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June 29, 2015

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Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
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By electronic submission: www.regulations.gov

RE: Temporary Non-Agricultural Employment of H-2B Aliens in the U.S.
80 Fed. Reg. 24042 (April 29, 2015)
RIN Number 1205-AB76

Dear Ms. Gagliardi:

The U.S. Chamber of Commerce writes in response to the request for comments by the Department of Homeland Security (DHS) and the Department of Labor (DOL) to comment on the agencies' jointly-promulgated Interim Final Rule entitled *Temporary Non-Agricultural Employment of H-2B Aliens in the United States,* 80 Fed. Reg. 24042 (April 29, 2015) (hereinafter "IFR," "rule" or "proposal"). The IFR imposes unnecessarily burdensome requirements that render the H-2B program unworkable for many employers. These requirements are burdensome because they inherently, and perhaps by design, create uncertainty for legitimate, well-established, compliant businesses. Some of these new requirements are outside of the legal authority granted to the agencies under the Immigration and Nationality Act (hereafter INA). Moreover, the Departments' economic analysis is woefully inadequate in estimating the true nature of the costs associated with the rule. The negative consequences attributable to the changes in policy set forth in this proposal will not be felt just by H-2B employers; the American workers who are employed by these businesses, the suppliers and customers of these businesses, and the local economies that are served by these businesses will suffer as well.

THE U.S. CHAMBER IS COMMITTED TO ENSURING THE H-2B VISA CATEGORY IS USABLE

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

The H-2B visa program allows employers to legally hire foreign nationals to fill temporary non-agricultural labor needs when businesses are unable to locate qualified and available American workers to fill vacant positions. In order to hire H-2B workers, the employers must show that the need for labor is a one-time occurrence, or is a seasonal, peakload, or intermittent need. For many years, agency practice has resulted in significant difficulty documenting any need other than seasonal and has established that, in any event, the period of need by a qualifying H-2B employer must end in the definable future and be less than 365 days. Many U.S. Chamber members have seasonal labor needs that necessitate the hiring of H-2B workers and they represent the following industries, among others: seafood processing, hospitality, forestry, oil rig construction, landscaping, horticultural nurseries, ski resorts, and stone quarries.

We agree that it is an important priority to give unemployed Americans every opportunity to obtain employment, but the changes proposed in the IFR will hurt, not help, this cause. Several studies show that the legal foreign workers that currently come into the U.S. through the H-2B program support the jobs of American workers. The American Enterprise Institute found that an additional "100 H-2B workers in the U.S. results in an additional 464 jobs for US natives."[1] A study by the Virginia Institute of Marine Science found that each H-2B worker created an additional 1.6 jobs in the state of Virginia for U.S. workers.[2] Another study from University of Maryland found that the loss of one H-2B guest worker job in Maryland's blue crab processing industry would cause 2.54 American workers to lose their jobs in Maryland.[3] The costs associated with making the H-2B program unworkable means lost economic output and less job growth for American workers. It is not an exaggeration to suggest that if the IFR is implemented as written it will cause some

[1] Madeline Zavodny, "Immigration and American Jobs" (American Enterprise Institute, December 14, 2011) https://www.aei.org/wp-content/uploads/2011/12/-immigration-and-american-jobs_144002688962.pdf,
[2] Thomas J. Murray "Preliminary Analysis of the Economic Impact of the H-2B Worker Program on Virginia's Economy," (Virginia Institute of Marine Science, September 2011), http://web.vims.edu/GreyLit/VIMS/mrr11-12.pdf, p.1, 3
[3] Douglas W. Lipton "An Economic Analysis of Guest Workers in Maryland's Blue Crab Industry" (Maryland Sea Grant Extension Brief, September 2008) http://www.h2bworkforcecoalition.com/pdf/AnEconomicAnalysisGuestWorkersMarylandBlueCrabIndustryMarylSeaGrantExtensionSeptember2008.pdf.

businesses to close up shop, which will decrease tax revenue and put more Americans out of work.

Ensuring adequate staffing levels, especially for small businesses, oftentimes means the difference between fulfilling a contract or losing valued customers. The Chamber believes that a rationally administered and economically sensible H-2B program is a key supplemental staffing mechanism for the businesses that use the program and, for that reason, the Chamber sits on the Executive Committee of the H-2B Workforce Coalition. While the U.S. Chamber joins in the comment filed by the H-2B Workforce Coalition, the Chamber filed this comment to highlight certain key issues that are concerning to our membership.

