American Federation of Labor and Congress of Industrial Organizations

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November 12, 2010

Thomas Dowd, Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
Room N-5641
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: RIN 1205-AB61, Proposed Rule: *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*

Dear Mr. Dowd:

Attached are the comments of the American Federation of Labor and Congress of Industrial Organizations in response to the Department of Labor's notice of proposed rulemaking and request for comments in RIN 1205-AB61, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 75 Fed. Reg. 61578 (Oct. 5, 2010). We appreciate the opportunity to comment on this proposal.

Sincerely,

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Associate General Counsel

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COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN RESPONSE TO THE DEPARTMENT OF LABOR'S PROPOSED RULE ON THE CALCULATION OF PREVAILING WAGES UNDER THE H-2B PROGRAM RIN 1205-AB61

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby submits these comments in support of the rule proposed by the Employment and Training Administration of the Department of Labor (DOL) to revise the methodology by which the Department calculates the prevailing wages to be paid to H-2B guest workers and U.S. workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 75 Fed. Reg. 61578 (Oct. 5, 2010) (the "NPRM" or "proposed rule").

The AFL-CIO is a federation of 57 national and international unions, including numerous affiliates that represent workers employed in the industries in which employers most frequently seek to employ H-2B guest workers, including construction, janitorial services, landscaping, food services, and amusement, gambling and recreation. Accordingly, the AFL-CIO has a vital interest in the methodology by which the DOL calculates the prevailing wages to be paid to H-2B guest workers and U.S. workers recruited in connection with the H-2B labor certification process.

INTRODUCTION

The Immigration and National Act (INA) states that H-2B visas may be issued to foreign guest workers to perform non-agricultural jobs in the United States only when "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Department of Homeland Security (DHS) regulations further emphasize this strict statutory limitation: an H-2B visa may only be issued if it will not "displac[e] qualified United States workers" and if it will not "adversely affect[] the wages and working conditions of United States workers." 8 C.F.R. § 214.2(h)(6)(i)(A). The employer must therefore "offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the United States" to H-2B guest workers and to U.S. workers recruited in connection with the labor certification process. 8 C.F.R. § 214.2(h)(6)(iii)(B).

The Department of Labor is responsible for ensuring that H-2B visas are issued in a manner that will not harm U.S. workers. 8 C.F.R. § 214.2(h)(6)(iii)(D). An employer who seeks to employ an H-2B guest worker must first "apply for a temporary labor certification with the Secretary of Labor." 8 C.F.R. § 214.2(h)(6)(iii)(A). The purpose of this certification requirement is to allow the DOL to advise DHS "whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." *Ibid.* To this same end, the employer must "consider available United States workers for the temporary services or labor" for which the employer is seeking H-2B guest workers. 8 C.F.R. § 214.2(h)(6)(iii)(B).

For obvious reasons, setting the appropriate prevailing wage for the position for which the employer seeks an H-2B guest worker visa is central to testing the labor market to determine whether unemployed U.S. workers are available for the job in question as well as to protect U.S. workers from displacement or adverse wage effects if the employer is eventually allowed to employ H-2B guest workers. As DOL regulations explain:

> "Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established.... Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. *If it is concluded that adverse effect would result, the ultimate determination of availability within the*

meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels." 20 C.F.R. 655.0(a)(2) (emphasis added and internal citation omitted).

Historically, the DOL based the H-2B prevailing wage on the rate set in a collective bargaining agreement or, where no collective bargaining agreement existed, on prevailing wage determinations from two other worker-protective statutes enforced by the DOL: the Davis-Bacon Act (DBA), 40 U.S.C. § 3141 *et seq.*, and the Service Contract Act (SCA), 41 U.S.C. § 351 *et seq.* *See* DOL, *Prevailing Wage Policy for Nonagricultural Immigration Programs*, General Administration Letter No. 2-98 (1998). In cases where no DBA or SCA wage determination was available, the DOL derived the H-2B prevailing wage from the Occupational Employment Statistics (OES) wage survey conducted by the Bureau of Labor Statistics (BLS), *ibid.*, a comprehensive annual wage survey that includes occupational wage data broken down by geographic area. *See* BLS, *OES: Frequently Asked Questions*, available at http://bls.gov/oes/oes_ques.htm#Ques1. Finally, employers were permitted to suggest their own prevailing wage rates based on employer-provided wage surveys, although such surveys had to meet specified criteria for relevance and accuracy. DOL, *Prevailing Wage Policy*, G.A.L. No. 2-98, *supra*.

Beginning in 2005, the Department of Labor significantly changed its methodology for calculating the H-2B prevailing wage, a change that was later codified in a 2008 rulemaking. *See* 73 Fed. Reg. 29942 (May 22, 2008) (Proposed Rule); 73 Fed. Reg. 78020 (Dec. 19, 2008) (Final Rule) (codified at 20 C.F.R. § 655.10). The 2008 rule, which remains in effect today: (1) eliminated mandatory use of DBA and SCA wage determinations as the H-2B prevailing wage; and (2) replaced the use of the single OES mean wage rate with a four-tier skill-stratified wage system based on OES survey data. *Ibid.*

The rule proposed by the DOL in this rulemaking would largely return the process of setting H-2B prevailing wage rates to the pre-2005 method. Specifically, the proposed rule would: (1) once again require the DOL to base the H-2B prevailing wage rate on DBA or SCA wage determinations where they exist; (2) in cases where there is no applicable DBA or SCA wage determination, return to the practice of using a single OES mean wage rate instead of the four-tier skill-stratified wage system currently in place; and (3) eliminate the use of employer wage surveys.

For the reasons explained below, the AFL-CIO strongly supports the DOL's proposed rule revising the methodology used to calculate the prevailing wage to be paid to H-2B guest workers and U.S. workers recruited in connection

with the H-2B program's labor certification process. In promulgating the final rule, the AFL-CIO urges the DOL to clarify that employers are required to provide the prevailing level of fringe benefits – or the equivalent cost of such benefits – to H-2B guest workers and U.S. workers recruited in connection with the H-2B labor certification process.

COMMENTS

A. The Proposed Rule Correctly Prioritizes the INA's Statutory Requirement of Protecting U.S. Workers from Job Displacement and Adverse Wage Effects

The unemployment rate for U.S. workers in industries in which employers regularly seek to employ H-2B guest workers is far above the already-high national average. For example, the national unemployment rate in the construction industry stands at more than 17 percent. BLS, *Employment Situation Summary* (Sept. 2010), available at www.bls.gov/news.release/empsit.nr0.htm. Similarly, the unemployment rate for those U.S. workers who often seek the jobs for which employers hire H-2B guest workers, especially young workers, is exceedingly high. Almost one out of every five young workers is unemployed. BLS, *Youth Employment and Unemployment in July 2010*, available at www.bls.gov/opub/ted/2010/ted_20100903.htm. The unemployment rate for young Hispanic workers is several points higher than the national youth unemployment average and fully one out of every three young African-American workers is unemployed. *Ibid.* An H-2B prevailing wage methodology that meets the statutory requirements of not displacing U.S. workers and of protecting the wages and working conditions of U.S. workers from adverse effects is sorely needed.

The AFL-CIO's member unions have, unfortunately, had significant experience with employers who misuse the H-2B guest worker program in a manner that hurts union members and other U.S. workers. For example:

- Unemployed members of the Laborers' Union in Virginia applied for jobs with a local landscaping company, but were denied employment in favor of H-2B guest workers. The union filed discrimination charges, which the company quickly settled. (DOJ, *Justice Department Settles Citizenship Status Discrimination Matter Against ValleyCrest Landscape Companies* (May 14, 2010), available at www.justice.gov/opa/pr/2010/May/10-crt-577.html).

