of DOL ETA. Indeed, findings of corresponding employment can affect opportunities for high

school students to get jobs on a farm. Anecdotally, NCAE members have had to turn away high school students seeking farm work because it might affect their ability to use H-2A workers. High school students typically cannot complete the season under the contract terms as they must return to school. Although unintended, this clearly impacts the students' ability to get experience on the farm.

First date of need and period of employment. The NCAE supports the Secretary's proposal to define the term "first date of need" as the first date on which the employer anticipates requiring the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification. This is the date that appears on the employer's job order and Application for Temporary Employment Certification. Further, we understand that by including the term "anticipated", the Secretary's proposed definition would provide a limited degree of flexibility for the actual start date for some or all of the temporary workers hired, which may vary due to such factors as travel delays or crop conditions at the time the work is to begin.

Under this proposed definition and subject to certain provisos, the employer's actual start date of work may occur within 14 calendar days after the anticipated first date of need listed on the temporary agricultural labor certification. This added flexibility is welcomed and should result in less economic waste.

H-2A labor contractor. The NCAE notes that the Department alludes to the farm labor contractor (FLC) registration requirement under MSPA but does not restate the applicable exemptions. We believe the absence of such exemptions has resulted in the Department erroneously applying the FLC registration requirement to itinerant beekeepers performing pollination services.

Beekeepers are agricultural employers and are therefore expressly exempt from FLC registration by statute. Per MPSA regulations, the agricultural exemption applies "even if the workers [the employers] obtain are utilized by other persons or on the premises of another." See 29 CFR 500.1(d).

The NCAE urges the Secretary to conform the regulation.

Joint employment. The Secretary proposes a specific joint-employment test that tracks current WHD rulemaking and common-law agency definitions. Further the Secretary specifically states that the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Worker Protection Act definitions of joint employment "neither apply nor are relevant" to determining H-2A joint employment.

The NCAE supports the proposed definition.

20 CFR § 655.103 (c) – Definition of agricultural labor or services.

The *NCAE supports* the proposal to add pine straw activities and reforestation activities to the definition of agricultural labor or services. However, we note that reforestation has special needs and challenges that need to be addressed for the H-2A program to work for these employers. Unlike agriculture, reforestation work does not return to the same fields year after year but instead follows timber harvest across a wide and often remote area. This makes it difficult and, in many cases, impossible to provide previously inspected and compliant employer provided housing as these workers move from site to site. We encourage the Secretary to work with reforestation stakeholders on possible solutions to these concerns before finalizing a rule incorporating these workers into the H-2A program.

The NCAE also believes that dairy, and all other year-round agricultural employment, such as pork, beef, mushrooms, poultry, greenhouse, etc., should be determined to be temporary as opposed to seasonal. Agriculture, and the food it produces to feed America, knows few seasons.

The NCAE's support for these recommendations entails concern regarding the capacity of the Departments of Labor and State to process additional applications. Both Departments should be adequately funded to take on any additional program burden created by these additions. NCAE has worked and will continue to work to ensure that the necessary funds are appropriated to the Departments to fully implement the critical components of the H-2A program.

Further, the *NCAE recommends* that the definition of agricultural labor or services should explicitly include the trucking of an agricultural commodity from the field to its processing facility, regardless of whether that activity is performed by a farmer, a farm employee, or the employee of a farm labor contractor (FLC) employed by the farmer, or on a farm, for this purpose. Anything a farmer can do, the FLC can do, as the FLC steps into the shoes of the farmer without regard to whether the service being provided is on or off the field.

Harvest of an agricultural crop is not completed with the picking of fruit from the tree nor cutting of the cane in the field. The crop must be transported from the field to the packing shed, the mill, the cotton gin or the grain elevator, etc., for the crop to be prepared for market.

NCAE also encourages the Secretary to take note of the continued evolution of today's agriculture. The H-2A program must evolve in tandem as well. Therefore, the work performed by a FLC equates to the work performed by the farmer and should specifically clarify that the hauling of a commodity to its first place of packing or processing is connected inextricably to the harvest of that commodity.

The *NCAE further recommends* the Secretary amend the definition of agricultural labor to allow for the packing of the commodity by employees of a FLC even if the operator of the farm produced less than one-half of the commodity with respect to which the packing activity is performed.

NCAE recommends the definition of agricultural labor or services be amended to read as follows:

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Definition of agricultural labor or services. For the purposes of this subpart, agricultural labor or services pursuant to 8 USC 1101 (a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in Section 3121 (g) of the Internal Revenue Code of 1986 at 26 USC 3121 (g); agriculture as broadly defined and applied in Section 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 USC 203(f); the pressing of apples for cider on a farm; logging employment; the transportation of any agricultural or horticultural product in its unmanufactured state by any person from the farm to a storage facility, to market, or to any place of handling, planting, drying, packing, packaging, processing, freezing, or grading such as a packing house, a processing establishment, a gin, a seed conditioning facility, a mill or a grain elevator; and the handling, planting, drying, packing, packaging, processing, freezing or grading by any person of any agricultural or horticultural commodity in its unmanufactured state. The provisions of this paragraph are not intended to reduce the scope of agricultural labor or services as defined under any statutory definition. An occupation included in this paragraph and either statutory definition is agricultural labor or services, notwithstanding an exclusion of that occupation from either of the other statutory definitions.

20 CFR § 103 (d) – Definition of a temporary or seasonal nature.

The proposed rule invites comments on whether the Department of Labor (DOL) or the Department of Homeland Security (DHS) determine whether a job is “temporary” or “seasonal”.

The *NCAE recommends* the DOL be the single agency responsible for adjudication of whether a job is temporary or seasonal. While lacking specific subject matter knowledge on agriculture that might be found in the Department of Agriculture, the DOL is very familiar with the workings of the H-2A program.

Users of the program also recognize that whereas they may not always agree with the determinations made by the DOL, the Department will respond to inquiries or problems navigating the program’s processes. The same cannot be said for the responsiveness of DHS. Labor decisions are often very time sensitive and as such, a decision in the negative allows for mitigation and alternative solutions to be sought, while lack of any response creates insecurity and loss of confidence in the process.

20 CFR 655.120 (b) – Offered wage rate. *AEWR Determinations.*

Regarding the determination of the Adverse Effect Wage Rate (AEWR), the proposed rule would recommend disaggregating data by occupation groups in surveys using the existing USDA Farm Labor Survey (FLS) as the primary data source. This data would be backed up by Bureau of Labor Statistics (BLS) data where necessary and use nationwide data where regional level data is not available.

As mentioned in the NCAE's General Comments, one of the most significant impediments to ensuring a stable domestic supply of US produced fruits and vegetables is the relative cost of production in the US versus our export-oriented neighbors. The biggest driver of this noncompetitive cost of production is the wage rate that US employers pay for farm labor. US minimums mandated by the 2019 AEWR range between \$11.13 and \$15.03 per hour.

Unfortunately, part of the damage to American farmers' and ranchers' competitive profile is regulatorily self-inflicted.

Section 218 (a)(1)(B) of the Immigration and Naturalization Act of 1986 (INA), 8 USC 1188 (a)(1)(B) provides that an H-2A worker is only admissible if the Secretary determines that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."

The Department attempts to meet this requirement, in part, by requiring an employer to offer a wage that is the highest of the adverse effect wage rate (AEWR), the prevailing wage, the agreed upon collective bargaining wage, the Federal minimum wage, or the State minimum wage.

Typically, the AEWR is the highest of these rates and is the rate offered. The methodology used to determine this wage, however, is seriously flawed.

The Secretary contracts with the US Department of Agriculture's National Agricultural Statistics Service (NASS) to perform the Farm Labor Survey (FLS). NASS surveys approximately 12,000 farmers and ranchers each year as to the gross wages paid to non-H-2A workers in their operations. The survey return rate is just in excess of 50%. But, of course, the wages paid to H-2A workers place upward pressure on the result and influence its result despite their exclusion from the survey.

The agricultural employers divide the gross wages by the number of hours worked. This results in an average hourly rate that includes overtime, Christmas bonuses, piece rates and other types of performance incentives, as well as any other bonuses. The NASS takes this information on worker's gross wages from a broad variety of different farm occupations and creates an average of these gross numbers by defined regions and the states of Florida and California.

So, the gross wages paid to an entry level worker with a 7th grade education are combined with the gross wages paid to a seasoned precision agriculture equipment operator with a bachelor's degree and the wages are then averaged. The Secretary takes these averaged gross wages and publishes these as an AEWR for the subsequent year.

This methodology is fatally flawed and results in wage rates mandated by the Secretary to be paid to H-2A employees and workers in corresponding employment arithmetically disconnected from the actual marketplace for agricultural labor. It also creates a "feedback loop" into the subsequent year's survey as non-H-2A workers are beneficiaries of this inexorably upwardly

spiraling wage. Further, defaulting to use of this flawed methodology avoids the Secretary's responsibility to make the determination required under the statute that employment of aliens "in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."

The utility of this flawed methodology does, however, result in several certainties for US agricultural employers. First, it ensures that US farmers and ranchers become less competitive. Secondly, it ensures that less and less of their harvest is consumed by Americans. Thirdly, it heightens the likelihood that the family farm or ranch legacy left to them, will end with their stewardship of that legacy.

We are not convinced that the FLS can be salvaged as part of the toolbox the Secretary employs to satisfy the statutory requirement found in the INA. In fact, recognizing this, anti-farmer activists have come to embrace this component as farm and ranch bankruptcies multiply along with farmer and rancher suicides.

The Secretary proposes to slow, but not end the self-sustaining upward spiral from the AEWR by disaggregating the data and considering nonfarm data from the BLS.

Conceptually, the *NCAE* believes it is likely a good idea to disaggregate the data by occupation so that higher level and salaried employees do not artificially skew wages in favor of relatively entry level workers. The Secretary should consider establishing an AEWR as a flat percentage over minimum wage instead, in that one of the challenges with the disaggregation proposal could be that too many wage categories will enhance volatility in the wages required to be paid.

A recent publication in the Rural Migration Blog at the University of California-Davis tends to support this volatility concern. *See Exhibit A*. Analysis performed in Washington and Oregon finds that disaggregation of wages as proposed in the rule, would have led to an even less sustainable wage rate in recent years. Further, concern was expressed within the NCAE that the Secretary may inadvertently eliminate some program efficiency by using additional categories.

Furthermore, *NCAE* strongly suggests that other costs of employing H-2A workers be considered; housing, visa costs, transportation, subsistence, etc., in making the adverse wage rate determination.

Piece rates, bonuses, overtime, etc., should never be considered when determining a wage rate as they are without the scope of any rational mandatory minimum. In fact, incorporating the earned benefits of such performance incentives, overtime and discretionary bonuses, etc., in a subsequent year's AEWR diminishes their efficacy and drives down operational efficiency, to the ultimate detriment of both the worker and the employer.

Further, noncompetitive wage rates disconnected from the labor market that are required in the US under the H-2A, program have been one of the driving factors motivating US companies to

establish operations overseas. This has led to reduced national security as today over half of the fresh fruit consumed in the US and just over a third of the fresh vegetables, are produced outside the US.

One of the questions that seems unanswered by the proposed rule is whether the Secretary will require employers to file multiple applications for different job codes. If the Secretary adopts any disaggregation of various jobs in the program, we request that accommodation be allowed for employers to include multiple SOC codes in the same job order if related to the same job.

Lastly, the *NCAE again recommends* the Secretary should instead annually determine as to whether there is an adverse effect on US workers created by the employment of H-2A workers in concert with statutory requirements. If there is no adverse effect, there need be no Adverse Effect Wage Rate.

20 CFR 655.120 (b) (3) – Offered wage rate. AEWB determinations.

The Secretary proposes that if an updated AEWB for the occupational classification and geographic region is published during the period of the contract, and the updated AEWB is higher than the previous AEWB, prevailing wage, agreed-upon collective bargaining wage, any applicable Federal or State minimum wage during the course of the contract agreed to between the employer and the worker, the employer must pay the updated AEWB not later than 14 days after the updated AEWB is published in the Federal Register.

The *NCAE opposes* any mid-contract adjustment in wages. The employer faithfully advertised the wages, housing provisions, visa costs, subsistence, transportation and other available benefits within the contract to which the employee agreed. Offer and acceptance with consideration was performed. Agency fiat should not abrogate the terms of a binding agreement. A contract is a contract.

Employers should know what they are going to pay for wages and the contract establishes the employer's wage requirement. Employees should know what compensation and other benefits they will receive for the work performed and the contract establishes that as well. Mid-contract adjustments in wages adds to business uncertainty unnecessarily, fundamentally changing the economics and the performance of the agreement, as well as the business enterprise, severing what was the essential "meeting of the minds" imperative to the contract.

20 CFR 655.120 (b) (4) – Offered wage rate. AEWB determinations.

The Secretary proposes that if an updated AEWB for the occupational classification and geographic area is published during the work contract, and the updated AEWB is lower than the rate guaranteed on the job order, the employer must continue to pay the rate guaranteed on the job order.

The *NCAE* *opposes* any mid-contract adjustment in wages.

Of course, within this proposal, consistent with the previous proposal under 20 CFR 655.120 (b) (3), the Secretary seeks to shift the risk of abrogating the agreed to terms of wage in the contract against the employer. If the surveyed wage goes up, the employer pays; if the surveyed wage goes down, the employer pays.

20 CFR 655.120 (c) – Offered Wage Rate. *Prevailing wage determinations.*

The Secretary proposes to replace ETA Handbook 385 with some definitive controls on SWA prevailing wage survey data and would require specific minimum response rates before finding a SWA survey to be valid and or enforceable.

The Secretary proposes that the survey must cover a distinct work task or tasks performed in a single crop or agricultural activity. The Secretary proposes that the survey be based on either a random sample or a survey of all employers in the surveyed geographic area who employ workers in the crop or agricultural activity.

The Secretary proposes to limit the survey to US workers and that a prevailing wage be issued only if a single unit of pay is used to compensate at least 50% of the US workers included in the survey and discusses hourly rate as distinct from piece rate.

The Secretary further proposes that a prevailing wage survey must report an average wage for the unit of pay that represents at least 50% of the wages of the US workers included in the survey covering an appropriate geographic area based on available resources, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the state.

The Secretary proposes to replace the statistical guidelines from Handbook 385 with standards the Secretary believes are more effective in producing a prevailing wage.

The proposed survey must report the wages of at least 30 US workers and 5 employers and that the wages paid by a single employer must represent no more than 25% of the sampled wages included in the survey.

The *NCAE* *doubts* whether the proposed change, and change in methodology, will result in a true prevailing wage.

Argument has been made within the *NCAE* that the Secretary should not be establishing prevailing wages for H-2A as there are far too many factors for the Secretary to assess to create an accurate prevailing wage rate. Our members report that some employers responding to the surveys pay higher rates to compete with employers who use the H-2A program which skews pay rates, particularly when the added costs of housing, transportation, visa costs and subsistence

are factored in. If the Secretary is still determined to allow prevailing wage surveys, any such survey must consider the percentage of the workforce in each state made up of H-2A workers and whether it is even possible to determine prevailing wages independent of the effects of H-2A wages.

Lacking in the Secretary's proposal is any third-party peer-reviewed analysis supporting a conclusion that the Secretary's proposal is statistically valid. Neither does the proposal provide evidence that the results of this change will provide a wage rate prevailing for a distinct work task or tasks performed in a single crop or agricultural activity. Nor does the proposal provide evidence that any wage developed is indeed prevailing in the surveyed geographic area by employers who employ workers in the crop or agricultural activity, within any statistical confidence interval.

It may be that, contrary to the asserted result of such a purported prevailing wage survey, it will only result in a different wage to be extracted from an employer and transferred to a worker. Such a methodology, should a prevailing wage be determined, would not disclose whether this wage or any other wage fulfill the Secretary's direction under the statute to avoid adverse effect on US workers by the temporary seasonal employment of H-2A workers. It could also be that such a methodology results only in numbers.

However, the *NCAE* is *certain* that under no circumstances, should a prevailing wage survey be distorted by "spiking" the survey to only capture peak activity. Should such a "spiked" survey be performed, it would be analogous to performing a geographic survey of the 30 tallest mountain peaks in the state of Wyoming and making a determination that the "prevailing" elevation of Wyoming is over 11,000 feet, while the average elevation is, in reality, only 6,700 feet. Results from this type of statistical distortion can only be suspect and must be avoided.

Further, one of the failsafe procedures presently required under Handbook 385 appears avoided in the proposed rule. The Handbook requires in-person interviews of both employers and employees. This is done ostensibly to validate the data contained in the survey that is then provided to the Secretary. It acts similarly to an audit.

Employer generated data is tested against the in-person representation of workers and employers alike, and its veracity tested. This auditing would not be to necessarily uncover any nefarious activity in the preparation of a survey response, but instead to check its accuracy.

Of course, it is the Secretary's and his Department's reputations that are at stake whenever a State Workforce Agency (SWA) submits prevailing wage survey for certification and publication that is deficient. However, at peril is the confidence of the regulated body in the process should a flawed survey be accepted. The recent *Zirkle Fruit Company* case in Washington state is such a situation on point.

The plaintiff in *Zirkle* asserted that the SWA, in performance of its survey, had failed to abide by the guidelines required in Handbook 385 regarding a prevailing wage determined for blueberries picked in Washington. The District Court preliminarily enjoined the Secretary from enforcing this prevailing wage, embroiling the Secretary in needless litigation.

Resultant from what was argued to be the SWA's departure from required survey protocol, among other matters, is that other employers have questioned the veracity of prevailing wages established from the same survey for other types of agricultural labor and crops.

The Secretary should approve only those surveys appropriately and properly performed and institute procedures to discern the work's propriety. Further, and consistent with the need for user confidence in the results of appropriately designed and performed prevailing wage surveys, the Secretary should forcefully reject those that are not. The Secretary should consider whether provision of such a flawed analysis by a SWA, asserted to be compliant and statistically valid, is subject to sanction. The *NCAE would support* any necessary rulemaking to effect such a sanction.

The Secretary should not index prevailing wage rates based on the CPI nor ECI when the OFLC Administrator issued a prevailing wage rate in one year for a crop or agricultural activity but a prevailing wage finding is not available in a subsequent year. A prevailing wage should expire on its anniversary. Given the dynamic nature of today's business environment, the Secretary should exclude from any such survey, data older than six months.

20 CFR § 655.121– Job order filing requirements. (b) *Timeliness.* (e) *SWA review.*

The Secretary proposes that an employer must submit a completed job order to the National Processing Center (NPC) no more than 75 calendar days and no fewer than 60 days before the employer's first date of need. Then it is sent to the SWA for review and proposes timelines for SWA and NPC review. The proposal also takes steps to commit to certification at least 30 days prior to first date of need.

The *NCAE opposes* these proposed changes. During discussion over this proposal concerns were expressed over whether employers were gaining much efficiency with the Department playing the role of middleman between the employer and the SWA. Some expressed that when there were issues with a job order, that often quicker resolution was available when working with the SWA initially.

However, there was expressed a perceived propensity to establish roadblocks for employers to succeed with the program, on behalf of the SWAs in the states of Washington, Oregon and California specifically. This propensity seems to be driven by anti-farmer activists in those States possessing outsized influence over those SWAs. An appreciation was expressed that the

Department of Labor was attempting to balance interests appropriately and cure anti-farmer activist bias.

20 CFR § 655.122 (d) (6) (ii) (A) – Contents of job offers. *Certification of employer-provided housing.*

The Secretary's proposed rule retains the requirement of free housing and precertification inspection of housing but allows government officials other than SWAs to conduct inspections. The proposal also contains specific rules for rental housing.

The *NCAE's sole objection* to this recommendation was to the possibility that already financially strapped Federal agencies should not be involved in housing inspections. The State has the resources necessary to perform the inspections through grants from the DOL and, consequently, utilizing Federal employees to perform the relatively few tasks delegated by the DOL to the States (and explicitly detailed in the Department's Training and Enforcement Guidance Letters (TEGLs)) under the H-2A program, would be inappropriate.

The NCAE recognizes in several States, the SWAs do not today perform inspections of employer-provided housing under the H-2A program. SWA's have delegated that responsibility to other State agencies such as Departments of Health or Housing to perform that function.

20 CFR § 655.122 (d) (6) (ii) (B) – Contents of job offers. *Certification of employer-provided housing.*

The Secretary proposes to authorize the SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for a period of up to 24 months. Twenty-four-month certification would be subject to appropriate criteria and prior notice to the Department by the certifying authority.

The Secretary proposes to authorize each SWA to develop its own criteria to determine, at its sole discretion, whether to certify specific employer-provided housing for a time period longer than the immediate work contract, but in no case longer than 24 months. An employer must self-certify that the employer-provided housing remains in compliance for any subsequent Application for Temporary Employment Certification filed during the validity of the original housing certification received.

To self-certify, an employer must re-inspect the housing which was previously inspected. The employer must then submit to the SWA and the CO a copy of the valid certification for the housing previously issued and a written attestation that the employer has inspected the housing and that the housing is available and sufficient to accommodate the number of workers being requested and continues to meet all applicable standards.

The *NCAE* supports the proposed change but would ask that the Secretary consider adjusting the rule slightly. Some concern was expressed that some SWAs, or its delegated agency charged with doing the housing inspections, may not allow their program participants the regulatory benefit envisioned by the Secretary.

It was suggested that perhaps the Department consider removing discretion for a SWA to discriminate against its program participants by not allowing them to participate in the regulatory benefit. Alternatively, the Department might direct the SWA that if certain criteria are met, the SWA's discretion to discriminate against their employers is unavailable. For instance, directing that if an employer has complied historically, except for minor non-substantive variances, the employer would be allowed to participate in the regulatory benefit proposed.

The *NCAE* always supports the efforts of program participants to fully comply with all the regulations. The *NCAE* is also very sensitive to the public perception that noncompliance brings to all employers. All employers should always maintain their housing in compliance with all regulations and recommend the SWA respond to housing complaints swiftly, to mitigate negative perception created by bad actors.

20 CFR § 655.121 (g) – Job order filing requirements. *Duration of job order posting.*

Presently, there is no requirement for the SWA to check the work-authorization of any workers referred to employers. The Secretary's proposed rule makes no reference to this practice and retains the current rule verbatim.

The *NCAE* recommends the SWA check the work-authorization of referrals of US workers made to employers. A SWA referral of a worker for a job order who is not work-authorized promotes delay and wastes the limited resources of the employer. SWAs should not refer workers to employers for jobs unless the SWA ensures the referral's work-authorization.

20 CFR § 655.122 (h) (1) – Contents of job offers. *Transportation to place of employment.*

The regulation requires that if the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means, and if the worker completes 50 percent of the work contract period, the employer must pay the worker the reasonable costs incurred by the worker for transportation and daily subsistence from the place the worker departed to the employer's place of employment.

The Fair Labor Standards Act (FLSA) interpretation under the *Arriaga* decision requires reimbursement to the employee in the employee's first pay period, instead. The proposal retains the current rule without reference to *Arriaga* but makes explicit reference to the employer's separate FLSA obligations.

The *NCAE recommends* the Secretary require the requisite reimbursement at 50 percent of the work contract period, to diminish the likelihood that a worker abandons employment taking advantage of the employer's payment. The NCAE believes that requiring reimbursement at this point of the contract not only protects the terms and conditions of the agreement reached between the employer and the employee, but also enhances US national security.

The Secretary proposes return to an earlier rule interpretation regarding required reimbursement to the temporary agricultural worker for their inbound travel costs. The proposal indicates that for an H-2A worker who must obtain a visa departing to work for the employer from a location outside the United States, "the place from which the worker departed", will mean the appropriate US Consulate or Embassy.

The *NCAE supports* this proposed rule change. A potential temporary agricultural employee under the H-2A program must obtain a visa in order to be employed in the US. The Departments of State and Homeland Security must first perform background checks and interview any such potential employee prior to the individual being accepted for H-2A visa benefits to protect national security. A potential employee is ineligible for employment in the US absent undergoing the rigor of this investigation and successfully passing it.

Following the potential employee's passage of this investigation and the issuance of visa benefits through the Consulate or Embassy, the individual is eligible for hire in the US by the domestic farmer or rancher under the program for a certified job. Once hired, the US employer would be obligated contractually to pay for the temporary agricultural employee's transportation to the place of employment in the US.

20 CFR § 655.122 (h) (4) – Contents of job offers. *Employer-provided transportation.*

The Secretary proposes to clarify the minimum safety standards required for employer-provided transportation in the H-2A program. Presently, the regulations provide that employer-provided transportation must comply with applicable federal, state, or local laws and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle licensure required under the Migrant Seasonal Agricultural Worker Protection Act (MSPA) at 29 USC 1841, 29 CFR 500.105, and 29 CFR 500.120 to 500.128.

In order to clarify the H-2A requirement to comply with 29 USC § 500.104, the proposal adds a citation specifically to 29 USC § 500.104.

While the NCAE believes that the proposed rule may not be necessary as state and federal guidelines for transportation safety are required and must be complied with, the *NCAE has no objection* to this proposed rule change.

20 CFR § 655.122 (i) – Contents of job offers. *Three-fourths guarantee.*

The three-fourths guarantee continues to be a regulatory challenge for employers because the guarantee is based on a guess that is impacted by weather, market, crop yields, abscondments of workers creating worker shortages, job abandonments and a host of other issues that are unique to agriculture.

There are times for example when employers need to stop work to protect the workers due to unexpectedly high temperatures but are then penalized because the protection of the workers caused the employer to fall short of the guarantee. We are aware of employers who have exceeded the expected hours of work for 3 years and in the 4th year struggled to meet the guarantee. Employers are expected months in advance to indicate the expected daily hours of work, which at the time can only be an estimate but employers are expected to meet that estimate in a constantly changing marketing environment.

We understand the need for a level of guarantee but due to the inconsistency that accompanies production agriculture, we recommend the three-quarter guarantee be based on the 35-hour required minimum. This provides an adequate and understandable guarantee for the worker and an understandable provision that is less likely to be negatively affected by unforeseen weather and market forces.

The *NCAE* recommends reform of this section of the regulation.

20 CFR § 655.122 (j) – Contents of job offers. *Earnings records.*

While we understand the Department’s reasoning with respect to the three-fourths hours guarantee, we urge the Department to reconsider the “hours offered” requirement for purposes of earnings records, pay statements, and document retention requirements. Most automated payroll systems are not designed to track hours offered, a concept that has no counterpart in the non-H-visa context. Therefore, most employers are forced to track this information manually, which is administratively burdensome and offers no benefit, real or perceived, to workers. *The NCAE therefore advocates* for the Department to remove hours offered from these provisions.

We note that there is already a viable enforcement mechanism specified in the regulations – the three-fourths guarantee. That provision permits employers to satisfy the guarantee through hours offered rather than hours worked. Therefore, employers are provided a significant incentive to track this information. We see no compelling reason for the Department to insist on using a “stick” when “carrots” are in abundant supply.

20 CFR § 655.122 (o) – Contents of job offers. *Contract impossibility.*

The Secretary proposes that with regard to early termination of a contract due to contract impossibility as a result of fire, weather or other Act of God, the employer will be allowed to do so with certain provisions required. The employer and employees must agree and the NPC must approve of the termination.

The *NCAE supports* this proposed rule change.

20 CFR § 655.130 (c) – Application filing requirements. *Location and method of filing.*

The Secretary proposes to require the employer to file the Application for Temporary Employment Certification and all required supporting documentation with the National Processing Center (NPC) using the electronic method(s) designated by the OFLC Administrator. This manner of filing is to be used unless the employer submits the application in accordance with paragraph (c) (2) or (3) of this section.

The *NCAE supports* the proposal to file electronically and also supports the allowances to file by other means as noted in paragraphs (c) (2) and (3) of this section. The NCAE also commends the Secretary's team at the Department for being assertive in bringing the program into the digital age.

20 CFR § 655.130 (d) – Application filing requirements. *Original signature.*

The Secretary proposes that the Application for Temporary Employment Certification must contain an electronic (scanned) copy of the original signature of the employer and (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent) or a verifiable electronic signature method, as directed by the OFLC Administrator. If electronic access is unavailable or other accommodation is required, allowance will be made for use of original signatures.

The *NCAE supports* the proposal to require electronic (scanned) signatures.

20 CFR § 655.130 (f) – Staggered entry of H-2A workers.

Presently, employers are required to hire all eligible workers through 50% of the contract work period.

The Secretary proposes to permit the staggered entry of workers into the United States. Under this proposal, any employer that receives a temporary agricultural labor certification and an approved H-2A petition may bring nonimmigrant workers into the US at any time during the 120-day period after the first date of need identified on the certified Application for Temporary Employment Certification without filing another H-2A petition.

If an employer chooses to stagger the entry of its workers, it must continue to accept referrals of US workers and hire those who are qualified and eligible through the period of staggering or the first 30 days after the first date of need identified on the certified Application. Additionally, the employer must comply with the requirement to update its recruitment report as described in §655.156.

The proposal would require employers to hire all eligible workers through the later of the first 30 days after the first date of need or until end of “staggered entry” period.

The *NCAE supports* the Secretary’s proposal allowing for staggered entry.

Agricultural work, by its nature, can be uncertain. The vagaries of Mother Nature dictate many aspects of agricultural endeavor. Late snows, spring floods or torrential rains may prevent planting. Hurricanes, high heat or other weather-related events may accelerate or delay harvests. Providing employers the ability to stagger the entry of their workforce provides more efficient use of farm resources, while at the same time gives US workers interested in the job, the opportunity to apply during the period of staggered entry.

The NCAE also recognizes that with this proposal comes no prohibition against employers filing additional job orders to sustain operation of their agricultural operations.

20 CFR § 655.131 (b) (1) (ii) – Agricultural association and joint employer filing requirements. *Joint employer filing requirements.*

The Secretary proposes that joint employers who have together filed an application, must both employ each H-2A worker for the equivalent of 1 workday (e.g., a 7-hour day) each workweek.

The *NCAE opposes* this requirement.

Joint employers are often smaller farming operations that jointly file an application in order to share workers over a similar period of time in an area of intended employment. A program stricture that mandates that each of the joint employers must employ each H-2A worker for the equivalent of 1 workday (e.g., a 7-hour day) each workweek, even though an employer may not have work for that employee on that date, frustrates program efficiency and utility. The employers should be allowed to utilize the workers as per their individual needs rather than due to a program mandate.

For example, assume two neighborly employers of modest size and means agree to file as joint employers. Farmer A raises watermelons and tomatoes. Farmer B raises banana squash and lettuce. Farmer A’s watermelons and tomatoes ripen almost simultaneously and that was unexpected. Farmer B’s banana squash and lettuce harvests are delayed by 2 weeks as a result of a torrential thunderstorm. Farmer A has a need for the workers for 4 weeks straight, while

Farmer B won't have any crop to harvest until all of Farmer A's watermelons and tomatoes have been shipped off to market.

It makes little sense for these neighbors to face a program violation due to having their crops mature ahead or behind the anticipated schedule.

20 CFR § 655.132 (c) – H-2A Labor contractor filing requirements.

The Secretary proposes that H-2A labor contractors surety bonds to guarantee employee wages be based on an average annual nationwide wage and would also require higher bond amounts. The Secretary also proposes that surety bonds be submitted to the Department electronically.

The *NCAE supports* the electronic submission of H-2A labor contractors surety bonds.

The NCAE fails to recognize the justification for raising surety bond amounts in the fashion proposed by the Secretary as we have no information provided in the proposal explaining how incidental the circumstances might be in which a surety bond is forfeit to WHD, or the relative amounts of such forfeitures. Neither has the NCAE been provided information as to the frequency of claims having occurred under which the proceeds from the existing surety was inadequate. In fact, a concern was expressed that, absent additional information, this appeared to be a solution in search of a problem that provides additional cost for the employer absent benefit for an aggrieved worker.

Subsequent to the release of a proposed rule, another significant concern has been raised regarding this aspect of the proposal from H-2A labor contractors (H-2ALCs) and their sureties.

It has been suggested that instead of the H-2ALC surety bonds operating as an insurance policy, they instead function like a bond for bail.

An insurance company assesses a risk, actuarially determines the cost to insure that risk and the time period coverage will be required, and what it will require to mitigate the insurance company's risk in the market (something like a reinsurance market). The insurance company then assesses a premium, mitigates its risk and moves on to the next opportunity. Claims made against that policy are paid and the ultimate risk holder will attempt to recoup any losses.

Surety bonds operate like a bond for bail. A risk is assessed based upon the total amount of the surety's exposure by examining the net assets of the party seeking the surety. After considering the net assets the surety might claim should the bond be forfeit, the surety makes a determination as to the cost of the bond necessary should it be required to claim against the net assets of the employer. The surety's potential risk and its accompanying potential liability is not mitigated in an insurance market. If an employer fails in its obligations to its workers and the surety covers the shortfall, the surety then proceeds to secure the net assets guaranteed by the employer to recover its loss.

Thus, a surety for a farm labor contractor that has potential exposure of x amount in covering an exposure in year 1, would require the employer to have x amount of net assets for the surety to proceed against should the surety need to recover its loss. The surety bond amount would cover that risk actuarially.

A surety for a farm labor contractor in year 3 would have a potential exposure of 3x under the proposal, and thus would require an employer to possess 3x the amount of net assets for the surety to proceed against to cover its loss. If the employer does not have 3x assets, the surety will not provide a surety bond and the farm labor contractor would have to find another line of employment for themselves and their workers. This would also leave the clients of the H-2ALC seeking other assistance to harvest their crops.

The NCAE urges the Secretary to carefully reconsider its approach until a market emerges in which a surety may better mitigate its risk.

20 CFR § 655.134 (a) – Emergency situations. *Waiver of time period.*

The Secretary proposes minor amendments to provide clarity to procedures for handling Applications for Temporary Employment Certification. The proposal would also allow the CO to waive the 45-day rule for filing for employers who did not make use of the temporary foreign agricultural workers during the prior year's agricultural season or for any employer that has good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis.

The NCAE *has no objection* to these proposed rule changes.

20 CFR § 655.134 (c) (1) and (c) (2) – Emergency situations. *Processing of emergency applications.*

The Secretary proposes to provide greater clarity with respect to handling emergency applications and proposes to eliminate the requirement that an employer requesting an emergency situation application waiver, submit a copy of the job order concurrently to both the NPC and the SWA serving the area of intended employment and, instead submit the required documentation to the NPC.

Further, proposed paragraph (c) (1) requires that the SWA inform the CO of any deficiencies in the job order within 5 days of the date the SWA receives the job order.

Under proposed paragraph (c) (2), if the employer's submission does not justify waiver of the filing timeframe and/or the CO determines there is not sufficient time to undertake an expedited test of the labor market, the CO will issue a Notice of Deficiency (NOD) that states the reason(s) the waiver request cannot be granted. The NOD will also provide the employer with an

opportunity to submit a modified Application or job order that brings the requested workers' anticipated start date into compliance with the required time periods for filing.

The *NCAE* has no objection to these proposed rule changes.

20 CFR § 655.153 (d) – Assurances and obligations of H-2A employers. 30-day rule.

The *NCAE* supports the replacement of the 50 percent rule in this section. However, the *NCAE* urges the Secretary to consider making the section consistent with the new rules regarding advertising and positive recruitment.

The new 20 CFR 655.143 (b) (3) Notice of acceptance, states in part “that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 of this subpart and will terminate on the actual date on which the H–2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H–2A workers, whichever occurs first;”.

The *NCAE* recommends the secretary conform this section to the timelines stated in the new 20 CFR 655.143 (b) (3).

20 CFR § 655.153 – Contact with former U.S. workers.

The Secretary proposes to require employers to contact the employees of Farm Labor Contractors (FLCs) that were contracted to perform services for the employer in the previous year, to notify them of current year job opportunities.

The *NCAE* opposes any requirement to contact the employees of an FLC that the employer had hired to perform services in the prior year. There should be no requirement for an employer to contact the employees of another employer. The employees of a farm labor contractor are not the employees of someone hiring the FLC and blurs the distinct line that exists between a farmer and his or her farm labor contractor. The employer who hires an FLC has no control or other authority over the employees of the FLC.

The resultant “poaching of another employer’s workers”, under this proposal is not only repugnant behavior, but may well be in violation of the contractual arrangement between the employer and the farm labor contractor. The employee of an FLC has only one employer and it is not the employer who hired the FLC.

The Secretary also proposes that an H-2A employer will be required to contact US workers who abandoned employment or were terminated for cause in the prior year, unless the employer timely notified the NPC of the abandonment or termination as required in § 655.122 (n).

The *NCAE opposes* requiring an employer to contact a worker who either abandoned the job prior to the contract end date in the prior year nor a worker terminated for cause simply because the employer did not timely notify the NPC of the US worker's abandonment or termination. There should be no requirement for an employer to contact a worker in those circumstances. It's a waste of the employer's resources to require them to contact a worker that the employer will not hire. Further, exposing an employer to a violation for properly protecting their business from frivolous lost time, is punitive.

20 CFR § 655.154 – Additional positive recruitment.

The Secretary would propose a requirement for specific analysis by OFLC be performed of out-of-state referrals before finding that a state is a "labor supply" state.

The *NCAE has no objection* to this proposed rule change.

20 CFR § 655.163 (a) – Certification fee.

Presently, there is a certification fee of \$100 plus \$10 for each position certified up to \$1,000 maximum. Joint-employer associations pay \$100 per employer, \$10 per job up to a maximum of \$1,000. The Secretary's proposed rule retains the current rule.

The *NCAE has no objection* with retention of the current rule.

20 CFR § 655.171 (a) – Appeals. *Request for review.*

The Secretary proposes that any employer appeal from a denial of certification must identify whether an administrative review or *de novo* hearing is being requested. The request for review must be received by the Office of Administrative Law Judge (OALJ) within 10 business days from the date of the CO's decision. If an employer fails to specify that a *de novo* review is being requested, OALJ will automatically treat the request as being for administrative record review.

The *NCAE opposes* this proposal as abolishing the concurrent briefing process that exists today, balances interests against the employer seeking review and creates a procedural unfairness. This would also likely slow down a process (review of a denial for certification) that demands expediency in its resolution.

20 CFR § 655.175 (a) – Post-certification amendments. *Scope of post-certification amendments.*

The Secretary proposes to add the new § 655.175 that would permit an employer to request minor amendments to the places of employment listed in an approved certification under certain limited conditions. These minor amendments will be permitted as long as (1) the employer has good and substantial cause for the requested amendment; (2) the circumstances underlying the

amendment request could not have been reasonably foreseen before certification and are outside the employer's control; (3) the material terms and conditions of the job order are not materially affected by the requested amendment; and (4) the new places of requested employment are within the certified areas of intended employment.

The *NCAE supports* the proposed rule change reinforcing the imperative of CO subjectivity, provided the heightened scrutiny does not delay processing.

20 CFR § 655.175 (b) – Post-certification amendments. *Employer requirements.*

The Secretary's proposed paragraph (b) outlines the procedures for requesting post-certification amendments. The employer must submit to the NPC a written request to amend the certified place(s) of employment and must: (1) Specify each place of employment the employer wishes to add or remove from the certified Application and job order, the expected beginning and ending dates of work at each place of employment, etc.; (2) Describe the good and substantial cause justifying the need for the amendment explaining how the circumstance could not have been foreseen before certification and is wholly outside the employer's control; (3) Assure the amendment does not materially change the material terms and conditions of the job order; (4) Assure the employer will provide to the workers a copy of the amendment as soon as practicable after approval; (5) Assure the employer will retain all documentation substantiating the requested amendment in the event of audit.

The *NCAE supports* the proposed rule change reinforcing the imperative of CO subjectivity, provided the heightened scrutiny does not delay processing.

20 CFR § 655.175 (b) – Post-certification amendments. *Processing and effective date of amendments.*

The Secretary's proposed paragraph (c) outlines the processing and effective date of the amendments. The CO will within 3 days after the date the request is received, decide whether to grant the requested amendment and provide notification to the employer.

The *NCAE supports* the proposed rule change reinforcing the imperative of CO subjectivity, provided the heightened scrutiny does not delay processing.

20 CFR § 655.304 (i) (2) – Standards for mobile housing. *Bathing, laundry, and hand washing.*

The Secretary proposes that the employer must provide access to laundry facilities, supplied with hot and cold water under pressure, at no cost to all occupants no less frequently than once per week.

While the NCAE supports providing workers access to laundry facilities with hot and cold water under pressure no less frequently than once per week, it is not the employer's responsibility to pay for the cost of laundering the worker's clothing.

29 CFR § 501.2 (b) – Coordination between Federal agencies.

The Secretary's proposed rule features coordinated enforcement with shared authority of WHD and OFLC as well as referrals to other agencies for enforcement.

NCAE recognizes problems with the proposed rule as there exists a number of challenges with coordinated enforcement. In particular, the NCAE recognizes that in many agencies, subject matter expertise is lacking which could create confusion and delay. The *NCAE requests* the Secretary reconsider this proposal.

29 CFR § 501.19 (b) – Civil Money penalty assessment.

The Secretary proposes to codify the Department's longstanding policy with respect to imposing liability among culpable joint employers. The Secretary will consider several factors when assessing civil money penalties (CMPs) including whether the association or other joint employer received financial benefit from a violation committed by one of the other joint employers and reduce CMPs accordingly.

The *NCAE supports* that in the circumstance where association members or joint employers are not culpable, nor have received financial benefit from a violation, the Secretary should have the ability to reduce CMPs with regard to those employers.

29 CFR § 501.19 (c) (d) (e) (f) – Civil money penalty assessment.

The Secretary proposes certain increases to civil money penalties for various violations of the regulations governing employment of temporary agricultural workers under the H-2A program.

The *NCAE believes* the current penalty structure is adequate to discourage noncompliance with the regulations and opposes changes to the current structure.

29 CFR § 501.20 (a) – Debarment and revocation. *Debarment of an employer, agent or attorney.*

The Secretary proposes revisions to the Wage and Hour Division's (WHD) debarment provisions to maintain consistency with proposed changes to 20 CFR 655.182 (a). The proposal would permit the debarment of agents and attorneys for their own misconduct, rather than solely for participating in the employer's violations. The proposal would permit WHD to debar an agent or employer for substantially violating a term or condition of the temporary agricultural labor certification.

The NCAE *supports* this proposed rule change.

However, it was noted that gratuitous pejorative comments found at *Federal Register* 84:144, p.36229 cast aspersion on H-2A agents. The comment reads, “The Department has long had concerns about the role of agents in the program and has questioned whether the participation of agents in the H-2A labor certification process is undermining compliance with program requirements.”

The NCAE would like to point out the significant services that agents provide to their clients in a program that has grown very rapidly. Agents assist their clients in not only accessing the program and assisting with their applications for the H-2A program but, as the program has grown with no diminution in program complexity, H-2A agents are often critical to client participation and compliance with program requirements.

29 CFR § 501.20 (d) (vii) – Debarment and revocation. *Definition of violation.*

The current regulation provides for debarment for employing an H-2A worker outside the area of intended employment, or in an activity(ies) not listed in the job order or outside the validity period of the job order, including any extensions thereof.

The NCAE recommends the Secretary provide for a *de minimis* exception on an incidental basis.

We appreciate the effort of the Secretary and the Administration in attempting to streamline and make the H-2A Temporary Agricultural Labor Program more efficient, accountable and user friendly.

Respectfully submitted,

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

Michael Marsh
President and CEO