IFR PROVISIONS CREATE UNCERTAINTY FOR EMPLOYERS BUT WITH REVISION WOULD LEAVE THE H-2B PROGRAM WORKABLE

The Chamber opposes the extraordinary expansion of regulatory requirements being foisted upon H-2B employers in the IFR. The common theme underlying the Chamber's criticism is the lack of certainty that is afforded to our members who need to use the program to meet their seasonal labor needs. Whether the problematic provision concerns an ill-defined term or a lack of guidelines limiting the Departments' discretion over certain provisions, the result is uncertainty created by the IFR that will make it difficult for businesses to plan for their operations. This will have a chilling effect on the usage of the H-2B program and it is important to emphasize that H-2B employers do not operate their businesses in a vacuum. The effects this rule will have on H-2B employers will reverberate through the economy and will impact the suppliers and customers of these businesses by the decrease in economic activity of the H-2B employers. This will have the unfortunate consequence of depressing the potential hiring of American workers in many different occupational classifications, not just those positions that are sought to be filled by the H-2B program.[4] Because of this significant potential negative impact of the IFR, we encourage the Departments to be responsive to comments filed by associations, and companies, that which will undoubtedly supplement the types of concerns we are raising regarding impacted U.S. businesses.

Corresponding Employment

The IFR definition of "corresponding employment" creates an ill-defined term that does not provide the certainty employers need from the H-2B program. The IFR merely says that corresponding employment is "defined" as "the employment of workers who are not H-2B workers…when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers."[5] The term "substantially the same work" is not defined in the IFR, nor does the IFR provide any meaningful suggestion as to what might later be deemed "substantially the same work" under

[4] *See*, studies cited in footnotes 1, 2, 3 that explain how H-2B workers help create and support upstream and downstream jobs for Americans.
[5] 20 CFR 655.5; 80 Fed. Reg. 24042, 24111 (Apr. 29, 2015)

the rule. Employers fears about this undefined term are grounded in the fact that the Departments have specifically crafted a new term not used in any other work visa program, even though DOL addresses similar concerns with other terms in other work visa programs.[6]

It is very common that H-2B workers perform a combination of duties with one or more duties similar to other positions in different occupations. Most H-2B employers are smaller businesses, where workers – both U.S. and H-2B – wear multiple hats and are assigned responsibilities that blur the vocational lines that DOL traditionally prefers to see between occupations. It thus becomes difficult to identify which responsibilities are "substantially the same work" if being measured by something other than a standard that treats the similarly employed similarly.

The horticultural industry shows why this requirement as currently worded has the potential to be unworkable. For example, a nursery might hire H-2B workers who have the experience and expertise to identify plants based upon their leaf structure who will spend much of their day digging holes, planting and watering flowers, pruning bushes, and preparing orders for customers, while the American workers at the job site might only be charged with digging, planting, and pruning. Given the lack of clarity from the Departments' as to what "substantially the same work" constitutes, the American workers who do not possess the same expertise as the H-2B workers will be treated as if they are corresponding employees because they share certain duties with the H-2B workers. This will entitle the American workers to the wages and benefits of the H-2B workers, even though the H-2B workers' experience and expertise would presumably entitle them to higher wages. Obviously, the examples might run in either direction – favoring either U.S. or foreign workers – and in a variety of industries.

The Departments seek to mitigate the effects of this requirement by creating two exceptions to prevent certain incumbent employees from falling under the definition of "corresponding employment." One of these exceptions applies to incumbent employees governed by a collective bargaining agreement or an individual employment contract that guarantees employment throughout the period stated in the H-2B job order and offers at least 35 hours of work per week.[7] The other exception pertains to incumbent employees that have been continuously employed by the H-2B employer for the prior 52 weeks and have worked full-time for 48 of those weeks.[8] These examples are short-sighted in that they presume that the only fact patterns under which employers hire H-2B workers are either ones where all U.S. workers are employed full-time and year-round or where written employment agreements are in place (either through collective bargaining agreements or written employment contracts). The presumed fact patterns have some, but relatively little, applicability in the real world and the Departments rule will not drive market changes that conform to these presumptions.

