Mountain Plains Agricultural Association and OMB Meeting
DOL and DHS Rules Affecting H-2A Workers
Thursday April 23, 2009

I. DOL Should Suspend Its Final H-2A Rules

Mountain Plains Agricultural Services ("MPAS") is an association of individual ranchers engaged in the range production of livestock, and sheep shearing contractors who are essential to the range production of sheep, and supports the suspension of the U.S. Department of Labor's newly enacted "H-2A Final Rule".

DOL's H-2A Final Rule must be suspended because the pre-filing recruitment and the attestation processes of the H-2A Final Rule are contrary to the statutory mandate. Section 218 of the Immigration and Nationality Act ("INA") (8 USC 1188) requires that DOL notify the employer within 7 days of filing the application for H-2A labor certification as to whether the application -- including all required terms and conditions of employment -- meets the statutory standards for approval. The current DOL H-2A rule restructures the H-2A application and agency review process in a manner that violates the 7-day requirement.

Such terms and conditions of employment include longstanding special procedures[1] established by DOL for those employed in occupations necessary for the range production of livestock. These special procedures are critical to the range production of livestock, which is an essential food and wool source for the United States. Thus, it is in the interest of the United States that DOL suspend any new regulations that jeopardize the application of these special procedures that have been vital to the use of the H-2A program over the past 20-30 years by ranchers and shearing contractors.

The clear effect of both DOL's and DHS's "Final H-2A Rules" has been to make the H-2A program more burdensome for employers. The new rules discourage its use to provide a source of legal foreign agricultural workers when qualified U.S. workers are not available. The new rules also jeopardize the survival of the small farms and ranches that provide a key ingredient in the agricultural livestock food production chain -- which employs countless thousands of U.S. workers and helps ensure U.S. food self-sufficiency.

In summary, MPAS and VRLP support the suspension of the new DOL H-2A rule, point out that the corresponding new DHS H-2A rule must be suspended as well, and believe that there is no reason to change the prior DOL and DHS H-2A rules in effect before January 17, 2009. A copy of the MPAS and VRLP comments to DOL's proposal to suspend its current H-2A rules is attached.

1[1] Field Memorandum No. 24-01, Special Procedures: Labor Certification for Sheepherders and Goatherders Under the H-2A Program and TEGL No. 15-06, Special Procedures for Processing H-2A Applications for Occupations Involved in the Open Range Production of Livestock; and TEGL No. 17-06 Special Procedures for Employers in the Itinerant Animal Shearing Industry Under the H-2A Program.

II. DHS H-2A Rules Should Be Suspended As Well

Just as DOL recognized that its new H-2A rule should be suspended, so should DHS suspend its corresponding new H-2A rule as well.

1. DHS recognized that the new rule would adversely affect sheep ranchers, and now that DOL may suspend its rule, it is improper to penalize sheep ranchers as DHS admits it would do.

In the H-2A proposed rule, DHS acknowledges that "there may be a slightly negative affect on sheep ranchers in the few states in the Western United . . .". 73 Fed. Reg. 8241 (Feb. 13, 2008). Under the previous rule, H-2A nonimmigrants working as sheepherders who had reached the three-year maximum stay in H-2A status were exempt from having to depart and remain outside the US for six-months. The new rule imposed a "three month-departure" requirement, which changed over 30 years of agency policy, causing an unnecessary burden on sheepherders and their employers. This is contrary to INA Section 218, which Congress enacted in 1986 to clarify that special considerations should be provided in the case of sheepherders and other employers involved in the range production of livestock, due to their unique needs. DHS has retroactively applied the three month departure requirement to workers who were already in H-2A status prior to the effective date of the new rule. The DHS regulatory proposal: (1) was inconsistent with Section 218 from its inception, (2) is even more problematic now that the DOL's regulatory assurances of the continuation of special procedures in effect for over 20 years have been eliminated, and (3) must now be suspended along with DOL's in order to achieve regulatory consistency. Failure to do so would be arbitrary and capricious, and therefore inconsistent with INA Section 218 and the Administrative Procedure Act.

2. The DHS rule is inextricably linked to the DOL rule, given the parallel revocation provisions.

The DHS rule revokes an H-2A petition whenever DOL revokes a previously approved labor certification application supporting such petition. See 8 C.F.R. 241.2(h)(11)(ii). DHS is prohibited, however, by INA Section 218 from relying on DOL labor certification decisions to determine admissibility or validity of status. DHS's ability under the previous rule to admit an H-2A applicant notwithstanding DOL's rejection or revocation of a labor certification application is critical to ensuring that employers have meaningful access to the H-2A process. In fact, the ability of the Immigration Service to trump an unreasonable DOL labor certification decision was a critical part of the compromise in the Immigration Reform and Control Act of 1986 that established the structure of the H-2A program that has been in place for over 20 years. The current DHS rule rescinds the critical independent review of a DOL denial of certification or revocation decision, is contrary to INA Section 218 and congressional intent, and therefore must be suspended.

3. The final rule's list of eligible countries is not a "logical outgrowth" of the initial DHS proposal to bar only 5 countries from which H-2A eligibility, thus violating the APA.

The DHS proposed rule clearly stated that H-2A petitions would not be permitted for workers who are from countries that do not have repatriation agreements with the United States or routinely refuse to cooperate with repatriation. The proposed rule listed five non-cooperating countries (China, India, Vietnam, Pakistan, and Laos) from which H-2A aliens would not be admitted. Critically, the proposed rule stated that, "this change is not expected to have any impact on the availability of H-2A labor." 73 Fed. Reg. 8243 (Feb. 13, 2008).

The DHS Final Rule, however, takes an entirely different approach, limiting H-2A program eligibility to only a narrow list of countries that DHS deemed to satisfy a list of criteria that were entirely unmentioned and undisclosed in the proposed rule. The result is that a dramatically large number of countries (over 100) are now not eligible to send their nationals to the United States as H-2A workers, and the justification for this limitation was no longer based on the violation of repatriation agreements or lack of cooperation in repatriation issues. Countries from which H-2A workers came in 2008 that have been left off the list include several European countries, which are either NATO allies and/or members of the European Union, i.e. Netherlands, France, Germany, Denmark, Ireland, Hungary, and Switzerland[2]. The proposed rule stated that these measures will not actually affect H-2A employers. This is true when limited to the five countries banned from H-2A eligibility in the proposed rule. That is clearly ***not*** the case, however, with the dramatically expanded number of banned countries in the final rule. The short list of "approved countries" is not a "logical outgrowth" of the initial narrow proposal of five "banned countries," and therefore violates the Administrative Procedure Act (5 U.S.C. 553(b) and (c)). See, e.g., *Long Island Care at Home v. Coke*, 127 S. Ct. 2339 (2007); *Louisiana Land Bank v. Farm Credit Administration*, 336 F. 3d 1075 (D.C. Circ. 2003); *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250 (D.C. Cir. 2005)

One Wyoming ranch has already been directly affected by the arbitrarily imposed country restrictions. For decades, this ranch relied on Nepalese sheepherders whose H-2A status, was not extended under the new rule. This has and will continue to cause tremendous hardship to the ranch, as it could be forced to downsize its business.

[2] DHS Yearbook of Immigration Statistics, Nonimmigrant Admissions (I-94 Only) by Region and Country of Citizenship: Fiscal Years 1998 to 2007 http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/table26.xls. Accessed on April 22, 2009

III. DOL Interim Rule

The DOL Interim Rule published April 16, 2009, contains multi-state advertising requirements that violate the clear statutory language in INA Section 218(b)(4), and therefore DOL's interpretation of the "transition rules" as applied to pending H-2A applications and as set forth in the Preamble to the interim rule should be corrected.

Mountain Plains Agricultural Service (MPAS) members have used the H-2A program for over 20 years. At no time during this period has DOL required MPAS members to recruit for U.S. workers in a multi-state region. DOL claims to have regulatory authority to impose this requirement under the guise of a "transition rule" in the new regulations, but their position violates the law. INA Section 218(b)(4) prohibits the requirement of multi-state recruitment unless "the Secretary finds that there are a significant number of ***qualified*** United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed." DOL itself has acknowledged that this statutory requirement applies in a recent "TEGL" guidance to State Workforce Agencies. TEGL, 11-07, C1 (11/14/07).

> "An employer is required to engage in positive recruitment of U.S. workers in the area of intended employment until the foreign worker(s) have departed for the employer's place of work (20 CFR § 655.103(d)). The Department may also require employers to recruit in other states of "traditional or expected labor supply." 20 CFR § 655.105(a). The imposition of such out-of-state recruiting requirements **shall be based on current information provided by a state agency or other sources** "**that there are a significant number of able and qualified U.S. workers**" in each state designated for recruitment "who, if recruited, would likely be willing to make themselves available for work at the time and place needed." Id. As required by regulation, the Department will not require employers to "recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations." Id."

DOL is changing its own application of its statutory requirement without any basis in law. We have consulted with DOL, and they concede that they have made no such finding. Their multi-state recruitment requirement imposed on MPAS (including in Fresno, CA, because there are "migrant and seasonal farm workers" with no finding as to whether the MSFWs are qualified to herd sheep on the open range in Wyoming) is therefore invalid.

The increased out-of-state advertising costs on this employer association alone are approximately $11,000 for only a small portion of the labor certification applications that this association will file on behalf of its members this year. Annualized additional costs to MPAS members could easily exceed $100,000. Because of the absence of any of the statutorily required findings of the availability of qualified U.S. workers by DOL outside of the state in which the petitioning ranch resides, this requirement must be immediately rescinded.