- Federal stimulus funds and Tennessee state transportation money went to a landscaping firm that hired H-2B guest workers instead of

unemployed U.S. workers. To make matter worse, the company then allegedly failed to pay the H-2B guest workers their required wages. As the President of the Tennessee AFL-CIO explained to a local newspaper: in order to obtain the H-2B visas, the company "claim[ed] to the U.S. Department of Labor that it could not find a single American worker to fill these landscaping jobs. I know a few that would have been interested, but neither [the company] nor the Department of Labor ever gave me a call." (Jerry Lee, "The Best Friend Tennessee Workers Have Is A Guest Worker From Mexico," *The Tennessean*, Aug. 15, 2010);

- Unemployed members of the Maine Building & Construction Trades Council applied for positions as structural and pipe welders on two oil rigs under construction in the harbor of Portland, Maine, but were denied employment in favor of H-2B guest workers who were not even paid required Davis-Bacon wage rates (*Maine State Building and Construction Trades Council, AFL-CIO v. Chao*, 265 F. Supp. 2d 105 (D. Me. 2003)).

While an accurately-calculated H-2B prevailing wage is obviously not the only safeguard against employer abuse of the H-2B program, it is a vitally-important failsafe. As DOL regulations recognize, "U.S. workers cannot be expected to accept employment under conditions below the established minimum levels." 20 C.F.R. 655.0(a)(2). That is, in order to accurately test the labor market to see whether "unemployed persons capable of performing such service or labor can[] be found in this country" for a position for which an employer seeks to hire H-2B guestworkers, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), the employer must offer the true prevailing wage for the position as well as the prevailing level of fringe benefits.

The fact that the DOL expects its proposed rule to raise hourly wages for some H-2B guest workers – as well as U.S. workers recruited and hired as part of the H-2B labor certification process – is *entirely consistent* with the INA's statutory limits on employer use of H-2B guest workers. As the DOL correctly explains, adoption of the proposed rule will further the INA's statutory purpose by ensuring that only those employers who truly have an economic need to employ foreign guest workers will be allowed to do so, while "those employers who can more easily attract U.S. workers will be dissuaded from attempting to participate in the H-2B program." NPRM, 75 Fed. Reg. at 61583.

B. Requiring The H-2B Prevailing Wage To Be Based On The DBA Or SCA Wage Rate Furthers The INA's Statutory Requirement of Protecting U.S. Workers

The AFL-CIO strongly supports the Department of Labor's proposed return to its traditional reliance on Davis-Bacon Act and Service Contract Act wage determinations to calculate the H-2B prevailing wage. Where DBA or SCA wage determinations exist for a position for which an employer seeks an H-2B guest worker, there is no basis under the statute or governing regulations for DOL to disregard such rates in favor of a lower H-2B prevailing wage.

H-2B regulations require the DOL to set the prevailing wage at least at the "level of wages, terms, benefits, and conditions ... below which similarly employed U.S. workers would be adversely affected." 20 C.F.R. 655.0(a)(2). The Davis-Bacon Act requires the Secretary of Labor to determine a prevailing wage for covered occupations "based on the wages ... prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed," a term that is defined to include the cost of fringe benefits. 40 U.S.C. §§ 3141(2) & 3142(b). The Service Contract Act requires the Secretary to determine the "minimum monetary wages to be paid ... in accordance with prevailing rates for such employees in the locality," as well as the "fringe benefits ... prevailing for such employees." 41 U.S.C. §§ 351(a)(1) & (2). In light of the fundamental similarity between the definitions of the prevailing wage under the DBA, the SCA and the H-2B regulations – all enforced by the Department of Labor – it would border on irrational for the DOL *not* to require the use of DBA and SCA prevailing wage determinations as the H-2B prevailing wage where such wage determinations exist.

In particular, DOL cannot realistically ensure that employer use of H-2B guest workers will not "adversely affect[] the wages and working conditions of United States workers," 8 C.F.R. § 214.2(h)(6)(i)(A), if it permits employers to pay H-2B guest workers *less* than what DOL requires other employers in the same industry and in the same geographic area to pay U.S. workers pursuant to the DBA or SCA. As DOL correctly observes in the preamble to the proposed rule, basing the H-2B prevailing wage on the DBA or SCA wage rate both "ensure[s] compliance with mandatory wage standards for ... occupations" covered by the Davis-Bacon Act or the Service Contract Act, as well as ensures that the use of H-2B guest workers does not "undercut[] ... wages" of U.S. workers more generally. NPRM, 75 Fed. Reg. at 61580.

Reliance on DBA and SCA wage determinations is preferable to reliance on OES wage survey data for another important reason: unlike OES wage

estimates, both DBA and SCA wage determinations provide the prevailing cost of fringe benefits together with the prevailing wage rate. Practically speaking, this means that the federal government lists the cost of fringe benefits alongside the DBA and SCA wage rates in its wage determinations. *See* Wage Determinations OnLine.gov, available at http://www.wdol.gov/Index.aspx. In contrast, as the Bureau of Labor Statistics acknowledges, "OES wage estimates represent wages and salaries only, and do not include ... employer costs of nonwage benefits, such as health insurance or employer contributions to retirement plans." *See* BLS, *OES: Frequently Asked Questions*, *supra*. As a result, when the H-2B prevailing wage is based on the OES wage rate, an employer has no easy way to know the prevailing cost of fringe benefits it must advertise to U.S. workers during the labor certification process, and pay to any H-2B guest workers hired, in order to comply with the requirement of paying at least "the minimum level of ... benefits ... below which similarly employed U.S. workers would be adversely affected." 20 C.F.R. § 655.0(a)(2).

The final regulation should therefore state clearly that employers are required to advertise the prevailing level of fringe benefits – or payment of the equivalent cost of such benefits – to U.S. workers during the labor certification process and provide such benefits or pay the equivalent cost to any H-2B guest workers hired. Where the H-2B wage rate is based on the collectively-bargained rate or on a DBA or SCA wage determination, the corresponding fringe benefits rate should apply. Where the H-2B wage rate is based on the OES rate, the final regulation should require employers to pay the SCA fringe benefits rate applicable to the area of intended employment.[1] Because the SCA fringe benefit cost determination is calculated on an across-the-board basis for all occupations within a geographic area, an SCA fringe benefit rate is available for every instance in which an employer might seek to employ an H-2B guest worker.

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[1] The DOL could accomplish these suggested changes in the final rule by:
(a) amending 20 C.F.R. § 655.10(a)(1) to read: "The employer must request a prevailing wage determination, including the prevailing cost of fringe benefits, from the NPC in accordance with the procedures established by this regulation;"
(b) amending 20 C.F.R. § 655.10(a)(3) to read: "The employer must offer and advertise the position to all potential workers at a wage and fringe benefits level at least equal to the prevailing wage and prevailing fringe benefits level obtained from the NPC;" and
(c) including a new subsection to 20 C.F.R. § 655.10 stating: "The prevailing level of fringe benefits is: (1) the fringe benefits set forth in the collective bargaining agreement (CBA) if the prevailing wage rate is determined by reference to the CBA; (2) the fringe benefits rate established under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act for the occupation in the area of intended employment if the prevailing wage rate is determined by reference to the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act; or (3) the fringe benefits rate established under the McNamara-O'Hara Service Contract Act for the area of intended employment if the prevailing wage rate is determined by reference to the arithmetic mean of the wages of workers similarly employed in the occupation in the area of intended employment as determined by the OES." (additions indicated by underlined text).

C. Where DBA and SCA Wage Determinations Do Not Exist, Reliance On A Single Average OES Wage Rate Represents An Improvement Over The Current Four-Tier OES Wage Determination

Basing the H-2B prevailing wage rate on either the collectively-bargained rate, the DBA prevailing wage, or the SCA prevailing wage is clearly the best means to further the INA's statutory purpose of protecting the jobs and wages of U.S. workers. However, where none of these wage determinations exist, DOL's proposed reliance on "[t]he arithmetic mean of the wages of workers similarly employed in the occupation in the area of intended employment as determined by the OES," NPRM, 75 Fed. Reg. at 61588, represents a significant improvement over the current four-tiered, skill-stratified wage system.

The current four-tiered system for determining the H-2B prevailing wage is grossly inadequate to protect the jobs and wages of U.S. workers. Because many of the positions for which employers seek H-2B guest workers require few skills and because evaluation of skill levels is inherently highly subjective, employers have abused the current system by slotting the majority of H-2B workers into the lowest skill and lowest wage levels. Unsurprisingly, allowing employers to hire H-2B guest workers at an entry-level rate of pay rather than the average wage rate prevailing in a given industry leads to displacement of U.S. workers and adverse effects on the wages and working conditions of U.S. workers.