[6] Elsewhere in DOL's immigration-related role the agency has defined and regulated jobs with a "combination of duties" (PERM labor certification program) as well as jobs that are "essentially equivalent" (H-1B program).
[7] 20 CFR 655.5; 80 Fed. Reg. 24042, 24111 (Apr. 15, 2015).
[8] 20 CFR 655.5; 80 Fed. Reg. 24042, 24111 (Apr. 15, 2015).

Recommendation:

The corresponding employment principle can satisfy what should be the goal here – of ensuring similarly situated employees are indeed treated similarly – without the text adopted in the IFR. The Chamber strongly recommends that the concept of corresponding employment be reconsidered by both of the Departments. The uncertainty caused by this requirement puts employers in a position where they do not know what to pay or what benefits to provide to their non-H-2B workers. Moreover, this uncertainty creates a very real disincentive for employers to legally hire temporary foreign workers through the H-2B program because such hire can jeopardize the market-driven compensation system of employers. The phrase "substantially the same work" should be replaced with terms already used by DOL and already understood by the regulated community.

There are two examples the Departments could borrow from in the H-1B context to provide the clarity that employers need to effectively plan for their business needs. The Labor Department has used the terms "similarly employed" and "essentially equivalent jobs" in comparing the jobs of temporary workers with those of American workers. The term "similarly employed" has been used to mean "having substantial comparable jobs in the occupational classification in the area of intended employment."[9] The term "essentially equivalent job" which is used in the context of the displacement of H-1B workers, is concerned with a multifaceted comparison that takes into the individual's job responsibilities, the qualifications and experience of the workers, and the area of employment.[10] A construct that borrows from either of these concepts, or both concepts, could be enacted in the H-2B program rule to give the certainty to employers that they will not be forced to pay inflated wages or provide benefits to workers who do not have the same job responsibilities or qualifications and experience as the H-2B workers.

<u>Three-Quarter Guarantee</u>

The three-quarter guarantee included in this rule is another unnecessary burden for employers to shoulder. Specifically, this provision requires an H-2B employer to guarantee employment for a total number of work hours that equals at least three-quarter's of the workdays of each 12-week work period if the period of employment stated in the job order is at least 120 days, or every 6 week period if the employment covered by the job offer is less than 120 days. If the employer fails to provide this minimum level of work hours under the rule, then the employer will be required to pay the worker what he or she would have earned if the employer had in fact offered that amount of work hours. This requirement would be problematic enough if it only applied to the H-2B workers; the Departments; however, crafted this rule in a manner that makes this requirement to workers in corresponding employment as well.

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[9] 20 CFR 655.731(a)(2)(iii).
[10] 20 CFR 655.738(b)(2).

The Departments justify the imposition of this new requirement by claiming it is necessary to ensure the integrity of the labor certification process.[11] The Departments believe this guarantee is necessary for the following reasons:

> "The guarantee deters employers from misusing the program by overstating their need for full-time, temporary workers, such as by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, or the total number of workers required to do the work available."[12]

> "The three-fourths guarantee is a reasonable deterrent to potential carelessness and an important protection for workers, while still providing employers with some flexibility relating to the required hours…"[13]

The Departments' focus on employers' actions as the basis for the need of this requirement rests on the assumption that, setting aside issues pertaining to unpredictable weather, the gain or loss of a contract, or other major events that are not easily foreseeable to employers during the application process, employers can accurately predict months in advance what their exact temporary labor needs will be in 6 or 12 week intervals. Experience tells us that this level of precision evades even the most conscientious of employers and it is arbitrary for the Departments to infer that the inability for employers to accurately predict future seasonal labor needs in 6 or 12 week intervals is indicative of the employer's carelessness or misuse of the H-2B program.

The imposition of this requirement poses a substantial economic risk to H-2B employers and the local economies in which they are located. Businesses of all sizes and in every industry deal with the reality that the work it anticipated having does not materialize. When this happens, the business generates less revenue. Under normal circumstances, this loss would be mitigated by a concomitant drop in labor costs because if there is no work to be done, there is no worker to pay. Unfortunately, this three-quarter guarantee inhibits normal market functions; if an employer loses a substantial amount of business and has lower than expected labor demands, this rule imposes costs on the business that would have been avoided but for this requirement. This uncertainty as to what additional costs a business might be forced to incur by using the H-2B program is not an incentive for employers to accurately predict their labor needs; this uncertainty is a disincentive for using the H-2B program. This is especially true for businesses whose day-to-day operations depend on the weather, like many H-2B seasonal employers. While it is reasonable to require employers to correctly estimate their temporary labor needs over the life of a foreign worker's assignment in the U.S., and it is reasonable for the Departments to ensure employers are not permitted to

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[11] 80 Fed. Reg 24042, 24066 (Apr. 29, 2015).
[12] 80 Fed. Reg 24042, 24066 (Apr. 29, 2015).
[13] 80 Fed. Reg. 24042, 24067 (Apr. 29, 2015).

carelessly make that type of assessment, it does not follow that a guarantee of work in 6 or 12 week increments is reasonable.

Recommendation:

The Chamber believes that the Departments should withdraw this requirement from the rule. In the event the Departments insist upon retaining this concept in the program, then the Departments must measure this guarantee across the entire length of the contract period as opposed to 6 or 12 week increments. The three-quarter guarantee was implemented in the H-2A program[14] this way. A three-quarter guarantee that is measured over the life of the job contract will strike a better balance by providing employers with more flexibility to operate their business during the busy season, while still providing adequate protection for American and H-2B workers.

<u>*New Recruitment Requirements*</u>

Many of the new recruitment requirements implemented under the IFR are extremely problematic for employers. The amount of authority vested in the Certifying Officers over the recruitment process provides the Labor Department the ability to add new recruitment requirements and extend the recruitment process indefinitely without any meaningful parameters, guidelines, and, thus, orderly expectations. In addition, the audit authority provided under the IFR could be used to force employers to have their recruitment efforts supervised by DOL, which could include extending the length of the job order indefinitely. The ambiguity of these provisions and the doubts they raise about employers' ability to effectively meet their temporary labor needs will negatively impact the functionality of the H-2B program.

The Certifying Officer has the ability under the rule to compel employers to conduct additional recruitment.[15] The "determination" by a Certifying Officer that "there is a likelihood that U.S workers are qualified and…available" is not required to be based on any specific level or type of evidence, or any evidence at all. If such a "determination" is made, without any opportunity for the employer to provide countervailing evidence, then employers can be forced to engage in more recruitment activities for American workers, of any type and for any duration.[16] There are no objective guidelines or conditions precedent that must be demonstrated by the Certifying Officer before she can require an employer to conduct additional recruitment.[17] The Certifying Officer is not required to explain why she thinks it is likely that qualified Americans are available for employment. Moreover, there are no explicit limitations on what a Certifying Officer can require of an employer to do in order to fulfill these additional recruitment requirements. At the most basic level, employers should at least be aware of what the Departments will require of them in order to obtain workers when the

[14] 20 CFR 655.122(i)(1).
[15] 20 C.F.R. 655.46, 80 Fed. Reg. 24042, 24125 (Apr. 29, 2015).
[16] 20 C.F.R. 655.46, 80 Fed. Reg. 24042, 24125 (Apr. 29, 2015).
[17] 20 C.F.R. 655.46, 80 Fed. Reg. 24042, 24125 (Apr. 29, 2015).

domestic labor markets will not provide for their needs. Moreover, given that the new rule requires all recruitment activities to be completed with 14 days of receiving, the Certifying Officer has the ability to add so many requirements that will be too costly and time-consuming for employers to reasonably comply with. These provisions need to provide reasonable limits on the authority of the Certifying Officer. The Departments should consider limiting the additional activities to those that are enumerated in the rule, along with exempting these additional requirements from the 14 day recruitment period.

Equally significant, the 21 day timeline in which the recruitment efforts must be conducted is troublesome. The IFR requires that the job orders that H-2B employers submit to a State Workforce Agency (SWA) must remain on the SWA's active file until 21 days before the date of need.[18] Employers must agree to continue to accept referrals from the SWA during this time period and must offer employment to any qualified U.S. worker that applies for the job during that period.[19] The logistical consequences associated with this change in the process is that it will force the consular processing of these H-2B petitions closer to the date of need. Truncating the process in this way will cause the demand for consular to spike in the lead up to each half of the fiscal year. There are serious concerns from our members that the State Department does not have the resources at many of its consular posts to deal with the influx in individuals who need to be interviewed, which increases the likelihood of delays that will prevent our member companies from bringing in their workers to the U.S. when they need them. The rule makes no mention of any interagency communication with the State Department and before the Department moves forward with these requirements, there should be some public assurances from the State Department stating that this new structure will not cause unreasonable processing delays at U.S. Consulates.

Lastly, another part of the recruitment process that is troubling is the Certifying Officer's audit authority. This is of priority concern in part because the Certifying Officer need not conduct an audit to utilize this authority under the rule to compel an employer to conduct supervised recruitment. The Certifying Officer need only "determine" that a violation has occurred and the Certifying Officer could force the employer to comply with the assisted recruitment provisions for up to two years.[20] Presumably, a clerical mistake made by an employer in an application could be sufficient for the Labor Department to supervise an employer's recruitment efforts. This will impose a considerable burden on the employer because these added requirements will be in addition to the general recruiting requirements previously mentioned in this section. The Chamber understands that bad actors need to be punished for their transgressions, but the Wage and Hour Division already possesses investigatory authority over H-2B program violations and they are in a better position than the Certifying Officer to determine compliance. This requirement made sense under the

[18] 20 C.F.R. 655.16, 80 Fed. Reg. 24042, 24116 (Apr. 29, 2015).
[19] 20 C.F.R. 655.20(t), 80 Fed. Reg. 24042, 24121 (Apr. 29, 2015).
[20] 20 C.F.R. 655.71(a) states that "if, as a result of audit **or otherwise**, the CO determines that a violation has occurred…the CO may require the employer to engage in assisted recruitment…," which leaves the CO with very broad authority to institute this form of recruitment on H-2B employers. 80 Fed. Reg. 24042, 24128 (Apr. 29, 2015) (emphasis added).

attestation-based system under the 2008 rule, but this audit authority is no longer necessary and maintaining these provisions is duplicative and unnecessary.

Recommendation:

The 21 day timeline should be abandoned as it seems unworkable and unrealistic with dire consequences for the viability of the H-2B category, especially because the State Department's consular posts do not stand ready to issue H-2B visas to qualified H-2B workers in a timely way, a mere 21 days prior to the start date. Unfettered Certifying Officer authority to expand employer recruitment obligations for an indefinite period of time to comply with unknown additional recruitment steps should be eliminated from the rule.

THE DEPARTMENTS EXCEEDED STATUTORY AUTHORITY

The IFR contains provisions that do not comport with the statutory authority bestowed upon the Departments by Congress. There is no legal authority for the Departments to add certain cost burdens to the bottom lines of H-2B employers, in particular transportation costs which is a subject about which Congress has specifically spoken. Congress has not in any way suggested, much less authorized, the executive branch to restrict otherwise legitimate businesses to act as H-2B employers, but the Departments new IFR in effect bars job contractors from participating in the H-2B visa program altogether. Given the adverse impact these provisions will have on H-2B employers, the Departments should remove the transportation cost requirement and the new mandates on job contractors.

The Departments Lack Authority to Impose New Transportation Requirements

The IFR states that employers must reimburse the inbound travel expenses for H-2B workers if they complete 50% of the contract period and must be reimbursed for their travel back to their home country upon the completion of the contract period.[21] Nothing in the INA supports the Departments' contention that they possess the statutory authority to impose such a requirement.

The INA specifically speaks to when an employer is liable to pay for any transportation of their H-2B employees. In particular, the statute states that an employer must pay for the reasonable costs of an H-2B worker's return transportation abroad when the worker has been dismissed from employment prior to the end of his or her authorized stay in the U.S.[22] This is the **only** instance wherein Congress specifically stated that employers of H-2B workers would be required to reimburse their workers for any transportation between their home country and the U.S. The requirements to pay both inbound and outbound international transportation under the terms of the IFR are contrary to the statute. If Congress wanted to

[21] 20 C.F.R. 655.20(j), 80 Fed. Reg. 24042, 24120 (Apr. 29. 2015).
[22] INA § 214 (c)(5)(A); 8 USC 1184(c)(5)(A).

require employers to provide reimbursements, they could have. They did not. These requirements are in excess of the statutory authority of the Departments.

