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UNITED STATES OF AMERICA

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November 12, 2010

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

Re: RIN 1205-AB61 ***Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program***

Dear Mr. Dowd:

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Many of these employers will be affected by the Department of Labor's proposed rule entitled, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 75 Fed. Reg. 61578 (Oct. 5, 2010) ("NPRM" or "proposal") and we appreciate the opportunity to comment on the proposal.

The H-2B program is crucial to the continued viability of thousands of businesses when they are unable to locate sufficient numbers of U.S. workers to fill their temporary or seasonal labor needs. The overwhelming number of these businesses are small business, companies that use the H-2B program apply for an average of 15 workers per year, [See attached Chamber study, *The Economic Impact of H-2B Workers*] with thin profit margins who have been particularly hard hit in these tough economic times. A rationally administered and economically realistic H-2B program enables these employers to fill temporary positions that in turn support and create full time permanent positions for U.S. workers. In fact, certain studies have actually been able to draw a direct correlation between the H-2B program and the hiring of U.S. workers.[1]

[1] Douglas W. Lipton. "An Economic Analysis of Guest Workers in Maryland's Blue Crab Industry." University of Maryland's 2008 Maryland Sea Grant Extension Brief. University of Maryland.

Without a rational H-2B program, many of these businesses would have to substantially curtail their services or cease operations altogether, which would result in scores of U.S. workers losing their jobs. For those industries and communities that are particularly reliant on the temporary labor available through the H-2B program, adverse changes in the program could result in economic devastation and the wholesale shift of jobs abroad. We urge the Department to make substantial changes in the Notice of Proposed Rulemaking as outlined below.

The Department's NPRM includes several substantial changes to the process of determining and assigning the wages that must be paid to H-2B guestworkers. By the Department's own calculations this NPRM would result in wage increases of more than 3/4 of a billion dollars across the economy. 75 Fed. Reg. 61583. The proposals in this NPRM mandate artificially high wage rates that will make the program prohibitively expensive for all but the largest and wealthiest businesses. The Department's own estimates indicate employers can expect on average wage increases of more than 50 percent. *Id.* As a result, small businesses and even entire industries will forced out of the H-2B program.

Employers turn to the H-2B program only after unsuccessful efforts to locate U.S. workers and as a result of not being able to secure temporary workers at market rates, these businesses will have to curtail their operations, raise prices and in some cases, go out of business. The Department's NPRM is another example of the job-killing effect that results from over-regulation of American business. Rather than "protect" U.S. workers, these misguided policies will in all likelihood just end up costing U.S. workers their jobs and U.S. business owners their livelihood, further worsening an already bleak economic environment.

A. Department's Rationale

1. Decision in CATA v. DOL

To begin, we note that the Department issued this proposal and provided just 38 days for the public to comment because it claims it is under a court-ordered deadline to do so as a result of the Opinion and Order issued by Judge Pollak in *Comite De Apoyo a Los Trabajadores Agricolas v. Solis*, No. 09-240, (E.D. Pa. August 30, 2010) ("CATA v. DOL").

While Judge Pollack may have directed the Department to promulgate a new rule within 120 days, he certainly did not instruct the Department to promulgate *this* rule in such a short timeframe. Nowhere in Judge Pollak's Opinion and Order does he require the Department to propose such sweeping changes that would fundamentally revise the operation of the H-2B program. In fact, Judge Pollak did not direct the Department to propose any new regulatory changes to the H-2B program. Rather, the Court simply directed the Department only to complete a new rulemaking to remedy the Department's failure to take public comment on its decision to use Occupational Employment Statistics ("OES") wage data and its decision to utilize four skill levels for OES data in the H-2B program. *See* J. Pollak's Opinion at 49, 53.

The Department's decision to propose a rulemaking with a substantially broader reach and impact than ordered by the Judge results in forcing these questionable policies on the public in the extraordinarily short timeframe mandated for the consideration of two very different and much smaller issues. The Department's NPRM includes a host of proposed regulatory changes,

including abolition of the four skill levels; abolition of employer-provided surveys; creation of a new definition of prevailing wage, with the effect that inflated union-based wage rates will be foisted on countless non-union employers; and a new mathematical calculation of OES-derived wage rates; none of which were contemplated in Judge Pollak's Order.

We urge the Department to narrow the Final Rule solely to the issues described in Judge Pollak's Order: whether the Department should utilize OES wage data and whether it should also assign OES wage rates based on the four skill levels. The Department has successfully used OES wage data as an option for H-2B employers since 1998, and has further successfully utilized the four skill level breakdown since 2005. The majority of H-2B employers have become accustomed to this wage data and have adapted to its use.[2] Therefore, the Department should maintain use of the four skill levels and OES data as it is presently utilized. The Chamber opposes each of the changes proposed by the Department in the NPRM and believes the Department has improperly underestimated the impact of this rulemaking, as noted in comments filed by the Small Business Administration Office of Advocacy.

2. "Concern" About Wage Depression

Having disregarded Judge Pollak's instruction to engage in a narrow rulemaking to take public comment on the use of OES wage data and four skill levels, the Department instead proposes wide-ranging and costly regulatory changes on the basis that "[s]ince the 2008 Final Rule took effect . . . [it] has grown increasingly concerned that the current calculation method does not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H-2B workers." 75 Fed. Reg. at 61579.

Solely upon the basis of this vaguely stated "concern," the Department proposes a host of sweeping regulatory changes that would upend more than a decade of established practice in the H-2B program. Notably, the Department offers no evidence, data, or analysis that would demonstrate the reason for its sudden "concern." Nor does the Department offer any evidence, data, or analysis that would demonstrate its proposed regulatory changes would remedy whatever alleged underlying problem has given rise to the Department's concern. This complete lack of evidence, data, or analysis prevents the public from having any meaningful opportunity to evaluate or comment on the basis underlying the Department's proposal.

The Chamber would like an opportunity to evaluate for itself and comment on whatever factual basis resulted in the Department's concern about current wage rates being inadequate to protect U.S. workers, as well as any factual basis that the Department relied upon in determining its proposed regulatory changes would produce wage rates adequate to protect U.S. workers. If the public had the benefit of evaluating and commenting on the basis for the Department's decision-making, we might agree with the Department's conclusions, or we might be able to point out alternative or better sources of data, or mathematical calculation errors, or faulty leaps

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[2] In this letter, the Chamber takes no position on the suitability of generally-applicable H-2B regulations, practices and procedures to those H-2B employers that are historically permitted to deviate from those regulations, practices and procedures pursuant to the Department's "Special H-2B Procedures."

of logic, or even wholesale alternative regulatory solutions to the problem (assuming a problem exists). At the very least, one would be able to discern whether there is any rational connection between the facts the Department considered and the regulatory choices it made.

With nothing but a few conclusory statements in the NPRM, the Department has largely obfuscated the rationale for its regulatory changes and as a result the public is left to guess about the reasoning and factual bases underlying the Department's position. Without knowing how the Department arrived at its regulatory solution, or even arrived at its conclusion that a problem exists that requires a regulatory solution, we are deprived of a meaningful opportunity to comment on the rulemaking in any substantial or substantive way, never the less we will respond to the Department's proposal, despite its lack of detail or analysis, in the best way we can.

B. The Structure of the Current H-2B Labor Certification Process Does Not Result in Adverse Effect or Wage Depression

1. DOL Concludes There is no Adverse Effect

The Department's claim of adverse effect and wage depression resulting from the current labor certification process is not consistent with its current certification process. A primary purpose of the Department's labor certification process is to ensure that the employment of foreign workers does not adversely affect U.S. workers. In this NPRM, the Department takes the position that the labor certification process, which includes use of a four tiered wage system and a wage assigned by the Department, somehow results in an adverse effect on U.S. workers by depressing wages. But the Department fails to explain why it continues to certify thousands upon thousands of H-2B applications as not adversely affecting U.S. workers if it actually believes, as asserted in this NPRM, that employment of those H-2B workers is adversely affecting U.S. workers and depressing wages. By definition, the Department's approval of an employer's application to hire H-2B workers, including the wage that will be paid to those workers, is a determination that U.S. workers will not be adversely affected and that wage depression will not result from employment of the H-2B worker at that wage.

2. Tiered Wage System Does Not Cause Wage Depression

As part of the justification for the NPRM, the Department claims that "a tiered wage system can have a depressive effect on wages of similar domestic workers . . . [and the] Department cannot continue to allow such wage depression where its mandate is to ensure that the wages of U.S. workers suffer no adverse impact." 75 Fed. Reg. at 61580 - 61581.

The Department offers no factual or analytical basis for its conclusion that a tiered wage system can result in a depressive effect on wages. In addition to providing no evidence that a tiered wage system could hypothetically result in wage depression, the Department does not provide any data or analysis demonstrating that such an effect is actually occurring as a result of the H-2B program. Yet, the Department proclaims that it will not allow this wage depression to continue. Thus, the Department's proposed wide-ranging regulatory changes are offered as a solution to a problem the Department has not shown actually exists.

Moreover, despite claiming a four tier wage system results in wage depression and must be abolished in the H-2B program, the Department would continue to use the same four tiered wage system in the H-1B program and the PERM program, apparently unconcerned about any wage depression on workers in those occupations.

The Department explains that the four skill levels used for each occupation in the OES data and in each of the foreign worker programs[3] are not actually determined by a survey of skills per se, but instead are artificially constructed through a mathematical division of the range of observed or imputed wages in an occupation within a small geographic area. As the Bureau of Labor Statistics and Department has long acknowledged, however, this four tier wage construct mandated by Congress was created to recognize that the range of skill levels in an occupation can be inferred by the difference in wages paid in the occupation.

The Department then claims that skill levels may be more appropriate for higher skilled occupations but are inappropriate for lower skilled occupations because there are no skill differences in those occupations. But once again, the Department offers no factual basis or analysis that would support that conclusory statement. The methodology for determining skill levels in H-1B and PERM is the same as the methodology for determining skill levels in H-2B, so the Department cannot reasonably conclude that the methodology appropriately reflects skill differences in the former program occupations, but not in the latter.

3. Current Prevailing Wage Does Not Have a Depressive Effect Because it is Skill Level 1

The wage assigned by the Department, which an employer must pay to an H-2B worker is not depressive simply because the wage happens to be for a job classified as skill level one. The Department's observation that most H-2B workers in a particular occupation are paid skill level one wages and that wage is below the median wage for that occupation is unfounded. 75 Fed. Reg. 61580. By its very definition, skill level one wages are below the median of all wages in that occupation: they are level one wages. In a four tier system, median wages would be between level two and level three.

It is also important to note that level one wages are not the lowest wage observed for the occupation, rather level one wages are, pursuant to the mathematical skill level calculation, about 30% higher than the lowest wage paid in the occupation. Thus, H-2B workers, even at skill level one, are paid more than a significant number of other workers in that occupation at skill level one. Following the Department's reasoning leads to the conclusion that paying the median wage, which the Department advocates in the NPRM, would result in wage depression because half the workers in the occupation are being paid more than the median wage.

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[3] Except for the H-2A program, which as of March 15, 2010 no longer utilizes OES data. Notably, the Department reversed its prior decision to utilize OES data in the H-2A program, not out of concerns about wage depression, but because it claimed OES data was inaccurate. 75 Fed. Reg. 6884 (February 12, 2010).

4. Current Prevailing Wage Cannot Have a Depressive Effect Because the H-2B Program Includes a Small Percentage of Workers

The Department has been using OES data in the H-2B program since 1998 and utilizing the four-tiered skill system since 2005. The Department does not explain how such wage depression has occurred when use of the H-2B program has, with one exception, been on a steady decline for the past 5 years.

In fact, since the Department, according to the NPRM, began to be concerned about wage depression in 2009, H-2B visa utilization has declined by 52% - to its lowest level in a decade.[4] The number of H-2B employer applications and number of requested workers has also substantially declined as Department data indicates, but those numbers alone do not tell the full story because regardless of the number of workers requested or approved, the number of H-2B workers that may enter the country in a given year is limited by statute to just 66,000. In 2009, there were just 44,847 H-2B workers in the U.S. economy, however, as thousands of H-2B visas went unclaimed.

Moreover, as the Department notes, the number of H-2B workers "represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the program." 75 Fed. Reg. 61582. Given that H-2B workers overall represent a miniscule composition of the entire U.S. labor force, are dispersed throughout a number of occupations and over wide geographic area, it is not clear how the Department determined that the H-2B program is causing wage depression. It is not even clear that such a conclusion would be reasonably possible because 44,847 H-2B workers out of a total nonfarm employment of 130.9 million is less than 0.034 percent of the entire workforce.[5] The Department has provided no data or analysis to comment upon that would demonstrate how the wages mandated in the NPRM, paid to this exceedingly small number of workers, could possibly result in wage increases for any of the remaining 99.966 percent of U.S. workers.

The Department also does not distinguish the magnitude and extent of the alleged wage depression among the various occupations that utilize H-2B workers, nor among specific geographic areas. The scarce H-2B program data cited by the Department in the NPRM, however, reveals a wide disparity in the extent of H-2B usage by occupation - ranging from .2 percent to just over 13 percent of an occupation, based on the Department's analysis of multiyear data.[6] 75 Fed. Reg. 6152. Instead of focusing on the source of the alleged problem, the Department lumps all H-2B occupations together from coast to coast and forces a one-size-fits-

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[4] *See* U.S. State Department Nonimmigrant Visas Issued FY 1989 - 2009.

[5] Bureau of Labor Statistics

[6] We cite the Department's numbers for illustrative purposes and do not necessarily agree with the Department's calculations due to the inability to reproduce the claimed results. The Department repeatedly uses inconsistent data sets and calculations to produce conclusions without providing the public with a complete explanation of the inputs used to produce the results claimed.

all regulatory change on all employers in the program without regard to whether that employer or industry is contributing to the alleged problem.[7]

While it is arguably possible that wages paid to 13 percent of workers in an occupation may perhaps have some effect on wages if the 13 percent were concentrated in one small geographic area, no credible economist would claim that wages paid to 0.2 percent of workers in an occupation would result in any significant affect on the remaining 99.8 percent of workers in that occupation, particularly when those workers are spread across the entire country. Thus, even if one were accept the Department's wholly unsupported conclusion that wage depression exists, the Department has proposed a wholly arbitrary regulatory solution for that problem that fails to recognize the legitimate differences among occupation and geographic area.

C. Abundant Data Refutes the Department's Claim of Wage Depression

Contrary to the Department's conclusory statements about the H-2B program resulting in an adverse effect on U.S. workers by lowering their wages, there is abundant data indicating there is wage growth and increased U.S. employment in occupations that utilize H-2B workers. Given the total absence of data and analysis in support of the Department's conclusions in the NPRM, this data is all the more compelling.

1. DOL Foreign Labor Annual Reports

Far from causing wage depression, H-2B program data released by the Department (though not as part of this NPRM) conclusively demonstrates there is positive wage growth for H-2B workers as reflected in employer applications.[8] A comparison of data contained in the Department's 2009 Report on Foreign Labor Certification with data contained in the Department's 2007 Report clearly demonstrates that the average wage growth for H-2B workers among the largest occupations utilizing H-2B workers far outpaces the overall wage growth for similarly situated U.S. workers in the economy.[9]

Specifically, the occupational classification that is by far the most cited in H-2B applications, "laborer, landscape," saw its average offered wage rise 6 percent from 2007 to 2009.[10] The "laborer, landscape" occupation represents more than 31% of all H-2B positions

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[7] Again, however, we note that an H-2B application approved by the Department cannot, by definition, result in an adverse impact on U.S. workers.

[8] *See* U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *The Foreign Labor Certification Report: 2009 Data, Trends and Highlights Across Program and States, October 1, 2008- September 30, 2009* ("2009 Report") and *Foreign Labor Certification: International Talent Helping Meet Employer Demand, Performance Report October 1, 2006 - September 30, 2007* (2007 Report). The Department failed to issue a 2008 Annual Report.

[9] *See* 2009 Report at page 34; 2007 Report at page 28.

[10] *Id.*

approved by the Department, nearly five times as many positions as the next largest category.[11] Another similar occupation, "groundskeeper - industrial and commercial" saw wages paid to H-2B and corresponding U.S. workers rise more than 9 percent from 2007 to 2009.[12]

Other major occupational categories cited in the H-2B program also saw wage increases, including construction workers with a 4 percent wage growth for H-2B and corresponding U.S. workers from 2007 to 2009.[13] These wage increases for H-2B and U.S. workers come at a time when wage growth for lower skilled workers in the overall economy has been flat or even declining. There is a wealth of government data and analysis demonstrating the effect of the economic recession on earnings for workers in various demographic groups. Notably, men with a high school education, which is representative of many H-2B workers, have seen no growth or even negative growth in average earnings in the past two years. Men with less than a high school education have seen in excess of negative 3 percent wage growth in the past year.[14]

Those flat or declining wage levels stand in marked contrast to the increase in wages paid to H-2B workers. Indeed, given the increase in wages seen among the largest occupational categories for H-2B workers, the Department cannot reasonably conclude, as it has in this NPRM, that the employment of H-2B workers results in wage depression.

2. U.S. Chamber of Commerce and ImmigrationWorks USA Analysis of the H-2B Program

There is further evidence of the H-2B program leading to wage growth and increased U.S. employment. The Chamber, along with ImmigrationWorksUSA recently conducted a study and econometric analysis of the H-2B program, *The Economic Impact of H-2B Workers*, which we have attached hereto as part of our comments. The analysis included Department of Labor data on H-2B program usage, as well as nationwide and state labor market data. Contrary to the Department's conclusions in this NPRM, for which the Department provides no data or analysis, this analysis indicates the number of H-2B workers in a given field has no negative effect on U.S. workers' employment or earnings.

Rather than depressing wages, it is clear that the presence of H-2B workers in a given occupation is associated with wages in that occupation increasing faster than they otherwise would. In addition, in occupations where H-2B workers are present, employment also increases faster than it otherwise would. The data and our analysis confirms that employers who utilize the H-2B program are able to hire more U.S. workers for higher skilled jobs that rely on the work performed by H-2B workers.

D. The Department's Proposed Changes

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] See Bureau of Labor Statistics, Employer Cost Index and Current Population Survey.

As a result of the Department's unsupported "concern" about adverse effect on U.S. workers resulting from the employment of H-2B workers, the Department proposes wide-ranging and unprecedented changes in the methodology by which wage rates are set in the H-2B program. These changes will dramatically increase costs to employers by mandating that they pay artificial wage rates to H-2B and U.S. employees. These inflated union wages will be particularly burdensome on the small, non-union businesses that most utilize the H-2B program.

Rather than proposing changes in the wage methodology that are the product of a reasoned analysis of actual data demonstrating a problem, the Department appears to have concluded it wants higher wages in the H-2B program and then goes in search of a justification for those higher wages. A critical examination of the problem the Department claims exists and its proffered solution, however, reveals that there is no rational connection of facts or analysis and the alleged problem, nor is there any rational connection between the alleged problem and proffered solution offered in the NPRM.

1. New Definition of "Prevailing Wage"

The Department's NPRM proposes an entirely new scheme for determining "prevailing wages" in the H-2B program that deviates from the traditional definition of prevailing wage that has existed since the H-2B program's creation in 1987. In particular, the Department would revoke the ability of an employer to determine which wage survey most accurately measures prevailing wages for the employer's job opportunity in the local market and would instead mandate that the employer pay the highest wage from among a variety of sources the Department consults.

In reality, the Department is proposing a significant regulatory shift though a linguistic sleight of hand. The Department would not be assigning employers a "prevailing wage," as it claims, but rather assigning the highest wage from any of the available wage surveys, regardless of the survey's accuracy or suitability for the occupation. It appears the Department is attempting to reproduce in the H-2B context the Adverse Effect Wage Rate concept from the H-2A program, but without any statutory, legislative or regulatory history for such an action.

The universe of wage data to which the Department will refer in selecting the highest wage for each occupation in an area of intended employment includes wage rates determined from (1) a survey produced by the Department of Labor pursuant to the Davis-Bacon Act ("DBA"); (2) a survey produced by the Department of Labor pursuant to the Service Contract Act ("SCA"); or (3) the median wage for the occupation from the Occupational Employment Statistics ("OES") Survey by the Bureau of Labor Statistics ("BLS"). In addition, the Department will also consider a collective bargaining agreement to be the highest wage if the employer's job vacancy is covered by such agreement and no other survey returns a higher wage rate.

The problem with the Department's proposal is that it treats each of these various surveys as being of equal validity when that is clearly not the case. The methodology for determining wage rates under each of the three surveys cited above varies widely and is by no means similar, let alone comparable. The fact that the Department claims each of those three surveys individually produces an accurate prevailing wage for a specific occupation in the area of

intended employment demonstrates the fallacy of the Department's position. If each of the three surveys accurately measures the prevailing wage for an occupation in the area of intended employment, then each of the three surveys (or however many are applicable) would be expected to produce wage rates that are virtually identical for an occupation in a specific geographic area. In practice, however, the three surveys produce wildly different results for allegedly "prevailing wages" in the same occupation and in the same geographic area. There are many examples of these discrepancies. For example, the "prevailing wage" in Wichita, Kansas for Landscaping and Groundskeeping Workers according to the OES survey (at Level 1) is $7.68 per hour, while the "prevailing wage" for Laborer, Grounds Maintenance workers under the SCA survey is $9.95 per hour, a difference of 30 percent.

The Chamber, on behalf of its members, would like an opportunity to comment upon the Department's basis for concluding that the highest wage produced from among the various surveys is the most accurate or the most representative, or the one that is "prevailing." But, yet again, the Department has provided no factual data or analysis in support of its conclusion and thus, the public is prevented from commenting on the Department's rationale.

2. DBA Wage Rates

Each of the three surveys cited above suffer from particular methodological problems that may in any particular case result in skewed wage determinations that are not reliable. For example, the DBA wage determination surveys have long been criticized for their inaccuracies and inadequacies. One major methodological flaw in the DBA wage determinations that makes them unreliable as a gauge of prevailing wages is that the survey is not scientifically or statistically valid. That is, the wage determinations are based purely on voluntary responses by employers that are not validated or adjusted to reflect the sample size. Moreover, the wages often do not reflect actual wages paid to workers in that locality, but rather a union-negotiated wage rate.

The Government Accountability Office ("GAO") has issued several reports detailing the structural and administrative flaws in DBA wage determinations going back nearly 40 years. The "excessive" DBA wage determinations resulting in an "inflationary effect" have been repeatedly well documented over the years. *See, e.g., The Davis Bacon Act Should Be Repealed*, HRD-79-18, Report to the Congress by the Comptroller General (April 27, 1979), GAO Testimony Before the Subcommittee on Oversight and Investigations and the Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities, House of Representatives, *DAVIS-BACON ACT Process Changes Could Address Vulnerability to Use of Inaccurate Data in Setting Prevailing Wage Rates,* (June 20, 1996). Also, more recently, a report from the Office of Inspector General, U.S. Department of Labor, *Concerns Persist with the Integrity of Davis-Bacon Act Prevailing Wage Determinations,* Report Number: 04-04-003-04-420, March 30, 2004, highlighted some of the same structural flaws in DBA wage determinations.

The Department claims in the NPRM that the DBA survey program has undergone improvements "in the last 7 years, resulting in a greatly improved" process, but fails to specify what methodological improvements have been implemented other than collecting data from three different types of public construction projects on a county basis. 75 Fed. Reg. 61579. By

contrast, the investigative arm of Congress, GAO, has noted that the program is fatally flawed and the problems and inadequacies it has identified in the Department's administration of the program "cannot be corrected or improved significantly by any administrative action, regulation modification, or application of additional resources to program administration. GAO Report at 13.

The Department has not explained on what basis it determined that DBA wage determinations produce accurate prevailing wages that should be mandated on private sector employers in the H-2B program that are not otherwise subject to the Davis-Bacon Act.

3. SCA Wage Rates

The SCA wage determinations by the Department of Labor are also flawed as an accurate measure of "prevailing wages" in a specific occupation within an area of intended employment. In fact, the Department acknowledges in the NPRM that there is not even a consistent source of data used to make SCA wage determinations. Sometimes BLS National Compensation Survey data is used and in some cases OES survey data is used, and in some cases data about wages paid to Federal employees is used. *See* 75 Fed. Reg. 61579.

Such inconsistent data sources cannot possibly be expected to return accurate and consistent "prevailing wage" determinations in the H-2B program. This is especially true considering wages for Federal employees have repeatedly been found to be substantially higher than wages paid to comparable workers in the private sector. *See e.g.,* James Sherk, *Comparing Pay in the Federal Government and the Private Sector*, WebMemo 2965, The Heritage Foundation (July 26, 2010) (finding 22 percent premium paid to federal workers over comparable private sector jobs). The Department has not explained how the methodology for collecting SCA wage rates is accurate or relevant to private sector occupations in the H-2B program that are not otherwise subject to the Service Contract Act.

4. OES Wage Rates

The OES wage data that is collected and compiled by BLS is often the most accurate and applicable wage data for the vast majority of occupations and employers in the H-2B program.[15] While the OES data is far from perfect in all cases, the OES survey data is the most widely gathered and the individual rates are published according to established statistical standards and modeling. The same cannot be said for DBA or SCA wage determinations. Moreover, the four tiers of wages representing skill levels have been successfully used by the Department for the past five years and have proven to be an effective addition to the Department's 12-years of experience administering the H-2B program and assigning prevailing wages based on OES data. The Department should maintain this practice.

In notable cases, however, the scarcity or complete absence of actual observed paid wage rates for particular occupations in geographic areas can lead to extreme volatility in wage rates derived from the OES survey. The resulting modeling required in the OES program to construct

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[15] There are, however, exceptions for many occupations (e.g., seafood processing) when the OES data is inaccurate, incomplete or nonexistent.

wage rates in the absence of actual wage data plainly does not reflect an actual "prevailing wage" paid for that occupation.[16] In these cases, the current practice of enabling employers to request DBA or SCA wage determinations, or to utilize an employer-provided survey, is a crucial safety-valve for employers who find the rates returned by a particular survey to be inconsistent with local market wages.

5. Employer-Provided Surveys

Employer-provided surveys have worked very well in the H-2B program. The Department's regulations include specific detailed and rigorous criteria and methodology that these surveys must meet in order to be accepted. Notably, the methodology for these private surveys exceeds even what the Department applies to its own DBA and SCA surveys. In addition, these surveys are critical to several industries that use the H-2B program and for which there is not valid or reliable or complete government data on wages paid in certain occupations, particularly in the seafood and resort industries. The Department claims that review of these surveys is inefficient, but provides no data or analysis in support of that conclusion that the public can evaluate. The Department also does not disclose how many private surveys it reviews a year, how many it rejects or how many it accepts, and thus the public has had no opportunity to evaluate the Department's claim that evaluate of the surveys is a waste of resources.

In addition, the surveys these employers utilize or commission regarding wages paid in their industry also cannot result in wage depression or an adverse effect on workers because each survey must be approved the Department. The Department should retain the option for employers to provide their own wage surveys conducted pursuant to the Department's current regulatory requirements for wage surveys.

6. Department's Proposed Prevailing Wage Change is Arbitrary

Finally, the Department's proposal to mandate that employers pay this new "prevailing wage," which really means "highest wage," in order to end wage depression caused by the H-2B program contradicts the Department's rationale elsewhere in the NPRM, lacks a reasonable basis, and is arbitrary. The Department first claims that in order to end wage depression it will no longer permit wages to be assigned by one of four skill levels using OES data and instead will require that employers pay the arithmetic mean of OES wages. Presumably, the Department determined that paying the median wage among a range of wages in the OES survey from high to low is sufficient to end wage depression.[17]

Yet, the Department then says that when faced with a range of wage rates from highest to lowest among the various wage survey sources (OES, SCA, DBA) it will require employers to pay the highest wage in order to end wage depression caused by the H-2B program. The

[16] BLS acknowledges that it often must utilize data from other surveys to construct the OES wage estimates.

[17] As noted, the Department fails to cite any data or analysis that would support this proposition and Chamber cites it here for illustrative purposes without agreeing with the Department's conclusion.

Department fails to explain how, when selecting from among a range of wages in the OES program, the mean wage is required to cure wage depression, yet when selecting from among a range of wages in the three surveys, the highest is required to cure wage depression. The Department is simultaneously advocating directly contradictory rationales, both of which cannot be true, and has offered no explanation for these diametrically opposed positions.

E. Failure to Properly Analyze Impact and Alternatives

As noted above, the Department's rationale for this rulemaking lacks any rational factual or analytical basis and instead relies on a series of unsupported conclusory statements in an attempt to explain the need for a massive re-engineering of the wage determination process that has been in place for the past 12 years. The Department has also failed to adequately measure the impact of its proposed rule, including the devastating economic consequences it will have for employers in the H-2B program, many of whom are small businesses.

1. Failure to Consider Alternatives

To begin, the Department fails to consider or analyze any meaningful regulatory alternatives to its proposed regulatory changes because it claims it did not have sufficient time as a result of the court's decision in *CATA v. DOL*. At the October 20, 2010 Small Business Administration Office of Advocacy Roundtable, however, representatives of the Department, including the Administrator of the Office of Foreign Labor Certification and a senior attorney from the Solicitor's Office acknowledged that the Department had been working on a comprehensive H-2B rulemaking since 2009 and following the recent *CATA v. DOL* decision, simply excised from that large rulemaking the section dealing with changing the wage methodology that it presents here.

Although the Department has acknowledged working on this rulemaking for well in excess of a year, it claims it has not had sufficient time to fully analyze regulatory alternatives. Yet, the Department provides the public with just 30 days, later extended to 38 days, in which to suggest regulatory alternatives. The Department has failed to explain how individual employers, currently operating businesses could, over the course of 38 days, gather sufficient evidence and analysis in support of regulatory alternatives that the Department, with all of the resources at its disposal was unable to produce in more than a year.

Moreover, while the Department invites suggestions for regulatory alternatives, it requires that those alternatives provide "adequate protections to U.S. and H-2B workers" without ever defining what qualifies as "adequate." 75 Fed. Reg. 61581. The Chamber would like to offer a number of alternatives but believes doing so would be futile because the Department has provided no objective basis for the public to determine what would be considered adequate. Having failed to enunciate any objective standard that will guide its decision-making, the Department can arbitrarily reject any alternative suggested by the public on the basis that the alternative failed to provide adequate protection to U.S. and H-2B workers. The Department has essentially created for itself an "I'll know it when I see it" standard, which is wholly insufficient to provide the public with a meaningful opportunity to offer viable alternatives to the Department's proposal.

In addition, the Department has taken the position that its proposed requirement for employers to pay the highest wage from any of the relevant surveys is the only way to ensure no adverse effect on U.S. workers, thereby effectively excluding any alternative to the Department's position as being inadequate to protect U.S. workers.

2. Flawed Analysis

The Department's economic and regulatory flexibility analysis of the proposed rule is inadequate, as noted in the comments filed by the SBA Office of Advocacy. The Department's analyses repeatedly use assumptions that lack any factual basis, even when the Department has relevant factual data at its disposal. For example, the Department acknowledges that it has been gathering data on the size of firms that use H-2B workers as part of the application process for the past two years. Yet, the Department inexplicably disregards this data claiming it is not complete and then goes on to make unsupported assumptions about the size of H-2B employers.[18] The Department does not explain the extent of the data it has collected or what it reveals. The Chamber would like the opportunity to comment on that data as it may very likely produce more reliable or informative facts about H-2B employers than do the Department's assumptions.

Likewise, when other government agencies possess data that would also inform the Department's analysis, it either ignores such data or claims it does not exits. For example, at 75 Fed. Reg. 61583 n.14, the Department claims the State Department "keeps records of visa issued but does not publicly break down these numbers based on subcategories within the H category." The Department's failure to locate basic and readily available Department of State data on the number of H-2B visas issued by year is astounding . The State Department makes available on its website a detailed breakdown (including an Excel format spreadsheet that can be downloaded) of visas issued by category and subcategory going back to at least 1989.

The lack of data and complete explanations in the NPRM prevents the public from being able to reasonably reproduce the Department's calculations in order to test their assumptions and conclusions.[19] The Department also makes a host of assumptions that call into question the validity of entire economic analysis of this NPRM. For example, in support of its conclusion that the rule will not have a significant economic impact on a substantial number of small entities. The Department characterizes the $769.4 million in increased "costs" resulting from the NPRM as a mere "transfer," thus downplaying the economic impact of the rule change. But in order to support this conclusion, the Department makes a significant assumption that violates the government standards it cites elsewhere in support of it analysis. At 75 Fed. Reg. 61582, fn. 4, the Department notes "[f]or purposes for this analysis, H-2B workers are considered temporary residents of the U.S."

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[18] For example, by assuming that 50 percent of all H-2B employers are small businesses. 75 Fed. Reg. 61586, fn. 29.

[19] *See* Circular A-4 at 17, Office of Management and Budget (September 17, 2003) ("A good analysis should be transparent and your results must be reproducible. You should clearly set out the basic assumptions, methods, and data underlying the analysis…").

This is a critical assumption because based on it, the Department then claims the increased wages are just redistributed within the U.S. economy. But, H-2B workers are foreigners who send the vast majority of their earnings back to their home country where it is spent in that nation. Thus, the increased wage payments are more properly considered "costs" and this is evident in OMB Circular A-4, which at page 38 instructs agencies conducting analyses of their regulations that "transfers from the United States to other nations should be included as costs" (emphasis in original).

3. Failure to Consider the Experience of the CNMI and American Samoa

The Department substantially underestimates the impact of the NPRM on individual employers that will be subject to its costly mandates, as well on specific industries and the U.S. economy overall. The result will be dramatic cost increases on H-2B employers that will result in economic contraction as employers curtail business, are driven into bankruptcy, or close their business in the face foreign competition that is able to undercut U.S. labor costs.

The job-killing result of the Department's NPRM have already been demonstrated over the past few years in a similar context where Congress mandated artificial wage increases. Ultimately, Congress cancelled future increases but not before the prior artificial wage increases resulted in an economic catastrophe.

The GAO completed a report in April 2010 that is a case study on the harmful effects of government over-regulation and mandated artificial wage rates. We commend this report to the Department as an instructive guide of the likely effect of this NPRM. *See American Samoa and Commonwealth of the Northern Mariana Islands: Wages, Employment, Employer Actions, Earnings, and Worker Views Since Minimum Wage Increases Began*, GAO-10-333 (April 2010) ("GAO report").

Just one week before the Department issued this NPRM, the President signed into law a bill that was passed overwhelmingly by Congress canceling U.S. government-mandated general wage increases in the Commonwealth of the Northern Mariana Islands ("CNMI") and American Samoa. *See* Pub. L. 111-244, Sec. 2 (Sept. 20, 2010). In the face of overwhelming evidence of the devastating effects on job creation and the economy caused by the mandated wage increases, the Congress, which just a few years prior had mandated the increased wages, abruptly reversed course. Notably, in late 2009, Congress had already once delayed wage increases set to become effective in 2010. *See* Pub. L. 111-117, Sect. 520, Division D (Dec. 16, 2009). This most recent change in the law cancels the 2010 and 2011 increases in American Samoa and the 2011 increases in the CNMI. *See* Pub. L. 111-244.

Although the CNMI and American Samoa are located thousands of miles from the U.S. mainland and the mandated wage increases there applied to the entire economy, rather than just a temporary worker program, those differences are largely irrelevant because of the otherwise significant similarities in the two events.

Virtually all of the private sector employment in the islands, including in the garment industry in the CNMI, involves lower skilled, non-agricultural work. Although not necessarily temporary or seasonal jobs, the skills required for those occupations are analogous to the skill

and educational levels required for employment in the H-2B program. Notably, in the CNMI and American Samoa, much of the private economy consisted of seafood processing and the hospitality industry, both of which are significant seasonal industries that utilize the H-2B program. It is this similarity of type of employment for lower skilled workers that is the key parallel between the two events.

In addition, the existence of lower priced substitutes in the market and ability of some employers in the CNMI and American Samoa to move their business abroad in response to the increased costs is particularly relevant to industries utilizing the H-2B program, such as seafood processing. Thus, the effects we have seen from the imposition of artificial wage increases on employers of workers in lower skilled occupations in the CNMI and American Samoa will almost certainly be repeated on the mainland as a result of the Department's NPRM. Indeed, the observed effects in the CNMI and American Samoa are likely to be even more pronounced on H-2B employers in the U.S. because of the seasonal nature of many H-2B employers.

Inexplicably, Congress waited to cancel these artificial wage increases in the CNMI and American Samoa until those economies had already been devastated by prior rounds of the mandated wage increases, even though Congress had been warned about the job killing impact of these polices two years before in a 2008 report produced the career Chief Economist at the Department of Labor in response to a request from Congress.[20] *See Impact of Increased Minimum Wages on the Economies of American Samoa and the Commonwealth of the Northern Mariana Islands*, U.S. Department of Labor (January 2008) (predicting mandated wage increases will lead to closures in tuna canning and garment manufacturing industries, and result in exacerbating an already difficult economic climate).

But rather than heed those warnings from the Department of Labor, Congress persisted with mandating artificial wage increases of nearly 50% in the CNMI and 44% in American Samoa until the 2010 GAO report corroborated the devastating economic effects predicted by the earlier study from the Department of Labor. *See* Cong. Rec. H7361, Sept. 29, 2010, Statement of Rep. Miller ("The recent GAO report lays out in great detail the serious economic difficulties confronting each territory . . . [and the] GAO report justifies an adjustment to the minimum wage scale"); Statement of Rep. Bordallo (This adjustment comes based on the thorough analysis of the Government Accountability Office").

The U.S. government's decision to require American Samoa and CNMI employers to pay inflated wage rates, far above market levels, was a clear cause of a massive collapse in private sector employment opportunities. Indeed, the GAO report notes, as the earlier DOL study predicted, that since Congress mandated these above-market wage increases, a major private employer in American Samoa closed a tuna canning facility and the major private employer in the CNMI closed its garment manufacturing facility. In both cases, the employers cited the excessive above-market wage rates mandated by Congress, which resulted in anti-competitive labor costs, as the reason they closed their facilities and moved operations abroad.

[20] Pub. L. 110-28, Sect. 8104 (May 25, 2007).

The GAO report found that employers representing (at the time of the survey) 84% of private sector employees reported they planned to close or relocate their businesses, and of those, employers representing nearly 90% of private sector employees noted they planned to do so explicitly because of the government-mandated wage increases. In the year following the initial wage increases in 2007, GAO determined there was a 12% decrease in the American Samoan workforce, as well as the direct loss of at least 2,000 jobs from one business closure alone. In the CNMI, there was a staggering 27% decrease in employment from the year before the first wage increases until the year after. Many private employers in the CNMI also noted they have responded to the wage increases by cutting costs through hiring freezes. The GAO found that in the CNMI hotel industry, the mandated wage increases required hotels to raise room rates, which in turn, would likely result in a 14% loss in business.

Significantly, the GAO report also includes comments from the government of American Samoa, which noted that "without a change to the harmful mandated wage increases, American Samoa will face very serious economic difficulties." GAO report at 11. And the CNMI government noted that "the annual minimum wage increases will greatly and negatively affect the CNMI economy, particularly small employers." GAO report at 12.

As a result of the GAO report, Congress finally acted in an attempt to ameliorate the job killing impacts of its earlier policy decisions. But the Department is now inexplicably on the verge of attempting virtually the same disastrous economic experiment with the livelihood of countless U.S. workers and employers even though it is faced with hard evidence in the GAO report and earlier DOL report that such policies are not only unnecessary, but also will in all likelihood produce catastrophic economic results.

F. Conclusion

The Department's NPRM to mandate inflated union-based wage rates on a host of businesses that employ H-2B workers lacks any factual or analytical basis. The Department repeatedly relies on unsupported conclusions and assumptions instead of actual data. Indeed, as we have cited here, there is extensive data available that directly contradicts the Department's assumptions and conclusions. The Department's analysis of its proposal is also sorely lacking in analysis of actual data and instead, like the proposed regulatory changes, relies on a series of unsubstantiated assumptions and conclusions even when actual data is available. Moreover, the Department ignores the recent history of economic devastation caused by other similar attempts to mandate artificial wage increases for lower skilled workers.

The Department's entire rulemaking effort is flawed. The unsupported conclusions and faulty analysis reveals a lack of basic transparency necessary for the public to have a meaningful opportunity to comment on an agency's basis for engaging in rulemaking. Rather than pursue these unjustified, job-killing regulatory solutions to non-existent problems, the Department should be looking for ways to lighten the regulatory burden on U.S. employers, so that they can expand hiring and provide additional jobs to U.S. and H-2B workers to grow our economy.

Respectfully submitted,

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