DOL's own analysis demonstrates that employers systematically abuse the four-tier system to the detriment of U.S. workers. In *over 95 percent of cases* the wage employers pay H-2B guest workers is lower than the mean OES wage rate, *i.e.*, lower than the average wage that employers pay U.S. workers in the same occupation in the same geographic location. *See* NPRM, 75 Fed. Reg. at 61580 n. 2 & 61582 n. 6. To illustrate, according to the OES, the mean 2009 wage for "Building and Grounds Cleaning and Maintenance Occupations" in Colorado was $11.96 per hour. BLS, *May 2009 Occupational Employment & Wage Estimates*, available at www.bls.gov/oes/current/oes_co.htm#37-0000. In contrast, the average prevailing wage certified by DOL for H-2B guest workers working in this occupational category in Colorado was $7.28 per hour – a full $4.68 less than the average wage paid to U.S. workers. *See* Friends of Farmworkers, "H2B Certified Occupations FY09" (compiling data available at Foreign Labor Certification Data Center Online Wage Library ("FLC Data Center"), available at www.flcdatacenter.com/CaseH2B.aspx).[2] There can be no clearer evidence that the current regulation allows employers to use H-2B guest workers in a manner that "adversely affects the wages and working conditions of United States workers." 8 C.F.R. § 214.2(h)(6)(i)(A).

[2] The compiled data, produced by Friends of Farmworkers, is available upon request.

D. The DOL Should Eliminate The Use Of Employer Wage Surveys In Setting The H-2B Prevailing Wage

Finally, the AFL-CIO supports the DOL's proposal to eliminate the use of employer wage surveys to set the H-2B prevailing wage. As a practical matter, wage surveys are only submitted by employers in order to *lower* the H-2B wage below the level of the DBA prevailing wage, the SCA prevailing wage or the OES survey wage, that is, to lower the H-2B wage below the comparable wage paid to U.S. workers for the same work.

Perversely, under the current regulation, the DOL's reliance on employer wage surveys (together with the use of the skill-stratified OES wage system) in some instances has resulted in H-2B prevailing wage determinations *below* the Federal or State minimum wage, violating the current regulation's requirement that the H-2B prevailing wage not be "lower than the highest wage required by any applicable Federal, State, or local law." 20 C.F.R. § 655.10(h). For example, in 2009, DOL certified an application for 35 H-2B guest workers to work as construction laborers at a masonry company in Utah at a prevailing wage of $6.35 per hour, which was less than the federal minimum wage at the time. *See* FLC Data Center, *supra*. Similarly, DOL certified an application for 96 H-2B guest workers to work at a Six Flags amusement park in California at a prevailing wage of $7.81 per hour, despite the fact that the state minimum wage was $8.00 per hour. *Ibid.*[3]

In light of these obvious abuses of the current H-2B prevailing wage methodology, the DOL's proposal to eliminate the use of employer wage surveys is well-founded. Employer surveys have too often been used as a mechanism to lower the H-2B prevailing wage to a level that – contrary to the INA's statutory requirements – displaces U.S. workers and adversely affects their wages and working conditions.

CONCLUSION

The AFL-CIO appreciates the opportunity to provide these comments in response to the Department of Labor's notice of proposed rulemaking. The AFL-CIO strongly supports the proposed rule and encourages the DOL to maintain all aspects of its proposal in the final rule. For the reasons explained above, the AFL-CIO also urges the DOL to clarify in the final rule that employers are required to provide the prevailing level of fringe benefits – or the equivalent cost of such

[3] In both cases, the employers appear to have paid the H-2B guest workers the applicable minimum wage – but no more – despite the sub-minimum wage approved by the DOL under the current H-2B prevailing wage methodology.

benefits – to H-2B guest workers and U.S. workers recruited in connection with the H-2B labor certification process.

Dated: November 12, 2010

Respectfully submitted,

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