The Job Contractor and Joint Employment Provisions Unlawfully Prohibit Legitimate Business Practices

The IFR's job contractor, employer-client, and joint employment requirements are disconcerting to the Chamber because they seem to severely restrictotherwise legitimate business practices without an explanation as to why, and without any statutory mandate or authority to do so. . In industries where such contracting relationships are prevalent, there will be an exponential increase in the cost of recruitment labor certification in order to utilize the H-2B visa program, merely because of the business model employed. The ambiguity of these three terms in the IFR gives pause to many employers because they are unsure and confused as to when, and under what circumstances the Departments might subject them to these increased requirements and costs. The imposition of these burdensome obligations will prevent many legitimate businesses who have historically relied on the H-2B program for their labor needs to no longer access the program.

The Departments' decision to impose additional legal requirements to H-2B employers that are job contractors or employer-clients does not rest on a sound statutory analysis. The INA contains no provisions that require specific H-2B employers that meet certain criteria to suffer a heavier regulatory burden than other H-2B employers. Moreover, none of the statutory references made by the Departments in the IFR could be construed as conferring such authority. When Congress wants to impose additional burdens for employers seeking to use temporary worker programs, they do so through the legislative process. For example, Congress distinguished between certain H--1B employers based on the concept of dependency and it imposed additional requirements upon H-1B dependent employers. Congress also distinguished between L-1B employers based on the concept of providing labor for hire and it imposed additional requirements upon L-1B employers who assign their employees to provide services to clients and do not directly supervise their employees. Congress has not acted in a similar fashion to impose heavier regulatory burdens on certain H-2B employers. The Departments are acting on their own without any underlying statutory authority to make this distinction between different types of H-2B employers. The preamble to the IFR does not explain why this distinction is being made, and therefore, the Departments' decision to impose additional burdens on H-2B employers the Departments characterize as job contractors and employer-clients are arbitrary, capricious, and in excess of statutory authority.

The new definitions of job contractor and joint employer greatly expand these concepts as compared to the 2008 rule in place before the beginning of this Administration.[23] Should these new definitions be implemented here, they have the potential to extend far beyond the circumstances of H-2B employers. These new definitions threaten to impact

[23] Cf, 73 Fed. Reg. at 78054 (Dec. 19, 2008).

businesses that use non-traditional workplace arrangements (such as temporary workers, independent contractors, or subcontractors) without a scintilla of evidence or explanation as to why such businesses are being so impacted. Moreover, by requiring that a job contractor H-2B employer be a joint employer with an employer-client and mandating a joint employment relationship where one may have not existed before, the Departments are creating liability of a type that perhaps the employer-client was and is specifically unwilling to be subjected to. This is an area that is potentially fraught with controversy and minefields. There are a whole host of factors that the Departments IFR ignores, which are necessary to determine who is or who is not a joint employer. This sort of classification has far-reaching ramifications and is completely inapposite as part of a program regulation for H-2B classification processes. This sort of determination seems far removed from DOL's role to advise about the availability of U.S. workers and equally removed from DHS's responsibility to promulgate immigration-related program regulations. A designation as a joint employer is being required by the Departments' IFR in order for certain employers to participate in the H-2B program, but that joint employer designation also has significant impacts regarding obligations under the Affordable Care Act, as well as under discrimination, wage and hour, and occupational safety laws – none of which the Departments are competent to consider as part of this H-2B program rule.[24]

All of these new job contractor, employer-client, and joint employer requirements are likely to deter many employers from using the program, which undoubtedly is the goal of the Departments. The uncertainty an employer has with respect to whether his business will be held as a job contractor and hold his business out as a joint employer to all of the firm's clients will undermine these businesses and the economic activity in the communities they serve.

Because nothing in the INA authorizes this intrusion into private commercial dealings of this sort and because these new burdens for employers using non-traditional employment relationships raises serious questions about employer-clients sharing private company information and the divulgance of proprietary company information by the job contractor as well, we ask that the Departments abandon these provisions in the final rule and revert back to the 2008 rule in this regard. The Departments' inclusion of new burdens that discourage job contractors from using the H-2B program is not well-thought out, has broad implications beyond the H-2B visa program, and has no basis in the INA.

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[24] *See* letter from Randel K. Johnson and James Plunkett on behalf of the U.S .Chamber of Commerce to Senator Lamar Alexander, Chairman, Committee on Health, Education, Labor & Pensions, noting the legal and economic effects of "joint employer" relationships (February 12, 2015)(available at https://www.uschamber.com/sites/default/files/joint_employer_comments_for_the_record-senate.pdf).

THE DEPARTMENTS' ECONOMIC ANALYSIS IS FLAWED AND FURTHER STUDY IS NEEDED

The IFR's cost-benefit analysis contains many short comings that do not properly account for the true costs associated with this new rule. The Departments estimated the total costs and transfers of the interim final rule to be in the range of $91.4 million to $127.8 million for the first year and slightly less ($90.0 million to $126.5 million) for each subsequent year. There are several problems with the Departments' analysis that call into question its accuracy and usefulness:

- The Departments improperly classify many costs under the rule as "transfers;"
- The Departments omitted or declined to include an analysis of certain costs and benefits associated with the program; and
- The Departments failed to obtain the necessary data to accurately estimate the economic effects of the rule when it was within the capacity of the Departments to obtain such data.

Many of the requirements imposed by the IFR are significant departures from the requirements under the prior rule. The Departments acknowledge that they do not currently possess the data necessary to quantify all of the costs and benefits associated with the IFR.[25] Many of the Departments' underlying assumptions for the new requirements have no analytical basis and the Departments should conduct a robust, systematic evaluation of the effects of the IFR to examine the validity of their assumptions. Doing so will build a stronger empirical foundation of cost and benefit data and that will provide the federal government insight future regulatory decisions for the H-2B program.

Multiple Costs are Incorrectly Classified as Transfers

The Departments list the annual amounts of $87.2 million to $125.4 million as the estimated amounts of new "transfers" that will be incurred by the IFR's new requirements. The Departments' definition of transfer payments in the IFR describes them as "payments from one group to another that do not affect total resources to society."[26] The Office of Management and Budget directs federal agencies to conduct regulatory cost and benefit analysis with a "focus on benefits and costs that accrue to citizens and residents of the United States."[27] The vast majority of the expenditures that are listed as "transfers," however, are concerned with expenditures that accrue to the H-2B workers, who are neither citizens nor residents of the U.S. As such, these expenditures that are listed by the Departments as "transfers" should be reclassified as "costs."

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[25] 80 Fed. Reg. 20242, 24091 (Apr. 29, 2015)
[26] Id.
[27] OMB Circular A-4, Regulatory Analysis, p. 15, (Sept. 17, 2003).

The transportation, subsistence, and lodging expenses for H-2B workers (estimated at $70.8 million per year) are listed as "transfers" under the Departments' analysis and should properly be classified as "costs" imposed by the rule. These expenditures shift income or wealth from U.S. employers to foreign workers and they need to be listed as "costs" because they will, per the Departments' statement, "affect total resources available to society."[28] For example, an H-2B worker in Laoang, the Philippines has to use multiple modes of transportation (boat and car) so she can (1) go to the consulate for their visa interview and (2) travel to the airport for their flight to the U.S. During those trips, the H-2B worker will need something to eat and might need lodging the day before their interview or their flight to the U.S. In this hypothetical, these expenditures being incurred by the H-2B employer are for the benefit of the H-2B worker and that money is leaving the U.S. economy. This affects the total amount of resources in the U.S. The Departments' analysis does not account for this phenomenon at all and as a result, the Departments' are understating the true costs of the program.

The reality that these requirements impose a cost is further suggested because the burden of these expenditures on H-2B employers likely will be reflected in higher prices paid by U.S. consumers and/or reduced supplies of goods and services available to U.S. consumers of seafood, flowers, wood products, and many other goods and services produced by H-2B workers. The Departments should have assessed the extent to which any of the aforementioned expenditures will be utilized for domestic consumption purposes in the U.S. by the H-2B workers because only the expenditure of those funds could be correctly classified as "transfers" under the analysis.

Costs and Benefits Omitted or Not Included by the Departments' Analysis

In addition, the Chamber is concerned that the Departments have neglected to include several potentially significant items in its analysis of economic impacts of the new rule compared to the baseline set under the previous H-2B program rule.

The Departments failed to include in its economic analysis any consideration of the impact of the rule on temporary labor supply businesses as evidenced by the new requirements for "job contractors". The IFR significantly curtails the ability of these businesses to participate in the H-2B program, and when these types of businesses can participate in the H-2B program they have a substantially heavier compliance burden under the rule. By implementing measures that will severely discourage the participation of these types of businesses in the H-2B program, the economic ripple effect might be felt by many people outside of these businesses. The Departments have not done the necessary analysis to assess if these firms lose business due to these new requirements, or determine the impact to companies that hire workers from these businesses. The Departments' proposal will certainly impose a cost burden on these businesses, their customers, and the U.S. economy, and the estimates of those costs should have been included in the Departments' analysis.

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[28] 80 Fed. Reg. 24042, 24091 (Apr. 29, 2015).

Another cost that was not considered by the Departments was the change in the definition of full-time employment under the H-2B program. The Departments increased the amount of hours per week from 30 hours to 35 hours in order for a job to be considered "full-time" under the rule. This change is not insubstantial. Some jobs that were full-time in previous years will no longer be considered as such. There will also be issues for employers in weather-dependent industries that might have problems providing their workers with the necessary hours if there are intermittent periods wherein the work schedule is very light for the employers. There certainly are costs associated with this change in the rule and the Department should have provided an estimate to that effect.

The Department did not present any estimate of monetized, or otherwise quantified, benefits produced by the IFR. Many of the qualitative benefit statements included in the Department's discussion of the need for the rule's requirements are susceptible to empirical quantification and testing. Even if all benefits cannot be measured in monetary terms, some degree of quantification of benefits is needed to help regulatory decision makers assess the relative merits of different regulatory approaches.

Program Data Collection and Review is Needed for Accurate Cost-Benefit Analysis

The Chamber encourages the Department to undertake a plan of evaluation research in tandem with the implementation of the IFR. The implementation of the provisions in the IFR over the next two or three years will provide a useful opportunity for the Department to compare data collected by the Department that documents the actual effects of the rule in terms of its costs and benefits. In doing so, the Department would be able to compare the actual data with its baseline estimates in the IFR and the Departments' would know whether its basic assumptions regarding the new provisions were accurate. The Chamber believes that many of the Departments' assumptions are flawed and the collection of the data would provide insight into where the IFR's requirements should be revised so as to not depress economic activity and job growth in the U.S. The opportunity to study the rule's effects is one that the Department should take advantage of in order to accurately determine the costs associated with the rule.

The wisdom in conducting this type of review is evident upon an examination of some of the issues mentioned earlier in this comment. The aforementioned corresponding employment and three-quarter guarantee requirements provide examples as to why further study is needed. The Departments' estimate that the three-quarter guarantee would result in zero cost impact on H-2B employers is not supported by evidence. The Departments' affirmation that there is little information with regard to workers in corresponding employment highlights a need for credible data on the subject, especially given the large range in the Departments' estimate of this requirement's impact. A study of the actual real-world impacts of these requirements would be an invaluable piece of information for policy makers seeking to properly balance the interests of all H-2B program stakeholders.

The DOL is fortunate to have already established within the Office of the Assistant Secretary for Policy a Chief Evaluation Officer and staff who are well-qualified to design the needed program evaluation research plan, obtain OIRA clearance for the necessary information collections, and procure qualified contract research services to oversee the research. An important part of an effective program evaluation study is to obtain input from an advisory committee of stakeholders who have practical experience as participants in the program. The Chamber would be pleased to participate in a stakeholders' advisory committee for evaluation of the H-2B program.

CONCLUSION

The IFR contains many onerous requirements for employers. These requirements inject an unreasonable amount of uncertainty into the program, which will make the continued usage of the program unworkable for many current employers that rely on the H-2B program to meet their seasonal labor needs. We have highlighted three such provisions that we believe are most fundamental, and have identified an alternative path for each. In addition, the Departments' exceeded their statutory authority in promulgating certain aspects of the IFR, and these provisions should be dropped from the final rule. Lastly, the Departments' cost estimate of the rule understates the rule's true economic impact of the rule. This is incredibly unfortunate since the rule will negatively impact H-2B employers, their American workers, and the local economy where these businesses are located. In publishing the final rule, the Departments' must correct these insufficiencies. We ask that a final rule be published within the next 180 days and that the Departments only issue a final rule on the provisions where the appropriate review and analysis can be completed, withdrawing any provisions from the final rule where such cost analysis cannot be properly completed and thus the terms and conditions of the rule cannot be timely finalized.

The Chamber appreciates the opportunity to discuss our concerns with the Departments. We thank you for your consideration of these views.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

Jonathan B. Baselice
Director
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