



May 17, 2011

Mr. Michael Jones  
Acting Administrator  
Office of Policy Development and Research, ETA  
U.S. Department of Labor  
200 Constitution Avenue, N.W. Room N-5641  
Washington DC 20210

**RE: RIN 1205-AB58 – Temporary Non-Agricultural Employment of H-2B Aliens in the United States**

Dear Administrator Jones:

The American Horse Council (AHC) appreciates the opportunity to submit the following comments on the proposed rule for the Temporary Non-Agricultural Employment H-2B Program. The H-2B program is very important to members of the horse industry, principally horse trainers and owners who cannot find American workers to fill semi-skilled jobs at racetracks, horse shows, fairs and in similar non-agricultural activities. According to the Department of Labor's (DOL) 2009 Foreign Labor Certification Report the horse industry is the 8<sup>th</sup> largest user of the H-2B program with 3,510 certified positions in 2009.

The AHC is a Washington-based association that represents the horse industry before Congress and the federal regulatory agencies. The AHC includes individual members and over 120 equine organizations representing all horse breeds and virtually every facet of the horse industry, including, horse owners, breeders, veterinarians, race tracks, horse shows, state horse councils, recreational riders rodeos, farriers, breed registries, horsemen's associations, and commercial suppliers.

The AHC is very concerned with the proposed rule. The proposed rule could make it considerably more difficult for the horse industry to utilize the H-2B program. The horse industry relies heavily on the H-2B program and this proposed rule could significantly impact employers who utilized it.

**Horse Industry and the H-2B Program**

The racing and showing segments of the industry are particularly dependent on the use foreign workers. The horse racing industry has a \$26.1 billion economic impact and supports 380,826 jobs. The horse show industry has a \$28.7 billion economic impact and supports 380,416 jobs. The 3,510 workers provided by the H-2B program are a small portion of horse industry workers however they play a vital role.

Despite substantial efforts to recruit and train U.S. workers, horse owners, trainers, and competitors must use the H-2B worker program to bring aliens into the country as temporary, non-immigrant workers. Without these foreign workers, the horse industry could not continue to operate as it does now.

Most H-2B workers in the industry are directly responsible for the care of the horses upon which the entire horse industry is dependent. Without these workers to care for the industry's horses, many American jobs supported by the horse industry could be in jeopardy.

Caring for horses is not an easy job. It is hard work, with often erratic hours. Many owners, trainers, and competitors simply cannot find enough Americans willing to take these jobs as grooms and stable attendants. Many in the horse industry have reported they have not had a single American apply for these jobs in several years. Furthermore, these jobs are not really unskilled. They require knowledge and understanding of horses, an understanding many Americans no longer have. Many H-2B workers have extensive experience with horses. In many instances the same H-2B workers have been returning to working for the same employers year after year.

The AHC believes that while flaws still existed substantial improvements were made to the H-2B program by the 2008 H-2B rule (2008 rule). The regulations governing the H-2B program previous to that rule change had many shortcomings that made the admissions process long and cumbersome and directly impacted the ability of employers to use the program. Unfortunately, the DOL proposed rule would roll back most of the provisions of the 2008 Rule that made the H-2B program more usable and efficient and will add new and burdensome requirements.

Horse industry employers who are forced to utilize H-2B workers are very often small businesses. They will be hard pressed to absorb any increase in costs the proposed rule could force upon users of the H-2B program. Furthermore, the AHC fears that if the proposed rule is made final the H-2B program will essentially become unusable for many employers.

## **Proposed Rule**

There are many specific provisions of the proposed rule that are of great concern to the horse industry, including:

- Abolishment of the attestation methods and reverting to the old, time-consuming directed recruitment methods, including recruitment up to 3 days before the date of need;
- Added administrative procedure of bifurcation of the registration phase that addresses the employer's temporary need and an application phase that addresses the labor market test;
- A requirement to compensate corresponding employees (US workers) in the same manner as H-2B workers;
- Three-fourths guarantee of payment of wages;

- A requirement to pay additional transportation cost and daily subsistence;
- New definitions for “full-time, seasonal work”; and
- New liability standards.

We believe these provisions will be the most burdensome for employers and will make it more and more difficult for employers to participate in this program.

## **SUBSTANTIVE CONCERNS**

### **Three-Fourths Guarantee of Payment of Wages is Unfair**

The DOL proposes to require a guaranteed offer of employment for a total number of work hours equal to at least three-fourths of the workdays of each four-week period. The rule states that a Certifying Officer can terminate an employer’s obligations under in the event of fire, weather, or another Act of God that makes fulfillment of the job order impossible. This implies that if an employer does not timely inform the CO, the employer is liable for payment. An employer should not have to pay an employee if the employee does not, or cannot, work. At the very least, DOL should include man-made disasters (such as oil spills and controlled flooding, etc.) to the list of exceptions to the guarantee. In addition, the three-fourths guarantee, if implemented, should only cover the length of the contract, similar to the H-2A program, rather than the four-week period.

### **The Application of ‘Corresponding Employment’ is Burdensome**

The rule requires that employers provide to workers engaged in corresponding employment at least the same protections and benefits as those provided to H-2B workers. The DOL defines corresponding employment as the employment of non-H-2B workers in any work included in the H-2B job order or any work performed by the H-2B workers during the period of the job order. This definition will significantly affect small businesses where many employers have positions that combine duties. The corresponding employment requirement, when combined with the prevailing wage rule and the three-fourths guarantee (discussed above), will result in mandatory payment of artificially high wages to the majority if not all of an employer’s workforce. This requirement takes away an employer’s flexibility regarding its workforce. To avoid this draconian result, an employer will be forced to monitor its employees and ensure they remain within the confines of their job description.

Additionally, as noted earlier many users of the H-2B program in the horse industry are small businesses and by its very nature the care of the horses involved is of the utmost importance. For this reason it is likely that at some point every employee of a horse business that employs H-2B worker will have to step in to attend to the needs of the horse and create a corresponding employment dilemma.

### **The Suggested Elimination of the Use of Agents is Problematic**

We agree with the DOL's proposal to require agents to submit copies of their agreements with employers to verify that a relationship exists between the employer and agent. We do not want agents using employer information to file fraudulent applications. However, bona fide agents are essential to the success of the H-2B program. DOL's own statistics show that in FY 2010, only 14% of employers filed H-2B applications without using an agent and, of these cases, 38% were denied. The H-2B program is very complicated and agents help guide employers through the process. We encourage the DOL to crack down on fraud using its enforcement authority rather than prohibiting agents from preparing and filing H-2B applications on behalf of employers.

### **Defining a Temporary Need as Nine Months or Less is Overly Burdensome**

Defining a temporary need as less than nine months is burdensome because some employers will no longer be able to participate in the H-2B program. A temporary need should not be quantified in the regulations because it is industry-specific. In addition, as part of the proposed bifurcated registration process, the DOL is adjudicating H-2B applications to determine temporariness. Each employer should be able to argue that its need is temporary and consistent with the definition of seasonal or peak load.

### **The Requirement that the Employer Pay Transportation and Daily Subsistence is Onerous**

We oppose the requirement that employers pay daily subsistence and transportation to and from work as overly burdensome, especially given the corresponding employment requirement. Payment of transportation and subsistence costs should be at the discretion of the employer as it is industry-specific and depends on the conditions of the job. This requirement is especially problematic in terms of the problem of disingenuous U.S. worker applicants. Employers should not have to pay transportation and subsistence costs of an employee who quits after only a few days of work. In the alternative, we suggest that the DOL require a certain amount of employment before employers are required to reimburse employees for these costs.

### **Requiring Additional Recruitment in an Area of Substantial Unemployment is Unnecessary**

We believe that requiring additional recruitment in an Area of Substantial Unemployment ("ASU") is burdensome and unnecessary. The standard required recruitment is sufficient to reach U.S. workers. Also, the ASU should be defined consistent with the period of need rather than with the recruiting period.

### **The Change in the Standard for Debarment is Unfair**

The new standard for debarment for substantial failure rather than willful failure is unfair because employers may be barred from using the program for negligent rather than knowing failures. This is a slippery slope and can only lead to debarment actions that do not include

“intent.” In addition, an employer could be debarred for mere technical violations. An employer should not be penalized with debarment for procedural failures.

## **PROCEDURAL CONCERNS**

### **The Requirement to Accept All Qualified U.S. Applicants Referred for Employment by the SWA Until the Third Day Preceding the Date of Need or the Date the Last Foreign Worker Departs for the Employment, Whichever is Later, is Burdensome, Too Short of a Timeframe, and May Create Liability for the Employer**

The rule requires that H-2B employers accept all qualified U.S. applicants until the third day before the date of need. The DOL says that “[t]his timeframe increases the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer.” This requirement is problematic for several reasons. First, an employer cannot wait until three days before the date of need to arrange for travel and long-term housing for its foreign workers. This requirement is unworkable for most employers given the investment required when sponsoring H-2B workers and bringing them to the U.S. Second, this requirement exacerbates the problem of disingenuous applicants and SWA referrals. Given that the employer must accept applicants up till three days before the employment begins, should those last-minute applicants quit, the employer will have to start the H-2B process all over and will be significantly delayed. In addition, this provision does not provide any protection for the H-2B worker, who plans to work in the U.S. and then is told a few days before he will travel to the U.S. that he is no longer needed. This rule may create a liability for the employer in terms of its agreement with the H-2B worker.

### **Bifurcating the Process is Burdensome and Time Consuming**

The imposition of a bifurcated application process is burdensome because the addition of a registration step in an already complicated and onerous process. We also question whether the DOL will be able to complete its adjudication in time to allow employers to subsequently apply with DHS and then the H-2B employee to apply with the Department of State to allow for timely arrival of employees. The attestation process is better for employers because it is more streamlined. Again, we encourage DOL to exercise its enforcement authority rather than instituting a new and burdensome application process.

In addition, please clarify at what point during the application process will an H-2B number be allocated.

## **Conclusion**

The AHC believes the proposed rule is overly burdensome and will hurt employers who are required to use the program out of a need for workers. We believe the current rule provides more than adequate protection for H-2B workers and American workers employed in the same jobs. In fact we have heard from stakeholders in the horse industry that under the current rule the H-2B program is after years of dysfunction working well and efficiently.

Horse industry employers do not use the H-2B program by choice. They are forced to use it because American workers are not seeking these jobs. In the current economic conditions any proposed rule that increases the cost of an already costly system could be devastating to those employers who rely on H-2B workers. Most horse industry employers who use the H-2B program also employ American workers in other capacities and support many other jobs. If current users of the H-2B program are no longer able to afford to participate, the jobs of many Americans employed by the horse industry will be put at risk.

The AHC urges the DOL to retain the current rule for H-2B program or at least consider making changes to the proposed rule based on our concerns listed above.

The AHC appreciates this opportunity to comment on the proposed rule change. If you need any additional information, please contact us.

Sincerely,

A handwritten signature in blue ink that reads "James J. Hickey, Jr." with a stylized flourish at the end.

James J. Hickey, Jr .  
President