AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Submitted via www.regulations.gov

Re: DOL Docket No. ETA-2023-0003
Regulatory Information Number (RIN) 1205-AC12
DOL Notice and Request for Comments: Improving Protections for Workers in Temporary Agricultural Employment in the United States

Dear Administrators Vitelli and Pasternak:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced notice and request for comments published by the Department of Labor (DOL) in the Federal Register on September 15, 2023.[1] The notice of information collection solicits comments on proposed regulatory revisions on protections for H-2A workers in temporary agricultural employment in the United States.

AILA is a voluntary bar association of nearly 17,000 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

[1] 88 FR 63750 (Sep. 15, 2023)

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 concerning protections for H-2A nonimmigrant agricultural workers. We believe that our members' collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government. We do so in the pages below.

I. Section 655.122(l) - Enhanced transparency and protections for agricultural workers/The disclosure of minimum productivity standards, applicable wage rates, and overtime opportunities.

DOL proposes to revise § 655.122(l) to require employers to disclose any minimum productivity standards they will impose as a condition of job retention, regardless of whether the employer pays on a piece rate or hourly basis. This proposal is intended to help ensure that the agricultural workers are fully apprised of the material terms and conditions of employment, including any productivity standards that may serve as a basis for termination for cause.

AILA recommends that DOL add a section for this information on the applicable forms – ETA 790 and ETA-9142- to assist employers in disclosing this data and ensuring compliance. Many employers already disclose this data on the forms, but no section currently makes it clear where this should be listed.

II. Section 658 subpart F and related definitions at 651.10 - Enhanced transparency and protections for agricultural workers/Enhanced protections for workers through the Employment Service System (ES system).

In the proposed rule, DOL proposes revisions to § 658, subpart F, and related definitions at § 651.10 regarding discontinuing Wagner-Peyser Act Employment Services (ES) services for employers, agents, farm labor contractors, joint employers, and successors-in-interest. AILA is concerned with the proposal to impose discontinuation services on successors-in-interest. These entities have not been responsible for any issues created by the former owners and should not have to answer for those issues merely by purchasing a business. Moreover, AILA notes that the proposed regulations surrounding the employer requirements under this system present due process concerns for employers. Under the proposed regulations, SWAs may enjoin employers from placing job orders in interstate clearance orders based on their findings. There is no mechanism for a hearing or rebuttal evidence. Discontinuing services for certain employers under the Wagner-Peyser Act Employment Services serve as a bar to effectively using the H-2A program and, as such, presents due process concerns.

III. Sections 653.501, 655.145, and 655.175 - Enhanced transparency and protections for agricultural workers/Protections in the event of a minor delay in the start of work:

DOL proposes revisions to the Wagner-Peyser Act implementing the regulations at 20 CFR § 653.501 to clarify an employer's obligations in the event of a delayed start date and to make conforming revisions to the H-2A regulations at 20 CFR § 655.145 and a new § 655.175 to clarify pre-certification changes to the start date.

Brief start date delays due to weather and other unforeseen circumstances that jeopardize crops or commodities are very common in agriculture. Employers may experience these delays several years in a row, especially as a result of climate change. This regulation is specifically geared toward delays unforeseen to employers and based on circumstances outside their control. AILA urges DOL not to require additional compensation obligations for employers in this context.

IV. Section 655.122 - Contents of Job Offers a. Paragraph (h)(4) Employer-provided transportation

DOL proposes to revise § 655.122(h)(4) to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation.

AILA commends DOL for working on enhanced safety standards for employees. However, this requirement will be challenging for employers to enforce. Short of having cameras in vehicles, which seems overly burdensome to employers, it is impractical to require employers to police employees while they are out in the field. AILA suggests instead requiring employers to post a notice advising employees to wear seatbelts while in employer-provided vehicles. This requirement would be similar to the signage required for employees in restaurant restrooms, which is also designed to increase safety in a less burdensome way.

DOL noted in its comments that "[d]espite the statistics showing the dangers related to rural transportation, agricultural transportation, and the failure to use seat belts, as well as its own enforcement experience, the Department has limited tools to address seat belt use in employer-provided transportation." AILA contends that employers have limited ability to force the adults they employ to utilize seat belts, especially while out on remote work.

V. Section 655.122(n) - Clarification of Justifiable Termination for Cause

DOL proposes to define ''termination for cause'' at § 655.122(n) by proposing six criteria that must be satisfied to ensure that disciplinary and/or termination processes are justified and reasonable, which are intended to promote the integrity and regularity of any such processes. In

the comments section, DOL noted three employers not in compliance with payment procedures of over 10,000 employers in 2022.

While AILA understands the impetus for extra protections for workers who are terminated for failing to meet productivity standards, DOL should clarify what it means by "reasonably" and "applied fairly" in § 655.122(n)(2)(D). Where the DOL notes in § 655.122.n(2)(D) that the employer's productivity policy must be "reasonable" and "applied consistently," It is unclear what the DOL means by "reasonable." "Reasonable" can have different meanings to different individuals. For example, employer A might consider it "reasonable" to ask a healthy thirty-year-old male farm hand to bale hay at a rate of one bale per hour. In contrast, employer B might consider it "reasonable" to ask the same healthy thirty-year-old male farm hand to bale hay at a rate of one bale per ninety minutes. AILA contends that what is "reasonable" to one might not be "reasonable" to another.

Moreover, the requirements found in § 655.122(2)(F), that "the employer engages in progressive discipline to correct the worker's performance or behavior," might prove onerous for the small business employer. Certain small business employers may not have sophisticated human resource departments wherein they can manage disruptive employees or written policies. In addition, investigations or work tutorials may take time during the workday that employers cannot afford to lose. AILA recommends DOL distinguish between small business employers and larger organizations with more significant resources.

VI. Section 655.135(o) - Protection against passport and other immigration document withholding

AILA stands fully in support of this provision. While there may be circumstances where it is safer for an employee to keep their documents with an employer, it is important that all H-2A beneficiaries have unfettered access to their passports and other immigration documentation, regardless of document location.

VII. Section 655.182(f)(1) and (2) - Enhanced integrity and enforcement procedures.

AILA does not support this provision, which is attempting to shorten the submission periods for appeal requests related to debarment matters and for the submittal of rebuttal evidence to the DOL. DOL suggests in the proposed rule that reducing the period for H-2A employers to appeal debarment procedures would lead to faster final agency adjudications and better protect and uphold program integrity. However, doing so may prohibit access to the H-2A program for many employers by not allowing the required time to gather and prepare vital documents to respond on debarment-related determinations and ensure they remain eligible to utilize the H-2A program. Such a proposal is countervailing to due process and must not be finalized.

VIII. Section 655.104 - Successors in interest

DOL proposes revisions to existing § 501.20(a) and (b) to conform to proposed 20 CFR § 655.104 and § 655.182 regarding the effect of debarment on successors in interest. As explained in the discussion of proposed 20 CFR § 655.104, any Wage and Hour Division (WHD) debarment of an employer, agent, or attorney applies to any successor in interest to that debarred entity. Under this proposed rule, WHD need not issue a new notice of debarment to a successor in interest to a debarred employer, agent, or attorney. However, as reflected in the proposed new paragraph § 501.20(j), WHD would be permitted, but not required, to identify any known successor(s) in interest in a notice of debarment issued to an employer, agent, or attorney.

DOL intends to accord liability to successors in interest to better ensure that debarred entities do not circumvent the effects of debarment. AILA does not believe it is fair and constitutional to impose sanctions on a successor-in-interest absent a successor-in-interest misconduct without sufficient notice and due process. This is not an "agency" but a "purchase" situation.

IX. Section 655.120(b)(2) - Immediate effective date for updated AEWRs.

While the obligation to pay the updated AEWR has long been established, the previous versions of the regulations allowed for advanced notice to employers of no more than 14 calendar days, which has been helpful. In the proposed rule, DOL proposes to make the updated AEWR immediately effective upon publication in the Federal Register.

Many employers utilizing the H-2A program operate with a handful of employees and wear many proverbial "hats" within the company. They strive for H-2A program compliance while managing a rigorous cultivation or production schedule. The risk of a single failure to comply with a required increased wage rate from one day to the next portends tremendous WHD fines, the payment of back wages, and irreparable damage to a company's brand caused by media coverage.

Under the proposed rule, it will be difficult for many employers to come into immediate compliance, as it may take some time to update their payroll system. AILA proposes that DOL consider setting an annual, date-specific effective date for each AEWR (FLS and OEWS) so employers can reasonably anticipate and implement wage changes from year to year. This would permit H-2A employers to know each year when to check the applicable wage rates rather than requiring employers to "be on standby" constantly watching day after day for notice of an immediate change to the wage rate. If the specific effective date fell on the 1st of July and of January, respectively, it would help most employers avoid the confusion and administrative burden caused by changing pay rates mid-pay cycle.

In the alternative, DOL needs to give sufficient advance notification for employers to come into compliance. If DOL wants the new AEWR to be effective upon publication, then DOL should delay the effective date of the Federal Register and do sufficient public outreach to ensure that employers are aware of the changes. AILA also recommends that the DOL consider options such as a notification to employers via email who are using the H-2A program when DOL is preparing to do so, and at least when the AEWR is updated.

X. Section 655.135(p) and Section 655.137 - Disclosure of Foreign Worker Recruitment

DOL proposes changes concerning the disclosure of information related to the foreign worker recruitment process, including a requirement on the employer and attorney or agency to disclose the identity and geographic location of individuals hired by or working for the foreign labor recruiter, as well as employees and agents of those individuals or entities.

While AILA understands the need for greater transparency between DOL, employers, and agents and the basis for the agency's proposal, the language in the proposed rule is overbroad. Requesting the identity of all employees of the recruiting agency is a violation of privacy, and not something typically signed up for with employment. Moreover, employees' actions are imputed to the employer under "agency" law, obviating the need for this language to be included.

In addition, DOL should clarify its definition of foreign labor recruiters in §§ 655.137(a) and 655.135(p). It is unclear whether DOL considers a full-time employee employed by the applicant employer (as defined in § 655.103(b)) in a capacity that, under normal conditions and in the course of normal daily work, does not actively undertake traditional recruitment activities is an "agent" or a "recruiter" for purposes of the clauses in §§ 655.137(a) and 655.135(p).

XI. Section 655.135(m)(1) - Employee Contact Information

DOL is proposing under § 655.135(m)(1) to require employers to provide worker contact information to a requesting labor organization. Per the language in the proposed rule, employers would be required to provide a list of all H-2A workers and those in corresponding employment engaged in agriculture and employed at the places of employment within the H-2A application, as well as a number of pieces of personal information such as full name, date of hire, job title, work location, personal contact information, home country address, and more.

AILA understands the need for H-2A employees to feel safe in their employment situations and homes. However, we believe that provisions like this are overly broad and overreaching. First, absent a request from a labor organization on behalf of a specific H-2A employee, labor organizations should not be entitled to this information as a matter of course. Second, the request should have a bearing and basis on the disagreement between the employer and the H-2A employee. Finally, requiring only a week to provide this information is insufficient, especially during a particularly busy time, and generally for small business employers.

XII. Conclusion

AILA appreciates the opportunity to comment on the proposed regulatory revisions concerning protections 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