



**NELP Analysis: The Need for Public Comment on DOL H-2B Rulemaking
Comment Period through May 17, 2011**

Background. There are currently two guest worker programs for low-wage temporary work lasting less than a year in the U.S.: the H-2A program, for temporary agricultural work, and the H-2B program, for temporary nonagricultural work. The H-2B program (8 U.S.C. § 1101(a)(15)(H)(ii)) expanded significantly during the last decade. As recently as the mid-1990's, the program was relatively insignificant in size (12,000 persons), but it became increasingly popular in the business community after required minimum prevailing wage rates were reduced to levels which were so low that in many cases H-2B employers could obtain temporary foreign workers at wage rates and on terms that were less expensive than the market labor rates paid even to undocumented workers. The H-2B program has historically provided few protections for either U.S. workers or H-2B workers.

In late 2008, the Bush Department of Labor (DOL) published H2B rules, which were challenged by worker organizations in January 2009 in federal court. In August 2010, a federal court in Philadelphia struck down several key provisions of the 2008 H-2B regulations. At the same time, worker organizing and litigation, especially by the [Alliance of Guestworkers for Dignity](#), brought national attention to human rights abuses in the program.

On March 18, 2011 the DOL proposed comprehensive new regulations for the H-2B program which greatly improve the protections for both H-2B and U.S. workers, and for the first time create real opportunities for U.S. workers to apply for H-2B jobs. 76 Fed Reg. 15130 (Mar. 18, 2011). The proposed regulations are likely to be strongly opposed by many business interests. The voices of workers, worker advocates, and immigrant advocates must be heard in support of the proposed regulations. Attached is a summary of key points in the proposed regulations. We urge you to support these proposed rules as well as additional improvements outlined below.

Comments on the proposed rule are due on May 17, 2011, and can be submitted electronically at: <http://www.regulations.gov/#!documentDetail;D=ETA-2011-0001-0001>. Click on the orange "submit a comment" box on the right hand side of the screen.

Summary of the Proposed DOL H-2B Rules

The proposed rules for the H-2B non-agricultural temporary worker program are a significant improvement for workers both within and outside the United States. Temporary “guestworker” programs have long worked to the detriment both of the U.S. workers who are bypassed in favor of foreign workers, and for the foreign workers who fall prey to unscrupulous employers and their labor contractors. Dozens of criminal and civil prosecutions have been launched against employers and recruiters for filing fraudulent applications for non-existent jobs, for race and gender discrimination, for human trafficking and wage and hour violations. As DOL notes, several of these violations have occurred in just the past two years under the 2008 regulations that these rules would replace. The proposed rules will help reverse these trends and help make certain that the program is used consistently with its aims – to ensure temporary workers are hired for jobs where U.S. workers aren’t available, and to ensure these workers are treated fairly. The rules advance workers’ rights in five basic areas:

Stepped up oversight. The proposals restore government oversight of employer H-2B applications, and return to a certification process that existed prior to the rules changes in 2008, as required under the Immigration and Nationality Act at 8 C.F.R. § 214.2(h)(ii)(D). In support of this change, DOL points out that its audits of employers have found more than half in violation of program regulations they had sworn to follow. In addition, the rules add a registration process whereby employers must first make a showing of a truly “temporary” need for workers before they submit a formal application.

A true test of the labor market through required active recruitment. At this time of high unemployment within the United States, the rules require an employer to make real attempts to recruit U.S. workers, including contacting former employees, community organizations and unions. Most importantly, they require that employers maintain a record of their recruitment activities. These steps will help forestall cheating by H-2B recruiters who told undercover Government Accountability Office workers how to avoid hiring U.S. workers by providing “good excuses” to help “weed out” prospective U.S. workers. The rules restore the key role of state workforce agencies into the process of recruiting workers.

Stronger worker protections for U.S. and H-2B workers. Key provisions of the proposals include that all protections of the program are extended to both H-2B workers and U.S. workers employed alongside them. Additionally, the rules require that employers offer work hours equal to at least $\frac{3}{4}$ of the monthly workdays included in the job offer and full-time work of 35 hours per week, to address the practice of “benching” workers.

Stemming recruitment abuse. Exploitation of foreign guestworkers has frequently begun in their home countries, where they pay recruiters huge sums of money – sometimes literally mortgaging the family farm – for the privilege of working in the US. The new rules remove some of the features of the system that make it ripe for forced labor. The rules require that employers provide copies to DOL of all agreements with recruiters, and that they contractually forbid recruiters from charging illegal fees. In addition, in keeping with key legal decisions under both the H-2A and H-2B programs and consistent with the goal of avoiding wage depression, DOL states that certain costs are for the “benefit of the employer” and therefore the employers must:

- Pay or reimburse (up to the “offered wage”) transportation and subsistence for workers to and from the worksite;
- Provide all tools, supplies and equipment; and

- Pay or reimburse all visa, border crossing and other fees.

Enforcement of core protections. DOL's Office of Foreign Labor Certification, which processes employer applications, has authority under the regulations to audit applications and to require more intensive recruitment, revoke certification, and debar employers from further applications. The DOL's Wage and Hour Division can also investigate employers, revoke certifications, and debar employers, their agents and their attorneys. In addition, the Wage and Hour Division has stronger and more explicit administrative enforcement authority. It can:

- Order payment of back wages, including recovery of prohibited fees paid or impermissible deductions, and it can enforce the provisions of the job order;
- Assess civil money penalties;
- Order make-whole relief for any person who has been discriminated against;
- Order reinstatement and make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced.

What's missing. The major weaknesses of the proposed rule are in enforcement of employer obligations. The long history of the program abuse has shown that neither U.S. nor foreign workers can be protected from violations ranging from discrimination to forced labor unless they can protect themselves, and unless employers are held accountable for all recruitment violations. In order to fully protect workers, DOL must:

- Make clear that workers are the intended beneficiaries of the H-2B job orders, and that they can therefore enforce them in private litigation;
- Make clear that employers are strictly liable for recruitment violations, for failure to report a violation by recruiter and for failure to disclose the identity of a recruiter;
- Make clear that employers must publicly disclose all recruiters and sub-recruiters in order to avoid the charging of illegal fees, and that their agreements should be available publicly on the web;
- Provide for notice to and intervention by workers in DOL administrative actions;
- Make clear that retaliation protections are extended to worker consultations with workers' centers, labor unions, and community organization;
- Require employer assurances that they have not - and will not - seek reimbursement for expenses for which they are responsible;
- Require employer to keep track of amounts paid to whom, by whom, and when for all fees and include in recruitment report to DOL and to retain such document for DOL inspection; and
- Bar individuals who are not licensed attorneys from acting as agents for employers submitting H-2B applications to DOL so as to restrict abuses by such agents.

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