



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

December 28, 2018

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

Submitted via www.regulations.gov

Re: DOL Docket No. ETA-2018-0002
Regulatory Information Number (RIN) 1205-AB90
DOL Notice and Request for Comments:
Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign
Workers in the United States

Dear Ms. Gagliardi:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced notice and request for comments published in the Federal Register on November 9, 2018.¹ The notice of information collection solicits comments on proposed regulatory revisions that would modernize the recruitment an employer seeking H-2A nonimmigrant agricultural workers must conduct when applying for temporary labor certification. The comment period for the proposed rule has been extended until December 28, 2018.²

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to the recruitment requirements for the temporary employment of H-2A nonimmigrant agricultural workers. We believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

¹ 83 Fed. Reg. 55985 (Nov. 9, 2018).

² 83 Fed. Reg. 63456 (Dec. 10, 2018).

Electronic Advertisements

The American Immigration Lawyers Association (AILA) appreciates the Department of Labor's efforts to modernize the H-2A recruitment requirements by eliminating the print advertisement requirements set out in 20 CFR 655.151 and replacing it with a requirement that the employer advertise its job opportunity on a website that is widely viewed and appropriate for use by workers who are likely to apply for the job opportunity in the area of intended employment. AILA supports the proposed move towards electronic advertisements and away from print and believes it will ultimately result in a more accessible and less costly recruitment process. This is an important step in the modernization process and will fully protect U.S. workers throughout the recruitment process as it will enable domestic workers greater access to open and available H-2A-related job opportunities. This is especially true as the proposed rule affords employers the flexibility to choose the source of publication including "state or local agricultural associations, job search websites that advertise agricultural job opportunities, and other classified advertisement websites with sections focused on local jobs." Moreover, AILA strongly supports the Department's proposal to eliminate recruitment in designated labor supply states under 20 CFR 655.154. Such recruitment has traditionally been required in states with high H-2A participation and has yielded little domestic applicant activity.

AILA believes that the choice of the recruitment sources should remain with employers as they are ultimately more familiar with industry-specific labor resources than the federal government. As such we do not believe that the Department of Labor should establish, by regulation, qualifying criteria or more specifically define the types of websites that would fulfill the advertising requirements. AILA would support an effort by DOL to elaborate on these issues through FAQs. This would be helpful to clarify the criteria, yet at the same time remain illustrative rather than binding on agricultural employers.

Advertisements on Websites Operated by State and Local Agricultural Associations

Concerning the proposal to allow advertisements to be placed on websites operated by state or local agricultural associations, we believe that the regulation should exclude recruitment through agricultural associations completely and should not be limited to restricting those associations that file H-2A applications as H-2A agents or joint employers. If agricultural associations are deemed a proper source for placement of the electronic advertisement, the Department of Labor's regulations should include language: 1) prohibiting such associations from charging employers unreasonable fees (i.e. fees that would be in addition to operating an online job portal); 2) prohibiting use of the online job portal as a means of soliciting membership in the association or participation in the H-2A program; and/or 3) prohibiting use of the information to facilitate litigation. In short, AILA believes that state or local agricultural associations are not a proper source for the placement of electronic advertisements in the H-2A process. Alternatively, if an agricultural association is permitted to place H-2A online ads on its website for its own members, then a fixed-site grower or H-2A Labor Contractor should also be able to place online ads on its

own website. This will help ensure that the Department of Labor does not appear to be affording preferential treatment to one type of agricultural employer over another.

DOL-Assisted Advertising

Although DOL is not soliciting comments at this time regarding DOL-assisted advertising, AILA would like to acknowledge the utility of such a program and the convenience that it could create. Such a platform should allow the employer to have control and access over where its job opportunities are eventually placed. This is an essential component to maintain in order to preserve the integrity of the H-2A recruitment process.

Conclusion

AILA appreciates the opportunity to comment on the proposed regulatory revisions to the recruitment requirements for the temporary employment of H-2A nonimmigrant workers. We look forward to a continuing dialogue with the DOL on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION