VIA ELECTRONIC SUBMISSION

July 6, 2011

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Michael Jones
Acting Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Amendment of the Effective Date; 76 Fed. Reg. 37686 (June 28, 2011).

Dear Secretary Solis and Mr. Jones,

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments to the Employment and Training Administration of the U.S. Department of Labor (DOL) regarding its proposed rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Amendment of Effective Date.

Advocacy believes that, in the proposed rule, DOL did not adequately provide a factual basis for its Regulatory Flexibility Act certification, and that the agency's certification did not take into consideration the economic impact that this unexpected change in the effective date of the wage methodology rule will have on small businesses. Moreover, the 11-day public comment period provided for in the proposed rule gives small entities little meaningful opportunity to comment on the impact of the amendment of the effective date on their businesses.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by

Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[1] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.[3] The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[4]

Regulatory Background

On January 19, 2011, DOL issued a final rule changing the wage methodology for the temporary non-agricultural employment of foreign workers under the H-2B visa program (the "Wage Rule").[5] The Wage Rule increased the wages by industry for H-2B workers by $1.23 to $9.72 per hour, effective for wages paid for work performed on or after the effective date of the final rule, January 1, 2012.[6] In the Wage Rule, DOL specifically welcomed information from the public on the feasibility and implementation of phasing in the new prevailing wages. According to DOL, the reason behind this request was that: "The Department recognizes that rapid wage increases may create burdens for employers that choose to participate in the H-2B program, while also providing potentially higher wages for U.S. and H-2B workers hired under the program."[7]

On June 15, 2011, the United States District Court for the Eastern District of Pennsylvania issued a Memorandum[8] and Order[9] in Comité de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, Civil No. 2:09-cv-240-LP. The court vacated the January 1, 2012 effective date of the Wage Rule, ruling that the Immigration and Nationality Act did not permit DOL to consider issues relating to employer hardship as a reason to delay the effective date of a new wage rule. The court ordered "that, within forty-five (45) days, the DOL will—in compliance with the Administrative Procedure Act, the Immigration and Nationality Act, and this court's orders—announce a new effective date." The court

[1] 5 U.S.C. § 601 et seq.
[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).
[3] Small Business Jobs Act of 2010 (PL 111-240) § 1601.
[4] *Id.*
[5] *Wage Methodology for the Temporary Non-Agricultural Employment-H-2B Program; Final Rule*, 76 *Fed. Reg.* 3452 (Jan. 19, 2011).
[6] 76 *Fed. Reg.* at 3476.
[7] *Id.* at 3462.
[8] 2011 WL 2414555 (E.D.Pa.).
[9] 2011 WL 2415141 (E.D.Pa.).

did not mandate what the effective date should be, leaving that decision to the discretion of DOL.

On June 28, 2011, in compliance with the court's order, DOL published a proposed rule ("Proposed Rule") titled: Wage methodology for the Temporary Non-agricultural Employment H-2B Program; Amendment of Effective Date.[10] DOL "propose[d] that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from this rulemaking" and "anticipate[d] the date of publication of the final rule to be on or about August 1, 2011; thus, the effective date of the Wage Rule would be on or about October 1, 2011."[11] The effect of the Proposed Rule accelerates the effective date of the Wage Rule by three months from January 1, 2012, to October 1, 2011.

Advocacy involvement in the Wage Rule

In the past year, Advocacy has submitted three public comment letters regarding changes to the H-2B program, citing small business concerns that these changes will have a significant economic impact on a substantial number of small businesses.[12] Advocacy argued that the wage increases will hurt seasonal small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do unskilled and temporary work, and may shut small businesses out of this vital program. Advocacy opined that the regulatory flexibility analyses in the proposed and final Wage Rule were inadequate because DOL provided no data to support the notion that wages of H-2B workers have depressed the wages of similar domestic workers, a premise that is central to DOL's justification for the wage increases.

Advocacy's previous comment letters recommended that DOL consider significant alternatives to this rulemaking that would meet the agency's objectives without jeopardizing small businesses.

DOL's certification of no significant impact in the Proposed Rule lacks a factual basis

In the Proposed Rule, DOL offers two reasons for selecting October 1, 2011as the effective date: 1) the rule is considered a major rule under the Congressional Review Act thereby requiring a 60-day delayed effective date from the date that the final rule is

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[10] 76 *Fed. Reg.* at 37686.
[11] 76 *Fed. Reg.* at 37688.
[12] Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, and Thomas Dowd, Administrator, U.S. Department of Labor (October 27, 2010) at: http://www.sba.gov/content/letter-dated-102710-department-labor-employment-and-training-administration; Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, and Thomas Dowd, Administrator, U.S. Department of Labor (March 17, 2011) at: http://www.sba.gov/content/letter-dated-031711-department-labor-employment-and-training-administration; and Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, and Michael Jones, Acting Administrator, U.S. Department of Labor (May 17, 2011) at: http://www.sba.gov/content/letter-dated-51711-department-labor-employment-and-training-administration.

published; and 2) a 60-day delayed effective date would allow the Office of Foreign Labor time to implement the provisions of the Wage Rule.[13] Neither of these reasons takes into account how reducing the effective date will impact small businesses. DOL chose not to perform an Initial Regulatory Flexibility Analysis (IRFA) in the Proposed Rule because "the Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), under the RFA at 5 U.S.C. 605(b), and certified that this rule will not have a significant economic impact on a substantial number of small entities."[14] In support of this certification DOL stated that "[w]hile the change in the effective date of the Wage Rule that is being proposed in this NPRM may change the period in which the total cost burdens for small entities would occur, the Department believes that the amount of the total cost burdens themselves would not change."[15] DOL offers no data or other analysis in support of the factual basis used to support its certification as required by the RFA.[16] [17]

Advocacy suggests that DOL's certification in the Proposed Rule contradicts the analysis provided in the Wage Rule. In the Wage Rule DOL chose not to certify and analyzed the impacts associated with the wage modification by performing an IRFA. DOL "recognize[d] that rapid wage increases may create burdens for employers that choose to participate in the H-2B program" and in response solicited "information from the public on the feasibility, and implementation of phasing in the new prevailing wages."[18] DOL was so concerned about the burdens caused by accelerated implementation that DOL delayed the effective date of the new wage methodology because DOL:

> "[R]ecognizes the impact that wage increases are likely to have on businesses, including small businesses that have in recent years relied on H–2B visas. In particular, the Department recognizes the commitments that employers have made in reliance on the current methodology, which has been expressed by many employers. In recognition of this impact, and in order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012."[19]

There is nothing cited in the Proposed Rule that negates the agency's previous concern noted in the Wage Rule about the impact of the wage modification on small businesses, other than the court order mandating a new effective date. However, it is clear that the amended effective date has removed the clarity that small businesses had when they

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[13] 76 *Fed. Reg*. at 37688.
[14] 76 *Fed. Reg.* at 37689.
[15] 76 *Fed. Reg.* at 37688-89.
[16] 5 U.S.C. § 605(b).
[17] DOL does incorporate by reference its Final Regulatory Flexibility Analysis that was published in the final Wage Rule. 76 *Fed. Reg*. at 37688-89.
[18] 76 *Fed. Reg.* at 3462.
[19] 76 *Fed. Reg.* at 3482.

planned to comply with the requirements of the Wage Rule by January 1, 2012. The amended effective date will impact small businesses because they now have just two months from the publication of the final rule to implement the requirements of the regulation. Small businesses have made plans, commitments, and have expended money for the current year based on the January 1, 2012, effective date announced in the Wage Rule nearly six months ago.

In addition to the unbudgeted costs small businesses will incur in paying higher wages for the last quarter of 2011, small business will have to expend significant administrative resources readjusting their operations around the new effective date. DOL fails to take into account the costs small businesses incur during the H-2B administrative process. Advocacy's position in this regard is supported by the U.S. Chamber of Commerce which suggests that the wage modification process is quite involved and requires advanced planning by small business employers.[20]
The court in CATA v. Solis ordered DOL to announce a new effective date in accordance with the Administrative Procedure Act which requires DOL to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[21] Eleven days is too short a period for small businesses to comment on a rule that is expected to have a significant economic impact on their operations. Further, the public's ability to provide DOL with meaningful comments is limited by the agency's decision not to provide an IRFA. Advocacy submits that the aforementioned concerns and DOL's failure to provide an adequate factual basis in support of its certification undermines the agency's justification for significantly limiting public comment on this proposed rule. While Advocacy appreciates the balancing act under which the DOL is operating, my office believes that DOL can comply with the court's order while also complying with the small business protections afforded by the RFA.

Conclusion

In order to address these concerns Advocacy encourages DOL to: (1) complete an IRFA of the Proposed Rule; and (2) extend the deadline for submission of written comments to give the public a meaningful opportunity to comment on the Proposed Rule.

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[20] "The H-2B process requires precise and exacting timing on the part of employers. The windows during which they must advertise for workers and file the recruiting report required for a labor certification are specified and short. An employer cannot begin recruiting workers more than 120 days before the company is going to need an H-2B worker, and the firm must advertise for at least 10 days. The clock can easily run out on employers seeking temporary workers. A company cannot submit its labor certification application until it has completed the recruitment process and found it impossible to hire enough U.S. workers. Historically, it has taken an average of 60 days for DOL to process these applications, leaving the employer just 50 days before its need for temporary workers kicks in – a need often determined by inexorable seasonal changes. During that period, the employer must still file a temporary worker petition, get it approved by USCIS and find an appropriate foreign worker for the job. Then that worker must apply to DHS and to the State Department, receive approval from both agencies and travel to the United States." *The Economic Impact of H-2B Workers*, U.S. Chamber of Commerce and ImmigrationWorks USA, October 28, 2010, *available at* http://www.uschamber.com/sites/default/files/reports/16102_LABR%20H2BReport_LR.pdf.

[21] 5 U.S.C. § 553(c).

Please contact me or Major L. Clark, III at (202)-205-6532 (Major.Clark@sba.gov) if you have any questions or require additional information.

Sincerely,

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory