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OF THE
UNITED STATES OF AMERICA

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Administrator Adele Gagliardi
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

By electronic submission: www.regulations.gov

RE: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States
84 Fed. Reg. 36168 (July 26, 2019)
RIN 1205-AB89

Dear Administrator Gagliardi:

The U.S. Chamber of Commerce submits the following comments regarding the proposed rule referenced above. The Chamber greatly appreciates the effort of the U.S. Department of Labor (hereinafter referred to as "Department" or "DOL") to modernize the H-2A temporary agricultural worker program, which is becoming increasingly important for agricultural employers across the country to meet their workforce needs.

Several of the proposed changes to the H-2A program in DOL's proposal are welcome changes to the program. In many respects, employers would have more certainty regarding the program's requirements, as well as increased flexibility to utilize the program in a manner that allows agricultural businesses to best meet their company's workforce needs.

While this proposal contains several positive changes to the program, there are some provisions contained in the Notice of Proposed Rulemaking (hereinafter referred to "NPRM") that, in our view, could prove to be problematic if they are not amended. Furthermore, there are other provisions in the NRPM that could benefit from further expansion or refinement. Our substantive comments on the proposal are provided below. We urge the Department to adopt our recommended changes to the proposal and continue to seek stakeholder input as they move forward towards finalizing this proposed rule.

SIMPLIFYING AND STREAMLINING SEVERAL REQUIREMENTS ARE WELCOME CHANGES TO THE H-2A PROGRAM

Implementing Sensible Electronic Filing and E-Signature Requirements Promote Efficient Processing of Applications

The Chamber supports the Labor Department's approach to requiring the electronic filing of Applications for Temporary Employment Certification and all required supporting documentation with the National Processing Center (hereinafter referred to as "NPC") in the manner designated by the Administrator of the Office of Foreign Labor Certification (hereinafter referred to as "OFLC").[1]

Specifically, while DOL will generally require employers to file their Temporary Employment Certification applications electronically, the Chamber is appreciative that the Department will provide the option for certain employers to file their applications by mail if they lack adequate access to use the electronic filing mechanism that will be established by the Office of Foreign Labor Certification (hereinafter referred to as "OFLC").[2] Similarly, the Chamber is glad to see that if the employer is unable or severely limited in their ability to submit their applications electronically as a result of a personal disability, the employer may request that reasonable accommodations are made to allow them to utilize the H-2A program.[3] Providing these limited exceptions to the requirement for electronic submission of labor certifications strikes the proper balance between promoting efficiency in the processing of applications and providing access to all employers that are interested in using the H-2A program.

Streamlined Recruitment Obligations Limit Potential Uncertainty Regarding the Workforce Planning Decisions of Growers

Currently, agricultural employers that use the H-2A program must comply with what is known as the "50 percent rule," which requires that the employer must continue to "provide employment to a qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract period has elapsed."[4] In agreeing to provide employment to any U.S. worker that presents themselves to the employer for work, the employer must continue accepting referrals of all interested U.S. workers from the State Workforce Agency when they apply for work under the job order for that first half of the contemplated contract period.[5]

For example, an employer with an eight-month work contract must continue to accept any workers that show up to their farm looking for work within the first four months of the contract period. Compliance with this requirement has proven to be highly disruptive to growers across the country. When an employer is required to hire people halfway through a season, it can

[1] Proposed 20 CFR § 655.130(c)(1), 84 Fed. Reg. 36168, 36271 (July 26, 2019).
[2] Proposed 20 CFR § 655.130(c)(2), 84 Fed. Reg. 36271 (July 26, 2019).
[3] Proposed 20 CFR § 655.130(c)(3), 84 Fed. Reg. 36271 (July 26, 2019).
[4] 20 CFR § 655.135(d).
[5] 20 CFR § 655.135(c).

cause serious disruptions to agricultural operations in that these new workers frequently quit working within a very short period of accepting employment. The anecdotal evidence that various companies have provided to the Chamber concerning this requirement is borne out in the Labor Department's own assessment, as it stated in its proposal that the "costs of the rule to employers outweigh any benefits the rule may provide to U.S. workers."[6]

Replacing the 50 percent rule with a "30 day rule" that only requires H-2A employers to provide employment to qualified, eligible U.S. workers for 30 calendar days after the employer's first date of need on its temporary employment certification[7] is clearly preferable to the current 50 percent rule. The shortened period within which employers are required to offer employment limits the possible disruptions to their business and provides a clear, bright line as to what their obligations will be under the 30-day rule.

Providing Agricultural Employers with the Ability to Stagger the Entry of H-2A Workers Provides Needed Flexibility for the Unique Circumstances faced by America's Growers

In certain respects, the needs of H-2A employers and H-2B employers in the seafood industry are very similar in that the needs of the employers are dependent upon the weather in the area where the job is located. This factor, which cannot be controlled, dictates many aspects of agricultural output in the same manner as it does for seafood processing. With regard to agricultural employment, an extended winter or significant flooding in the springtime can delay planting. Similarly, hurricanes, extreme heat, or even a lack of sufficient rainfall can accelerate or delay a harvest. All these natural uncertainties that are inherent in agricultural production will provide H-2A employers with the ability to bring their workers into the country when they are actually needed without having to file multiple labor certification applications with the agency to do so.

Currently under the H-2A program, employers are not allowed to stagger the entry of their workers in a manner that is currently allowed under the H-2B program for seafood workers. Under this proposal, employers that receive an approved temporary labor certification and an approved H-2A petition can bring in their H-2A employees at any time during the 120-day period after the first date of need identified on the labor certification. However, if an employer informs DOL that it will opt for the staggered entry of its workers in compliance with the process set forth under the proposal,[8] the employer must continue to accept referrals of U.S. workers and must hire those that are qualified and eligible through the longer of a) the period of staggered entry set by the employer or b) for the 30 day period after the initial date of need on the temporary employment certification.[9] In addition to the employer potentially having an extended

[6] 84 Fed. Reg. 36168, 36172 (July 26, 2019).
[7] Proposed 20 CFR § 655.135(d)(1), 84 Fed. Reg. 36168, 36274 (July 26, 2019).
[8] See Proposed 20 CFR § 655.130(f)(2), 84 Fed. Reg. 36168, 36272 (July 26, 2019).
[9] See Proposed 20 CFR § 655.135(d)(2), 84 Fed. Reg. 36168, 36274 (July 26, 2019).

recruiting period beyond what is required under the proposed 30 day rule,[10] the employer will also be subject to updating its recruitment report.[11]

While employers who chose to stagger the entry of their workers will have to comply with these added requirements, our members have conveyed to us that this tradeoff is well worth the added flexibility that an employer obtains to bring its workers into the U.S. when they are needed without the need to file a significant amount of additional paperwork with the Labor Department. Moreover, these staggered entries will provide additional efficiencies to the agency, as there will be less resources that the Labor Department will need to devote to multiple labor certifications for the same employer when the only difference between different groups of agricultural workers is the expected start date for the job.

BROADENING THE DEFINITION OF AGRICULTURAL LABOR OR SERVICES IS WELL-INTENTIONED, BUT FURTHER STAKEHOLDER INPUT IS NEEDED TO EFFECTIVELY IMPLEMENT THESE TYPES OF PROGRAM CHANGES

Reforestation and Pine Straw Need More Certainty Regarding Program Requirements in Order to Embrace the Department's Proposal

The Chamber appreciates the intent behind DOL's inclusion of reforestation and pine straw activities into the definition of agriculture for the purposes of determining employer eligibility for the H-2A program.[12] Providing greater access to legal temporary workers for employers involved in these industries helps these businesses meet their workforce needs by providing them with an orderly, controlled avenue with which to hire workers to perform jobs that, in many cases, would simply go unfilled. More importantly, providing more employers with access to the temporary workers they need through the H-2A program helps boost the integrity of our nation's legal immigration system by diminishing the incentives for illegal entry and unauthorized employment in the U.S.

While we applaud the Department for proposing to expand access to legal temporary workers in the above-mentioned industries, forestry industry stakeholders have been outspoken with us in expressing their concerns about the Department's proposal that would force a significant amount of temporary forestry workers out of the H-2B program and into the H-2A program.[13] Many forestry industry stakeholders, at this point in time, would prefer to continue

[10] Proposed 20 CFR § 655.135(d)(1), 84 Fed. Reg. 36168, 36274 (July 26, 2019).
[11] See Proposed 20 CFR § 655.156(b), 84 Fed. Reg. 36168, 36278 (July 26, 2019).
[12] See Proposed 20 CFR 655.103(c), 84 Fed. Reg. 36168, 36264 (July 26, 2019).
[13] See 84 Fed. Reg. 36168, 36176, where the Department differentiates between tasks normally associated with reforestation work and the cultivation of trees or other forestry products as activities that would fall under the H-2A program under the proposal, from "vegetation management activities in and around utility, highway, railroad, or other rights-of-way" which are activities/tasks that are **not** associated with the cultivation of trees and other forestry products, thus ensuring that some forestry industry stakeholders will still have to use the H-2B program to obtain temporary workers in the future (July 26, 2019).

classifying reforestation workers under the H-2B program, despite the fact that the H-2B program issues a much smaller amount of visas each year.

Forestry industry stakeholders are most concerned about the imposition of new burdens that they do not currently bear under the H-2B program. This includes more costly housing requirements, onerous itinerary requirements that would require significantly more temporary employment certifications to be filed, and a more complicated wage requirement, which will be discussed in further detail below. These are all burdens that forestry companies have not planned for, let alone budgeted for. The Department should be mindful of these concerns as it considers whether to move forward with largely moving reforestation operations from the H-2B program to the H-2A program in its final rule.

Relatedly, the Department's acknowledgement in its proposal that there will be distinctions between which forestry workers qualify for benefits under each of the H-2 programs[14] is a cause for consternation and concern. We hope that the Department understands that it is well within the realm of possibility that confusion and business disruption could occur if these changes, as proposed, were implemented on forestry industry stakeholders. For example, an employer with a tree farm that either abuts or contains an easement for a railroad or a utility right-of-way, could very easily have trouble obtaining workers because the company would have workers engaging in tasks that constitute both H-2A and H-2B work-related duties. Without clarity on issues pertaining to the proper classification of workers, stakeholders will continue to be wary of embracing the sweeping changes suggested in this proposal. We hope the Department conducts further outreach to forestry businesses across the country before any final decisions are made regarding the expansion of the definition of agriculture in this manner.

Given the concerns expressed to us by forestry industry stakeholders, one potential solution that we hope the Department considers is providing forestry with the opportunity to be classified as either agricultural labor or non-agricultural labor. Providing businesses with a choice, as opposed to being told that their work is "agricultural" and many forestry services providers will be forced to apply for H-2A workers if they want any temporary workers. If a construct could be crafted wherein the employer, in this case the forestry services provider, had the option at the beginning of the application process to choose whether they wanted to use the H-2A or the H-2B program to meet their workforce needs, this might be a course of action where more forestry industry stakeholders would be warmer to the idea of having this forestry operations being defined as "agriculture."

The Definition of "Agriculture" Should Explicitly Acknowledge Dairying's Eligibility Under the H-2A Program

Today, many dairies across the country struggle to meet their workforce needs. There are many reasons as to why businesses in the dairy industry struggle to find enough workers, but one key reason for that is the lack of meaningful access that dairies have to the H-2A program. In

[14] Id.

our view, dairy work clearly falls within the definition of agriculture and many of the jobs that are sought to be filled by dairies should also be defined as "temporary" under the proposal. We urge the Department to consider including dairy in the list of agricultural sectors that can utilize the H-2A program.

The statutory text in the Immigration and Nationality Act (hereinafter referred to as "INA") that defines "agricultural labor" under the H-2A program clearly includes the work that is performed on a dairy farm.[15] In order to successfully petition for a worker under the H-2A program, the work being performed by the putative H-2A visa beneficiary must be of a "temporary or seasonal" nature.[16] The statutory text of the INA does not provide any additional insight as to what Congress intended "temporary or seasonal" to mean, but the use of the disjunctive "or" is critical in that it only requires the employer seeking an H-2A worker to meet one of these criteria in order to successfully petition for an alien worker. This is borne out in the manner that the Department of Homeland Security (hereinafter referred to as "DHS")[17] and the Labor Department[18] have defined the term "temporary or seasonal nature."

The key language regarding the ability of dairies to utilize the H-2A program to meet their workforce needs is with regard to how "temporary employment" is defined. The Labor Department establishes that employment is of a temporary nature when "…the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year."[19] Other provisions in the Department's proposal specify that a temporary "period of need" may be defined as "no more than 364 calendar days" for range sheep or goat herding or as "no more than 10 months" for range herding or production of cattle, horses, or other domestic hooved livestock, excluding sheep and goats.[20]

Many dairy operators have historically been shut out of the H-2A program because Labor Department found the work being offered was not of a temporary nature. These historical practices have helped contribute to the inability of dairies across the country to meet their legitimate temporary labor needs. Given how the Department has proposed to treat other non-seasonal agricultural employment opportunities regarding range livestock, not providing similar accommodations for industry stakeholders involved in dairy would not only be intellectually inconsistent, but it would mean that the Department is not going as far as it could to ensure that employers in all sectors of American agricultural production have access to a legal workforce. In other words, the limits being proposed by the Department suggest that DOL is not doing all that

[15] See 8 USC §1101(a)(15)(H)(ii)(a), stating that "agricultural labor" includes the definition of "agriculture" in 29 USC 203(f), which, in relevant part, states that "'Agriculture' includes farming in all its branches and among other things includes…dairying…".
[16] 8 USC §1101(a)(15)(H)(ii)(a).
[17] See 8 CFR §214.2(h)(5)(iv), which in relevant part, shares the same language with the Labor Department's regulations defining both "seasonal employment" and "temporary employment."
[18] See both Proposed 20 CFR § 655.103(d), 84 Fed. Reg. 36168, 36265 (July 26, 2019) and the current 20 CFR § 655.103(d), which are identical in how both seasonal employment and temporary employment are defined.
[19] 20 CFR §655.103(d).
[20] See Proposed 20 CFR § 655.215(b)(2), 84 Fed. Reg. 36168, 36287 (July 26, 2019).

can be done to diminish the incentives for illegal entry and unauthorized employment in the U.S. We urge the Department to provide greater access to the H-2A program to the dairy industry in America.

The "Agricultural Labor or Services" Provided by Farm Labor Contractors, Particularly with Regard to the Hauling of Commodities, Should Not Be Diminished Under this Proposal

Many Chamber members representing various sectors of American agriculture have consistently noted how critical it is for their businesses to haul their harvested commodities from the fields to the packing/processing facilities or to market. The current definitions of agriculture relied upon by the DOL and DHS to administer the H-2A program acknowledge that in order for agricultural businesses to survive, they must get their commodities to market. As such, the statutory text defining agriculture explicitly recognizes the following activities related to the transportation of agricultural commodities as "agricultural labor:" 1) the first place of packing or processing to be prepared to go to market, 2) delivery to storage, and 3) delivery to market or to carriers for transportation to market.[21] If a farmer cannot find a worker to drive the heavy truck that transports their agricultural commodities from the field to a packing shed, a mill, a grain elevator, or other processing facility, the farmer should be able to find an H-2A worker to fill that position and it should not matter whether that individual is a direct employee of the farmer or a farm labor contractor.

Unfortunately, several of our members informed us that the Department has recently changed the interpretation of long-standing policy that recognized that the hauling of agricultural commodities to market by farm labor contractors was an acceptable employment opportunity under the H-2A program. The increase in denials for farm labor contractors serving as heavy truck drivers of agricultural commodities is causing a significant amount of disruption for agricultural production in various areas of the country. In our view, the statutory definition of "agriculture" should cover farm labor contractors hauling crops to market or to packing of processing facilities, as these tasks would appear to include "any practices…in conjunction with…farming operations, including preparation for market, delivery…to market or to carriers for transportation to market."[22]

If the Department's opinion of the matter is that this language does not cover the performance of these tasks by farm labor contractors, the Department should amend the language in its definition of agricultural labor or services to equate the work performed by a farm labor contractor with that of a farmer and to clarify that the hauling of commodities is directly connected to the harvest of that commodity. We suggest the following language for the Department to adopt in order to ensure that agricultural businesses can meet their workforce needs regarding their ability to haul their commodities off their fields to get them to market.

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[21] See 29 USC § 203(f), which states in relevant part, that agriculture includes "farming in all its branches, and among other things includes…any practices (including any forestry or lumbering operations) performed **by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.**

[22] See 29 USC § 203(f).

> *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services pursuant to 8 USC 1101 (a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in Section 3121 (g) of the Internal Revenue Code of 1986 at 26 USC 3121 (g); agriculture as broadly defined and applied in Section 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 USC 203(f); the pressing of apples for cider on a farm; logging employment; the transportation of any agricultural or horticultural product in its unmanufactured state by any person from the farm to a storage facility, to market, or to any place of handling, planting, drying, packing, packaging, processing, freezing, or grading such as a packing house, a processing establishment, a gin, a seed conditioning facility, a mill or a grain elevator**;** and the handling, planting, drying, packing, packaging, processing, freezing or grading by any person of any agricultural or horticultural commodity in its unmanufactured state. The provisions of this paragraph are not intended to reduce the scope of agricultural labor or services as defined under any statutory definition. An occupation included in this paragraph and either statutory definition is agricultural labor or services, notwithstanding an exclusion of that occupation from either of the other statutory definitions.

SIGNIFICANT CONCERNS REMAIN OVER THE REQUIRED WAGES AND OTHER EMPLOYEE BENEFITS THAT MUST BE PROVIDED TO H-2A WORKERS

The Complexities in the Proposed Wage Requirements Will Cause Business Disruptions

The INA requires that H-2A employers must ensure that the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.[23] To accomplish this, the Department proposes to require H-2A employers to offer highest of the following wage levels listed below: 1) the Adverse Effect Wage Rate (hereinafter referred to as "AEWR"), 2) a prevailing wage rate approved by the OFLC Administrator, 3) an agreed-upon collective bargaining wage, 4) the federal minimum wage, or 5) the state minimum wage.[24] Our members are willing to pay the necessary wages to ensure that the interests of American workers are not undermined. However, they are very concerned over how this proposal could lead to significant business disruption with the Department claiming the authority to void a contractually agreed-upon wage between employer and employee and force the employer to pay higher wages than were contemplated during the contract period.

The Department's proposal would force H-2A employers to raise their wage rates in the middle of a contract period if, during the contract period, the AEWR in a given region/state or the prevailing wage for agricultural work in a given geographic region, surpasses the dollar amount of the previously approved wage in the employer's temporary employment certification

[23] 8 USC § 1188(a)(1)(B).
[24] See Proposed 20 CFR § 655.120(a), 84 Fed. Reg. 36168, 36265 (July 26, 2019).

application.[25] In situations such as these, not only is this a matter of a wage that was agreed to in the employer's work contracts with its employees, but the original wages in the work contract were determined by the Labor Department to prevent any adverse effects on similarly employed Americans during the application process. While it is true that the Department would provide 14 calendar days for employers to adjust to these new wage rates,[26] this two-week adjustment period is woefully insufficient to prevent the serious disruptions that could occur by a significant increase in the required wages that must be paid to employees.

The Chamber is opposed to the Department having the authority to void key terms of an employment contract and force an upward adjustment of wages in the middle of a contract period. Agricultural employers advertised these jobs at a wage rate approved by the Department, along with housing provisions, transportations costs, and other benefits that were offered to potential workers, to which the employees agreed to. If all the basic elements of a binding contractual agreement (offer, acceptance, and consideration) have been met in a manner that complied with the program's requirements at the time the contract was entered into, the authority of the Labor Department should not extend to renegotiating those terms in the middle of the work period. It is easy to foresee how an abrupt increase in costs could upend the ability of agricultural employers to maintain their operations, as growers determine their budgets for other farm priorities in part on how much they are paying their workers. If these costs increase, it could lead to business disruptions, layoffs, and crops rotting in the field. We hope that the Department amends this requirement to ensure that the wage approved at the time of the filing of the temporary employment certification should remain the wage in force until the work contract is completed.

A related concern raised by our members with respect to the proposal's wage requirements is how prevailing wage determinations will be established by OFLC. The Department's stated goal is to establish a new methodology to more effectively produce a prevailing wage that accurately reflects what agricultural workers are being paid.[27] To effectuate this, the Department's proposal established several requirements that must be met before the OFLC Administrator issues a prevailing wage for a given crop or agricultural activity. [28] Unfortunately, several requirements set forth in the proposal cast doubt upon the effectiveness of the Department's approach.

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[25] See Proposed 20 CFR § 655.120(b)(3), 84 Fed. Reg. 36168, 36265 (July 26, 2019), which states that if the newly announced AEWR is published in the Federal Register and it is now the highest of all the five wages in the Department's new wage construct, then the employer must begin paying the new AEWR to employees within 14 calendar days from its announcement in the Federal Register, and Proposed 20 CFR § 655.120(c)(3), 84 Fed. Reg. 36168, 36266 (July 26, 2019), which similarly states that if the prevailing wage level is adjusted during a work contract such that it is now the highest of all available wage sources under the Department's new construct, the employer must begin paying these increased wages within 14 days after the Department notifies the employer of the new prevailing wage level.

[26] See 20 CFR § 655.120(b)(3) and 20 CFR § 655.120(c)(3), 84 Fed. Reg. 36168, 36265-6 (July 26, 2019).

[27] 84 Fed. Reg. 36168, 36185 (July 26, 2019).

[28] See Proposed 20 CFR § 655.120(c)(1), which lists out nine separate criteria for the establishment of a prevailing wage for a given agricultural or crop activity, 84 Fed. Reg. 36168, 36265 (July 26, 2019).

One such troubling factor that is considered in these surveys is that the Department, in its stated effort to protect against adverse effect wage impacts on American agricultural workers, is proposing to limit these surveys to only capture the wages of U.S. workers.[29] We find this approach to be flawed. Given the profound impact that migrant workers have on the success of American agriculture, conducting a survey where the Department cannot even compare the wages of U.S. workers with their non-domestic counterparts, is a missed opportunity to fully capture what, if any, adverse impact H-2A workers have on American agricultural workers.

Another issue that companies are concerned about with respect to these proposed prevailing wage determinations are, in the view of our members, the lack of constraints to ensure that the survey itself is rigorous enough to stand up to scrutiny. A survey under the Department's proposal only has to report the wages of at least 30 American workers,[30] those workers must have received those wages from no less than five separate employers,[31] and that the wages paid by a single employer cannot represent more than 25% of the sampled wages included in the survey.[32] Many employers fear that, given these lax constraints placed on these surveys, the Department may approve either skewed surveys that don't reflect the market realities in a given area of the country, or the survey only provides a picture of a certain set of employers in an area and doesn't take into account others that are operating in the same area. When there is the potential that the wages paid by hundreds of employers to thousands of agricultural workers could be determined by a very small data set obtained from a relative handful of workers and employers in that area, it calls into question the accountability and trustworthiness of the upon which the prevailing wage determination is based.

There are many ways in which the Department could consider improving the manner in which these surveys are conducted and how they will be used by the OFLC. One such idea would be to incorporate some form of third-party peer review of these studies, particularly with respect to its methodology. Another change for the Department to consider would be including the collection of wage information from non-U.S. workers to ascertain a broader data set that better represents the wages that are being offered for specific crop or agricultural activities in a specific geographical area.

Disaggregating the Adverse Effect Wage Rate into Specific Agricultural Occupations Creates Significant Challenges for Employers to Plan for their Temporary Workforce Needs, Especially for Small Businesses

Currently, the Department of Labor sets the AEWR at the combined gross hourly rate for field and livestock workers conducted from USDA's Farm Labor Survey (hereinafter referred to "FLS"). This data is broken down by each state or region under the H-2A program. In effect, this creates one AEWR for all agricultural workers in a given state or region, such that

[29] 84 Fed. Reg. 36168, 36186 (July 26, 2019).
[30] See Proposed 20 CFR § 655.120(c)(1)(vii), 84 Fed. Reg. 36168, 36265 (July 26, 2019).
[31] See Proposed 20 CFR § 655.120(c)(1)(viii), 84 Fed. Reg. 36168, 36265 (July 26, 2019).
[32] See Proposed 20 CFR § 655.120(c)(1)(ix), 84 Fed. Reg. 36168, 36266 (July 26, 2019).

supervisors, inspectors, agricultural equipment operators, crop laborers, and workers that fall under other agricultural occupation classifications are all assigned the same AEWR.

This has proven to be a vastly suboptimal method for calculating wage rates that must be paid to farmworkers because all workers on a farm are subject to the same AEWR. In layman's terms, the entry level worker and the supervisor that leads a team of workers and is the primary operator of heavy machinery on the farm have their wages averaged together and these two workers with vastly different skill sets are all subject to the same AEWR. In other words, calculating the AEWR in this fashion inflates the wages required to be paid to entry-level crop workers under the H-2A program, which puts American agricultural producers at a distinct disadvantage against foreign competitors.

To address this issue and provide more accurate wages for agricultural workers, the Department proposes to disaggregate the wage data underlying the current AEWR and establish new AEWRs for specific agricultural occupations. The occupation-specific AEWR would be based on the annual average hourly gross wage in that occupation in the state or region reported under the FLS when the FLS is able to report such a wage.[33] In the event that the FLS does not report a wage in a specific agricultural occupation in a given state or region, the Department would utilize the wage data from the Occupational Employment Statistics survey from the Bureau of Labor Statistics and set the AEWR at the statewide annual average hourly wage for the standard occupational classification (SOC) in that state.[34] Last, but certainly not least, if neither the FLS data nor the OES data is sufficient to determine the AEWR, the Department proposes to base the AEWR for an agricultural employment opportunity in the U.S. as the national wage for the occupational classification from those combined sources.[35] All of this is designed by the Department to provide more tailored AEWRs for each occupational classification to better prevent any adverse effects that H-2A workers could have on similarly employed American workers.

From a theoretical standpoint, the Chamber certainly understands the logic underlying the disaggregation of data by occupation so that supervisory employees and other higher-earning workers like equipment operators do not artificially skew the AEWR levels in favor of the relatively cheaper entry level crop workers. However, multiple Chamber members have expressed their concern in that disaggregating the wage data as proposed into several categories based on occupational classification in reliance upon multiple sources of data to determine these wage levels, is very complex and could lead to much more volatility in the agricultural labor market in the U.S. moving forward. Some of our member companies and associations have suggested the idea of establishing an AEWR as a set-percentage over the federal or state minimum wage to avoid some of the problems they foresee happening if the disaggregation proposal is imposed.

[33] 84 Fed. Reg. 36168, 36179, (July 26, 2019).
[34] Id.
[35] Id.

Admittedly, the state or federal minimum wage is not the only baseline with which the Department could utilize as a means for finding a reasonable premium above that base dollar amount to prevent adverse effects on U.S. workers, but it is crucial to employers that whatever baseline the Department chooses, it should be a baseline with a relatively stable value year-over-year. This would provide employers with the highest level of certainty possible, which will be helpful for businesses as they make long-term workforce planning decisions. The clearer the picture they have regarding how many workers they can obtain for their American operation, the more likely they will be able to expand their operations domestically, which means America produces more (and imports less) food.

For example, the American Farm Bureau Federation has performed some preliminary analysis on the proposal and found that "due to thin data for many occupations it appears as if the proposal will make estimating wage expenditures more difficult, more variable and more expensive."[36] Similarly, a recent publication in the Rural Migration Blog at the University of California, Davis, lends credence to the volatility concern that our members have regarding the AEWR. The UC Davis analysis showed that for Grader and Sorters in the State of Florida, the AEWR in effect showed a 4% increase in the AEWR from 2016-2017 and a 2% increase in pay from 2017-2018.[37] Had the Department's proposal been in place during those years, there would have been a 1% increase in the AEWR during 2016-2017, but a 15% drop in 2017-2018. The study found volatility in California as well, where they found that crop workers in the Golden State would have seen as much as a 3.5% drop in the AEWR for them, but front-line supervisors in California could have seen a 65% or 68% increase in the AEWR had the Department's proposal been in law for the past few years.[38]

In short, the complex system that has been proposed for establishing the AEWR, with the varying wage sources to be examined depending upon the state or region where the job is located, as well as the increased volatility shown by multiple sources, is a serious cause for concern for many agricultural employers. We urge the Department to consider the ideas mentioned above to remedy this situation and fashion a wage construct that is more workable for America's farmers.

The Concept of "Corresponding Employment" Needs to be Refined to Provide Employers with the Certainty to Make Workforce Planning Decisions

We were disappointed in the Labor Department's decision to not address the fundamental flaws inherent in its current definition of "Corresponding Employment" in this proposal. In doing so, the Department appears to be acquiescing to the flawed approach taken by the Obama Administration where, according to the text of regulation, a non H-2A worker can be determined

[36] *Proposed H-2A Changes Try But Fail to Contain Considerable Wage Variability*, American Farm Bureau Federation Market Intel weblog (Sept. 19, 2019), available at https://www.fb.org/market-intel/proposed-h-2a-changes-tries-but-fails.
[37] *The H-2A Program and AEWRs: FLS and OES*, The University of California at Davis Rural Migration Blog (Sept. 9, 2019), available at https://migration.ucdavis.edu/rmn/blog/post/?id=2337.
[38] Id.

to be in corresponding employment with an H-2A worker if the non H-2A worker performs "any work included in the job order, or in any agricultural work performed by the H-2A workers."[39] Aside from some minor, superficial language changes to the definition, the Department's current proposal embraces the same flawed approach where the term "corresponding employment" does not refer to workers that "similarly employed," but instead those that merely share some similar duties in the course of their jobs.[40]

The concept of "corresponding employment" in the context of the H-2A program was designed to ensure that American workers who were "similarly employed" to the H-2A workers in a given occupation were not "adversely effected" as a result of companies employing foreign workers in that occupation. Implicit in this understanding of this concept was that the nature of the work being performed, which is influenced by the worker's ability, drive, and employment qualifications, was related to the nature of the work itself in that the work being performed by the American worker and the H-2A shared a significant degree of similarity.

At this juncture, the Department's proposal does not even attempt to provide any additional clarity as to what "similar employment" would mean between a putative American worker and a putative H-2A worker. That said, reasonable people would likely agree that similar employment cannot be equated to a situation where two different employees with very different responsibilities have an overlap over one single job duty. Utilizing that logic, a named partner and a paralegal at the same law firm might both need to answer the phone when it rings at the office, but no rational person would claim that the attorney and the paralegal are "similarly employed." To that end, no one would seriously claim that the paralegal must be paid what that named partner is earning. Unfortunately, that's the crux of the matter regarding how this definition impacts employers utilizing the H-2A program; we hope the Department rethinks its initial assessment in maintaining the current definition for this term.

There are multiple actions that the Department could take to help rectify this issue and provide agricultural employers with a greater degree of certainty when they determine what their workforce needs are and if they choose to use the H-2A program to meet those needs. The Department must consider whether workers are equally "able, willing, and qualified" for the position in question, as part of the analysis of whether they are "similarly employed" to under the H-2A. In doing so, the Department could craft a *de minimis* exception that would allow individual H-2A workers to perform some job duties outside the core job description in the application for temporary employment certification without triggering the need for that worker to be placed into a different occupational classification. As such, this key term would provide that U.S. workers in "corresponding employment" would be those in the same occupation as H-2A employees or those performing a material number of job duties listed in the job description for that position.

[39] 20 CFR § 655.103(b).
[40] See Proposed 20 CFR § 655.103(b), 84 Fed. Reg. 36168, 36262 (July 26, 2019).

Another way to look at this would be to compare the H-2A definition with how this concept is defined in the H-2B program. The operative language in the H-2B programs' corresponding employment definition was that the non-H-2B worker was "performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers…".[41] The H-2B program's definition, which is not as precise as businesses would like it to be in order to provide them highest degree of certainty as it pertains to classifying the occupations their workers fall under, is still significantly preferable over the language currently governing this term in the H-2A program.

These concerns over the corresponding employment definition bleed into the concerns regarding offered wages and the AEWR. Many members of ours are concerned that the Department's division of the agricultural workforce into 8 different categories could be unworkable. Agricultural operations, particularly those with relatively small workforces, are not able to employ workers that are "siloed" in a manner that ensures they do not perform any other tasks outside of their job description. For example, a nursery may need someone to drive a tractor or operate other heavy machinery from time to time, but not on a full-time basis over the entire growing season. In setting a wage rate for a given H-2A contract, the Certifying Officer should look at which occupation the work "primarily" falls into and then make the decision as to how to classify that H-2A worker. If a crop worker is called upon to drive a tractor once or twice throughout the course of his or her employment over several months, the employer should not be required to pay its entire workforce of field workers as "equipment operators," which demand significantly higher wages than crop workers.

Beyond the concerns about the process for placing particular positions into one of the different occupational categories, several of our members are worried that there could be too many different categories proposed under the Department's wage construct. Eight separate categories could balkanize the workforce beyond what is functionally appropriate. While there is not uniform agreement as to what the right number is in this regard, some members have suggested to us that a more proper number for the designation of specific agricultural occupation would leave four or, at most, five, occupational classifications. This would include (1) nursery/greenhouse/crop worker; (2) livestock worker; (3) equipment operator; and (4) grader/sorter/packer. The overwhelming majority of H-2A workers would fall into those categories as line-level employees of agricultural operations. To the extent that the Department concludes that there are a substantial number falling into a category of supervisor/manager positions, that might warrant either the creation of a fifth occupational category for those workers or, alternatively, those individuals could constitute a higher tier within the aforementioned four categories - *e.g.,* a packing-supervisor or livestock-manager.

We urge the Department to address the need for further clarity regarding the definition of corresponding employment under the H-2A program. Properly limiting the application of this concept to employees that are truly "similarly employed" will be extremely helpful in ensuring that agricultural employers across the country can hire the legal workers they need.

[41] 20 CFR § 655.5.

The Three-Fourths Guarantee Remains a Burden for Agricultural Employers

The Three-Fourths guarantee, which requires that H-2A employers guarantee their workers a total number of work hours that is at least equivalent to three-fourths of the workdays of the total contract period,[42] is something that has long been an obstacle for agricultural employers. The Chamber acknowledges that requirements like these provide a modicum of protection for agricultural workers, but there are many situations where employers can run afoul of this guarantee and have to foot the bill for work that wasn't performed during the contract period. The added costs that must be borne by employers to maintain compliance with this guarantee are resources that could have been used to upgrade equipment, hire more workers, or provide bonuses to current employees. Instead, these situations require the employer to pay for work that was not performed, and in the unfortunate event that the employer cannot cover the added costs under this guarantee, the employer faces sanctions under the enforcement provisions under current law, as well as under the Department's proposal.[43]

To illustrate the conundrum that agricultural employers must confront with this requirement, the employer must make this guarantee up front before any work is performed under the work contract.[44] It is important to keep in mind that not even the most conscientious of agricultural employers possess the requisite level of clairvoyance to accurately predict what type of season they will have before it starts. Given all of the uncertainty that agricultural employers must face with the weather, limited crop yields, mid-season labor shortages caused by workers absconding, among other factors that are unique to agriculture, the best an employer can do is estimate how many hours they can provide in a given employment contract and hope for the best.

The Department intends to maintain its current approach whereby it evaluates the three-fourth guarantee based on an eight-hour workday. Given the lack of predictability in production agriculture, one way for the problems associated with this requirement to be mitigated would be to base the three-fourth guarantee on a 35 hour/week required minimum. This would provide an adequate and easily comprehensible guarantee for the worker and a benchmark for the employer that provides a marginally smaller burden, but that minor difference would provide employers with some added flexibility with which to deal with unforeseen weather, diminished crop yields cause by citrus canker and other similar issues, and other problems unique to agriculture that will not be so burdensome upon agricultural employers.

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[42] See both 20 CFR § 655.122(i) and Proposed 20 CFR § 655.122(i), 84 Fed. Reg. 36168, 36269 (July 26, 2019).
[43] See both 29 CFR §§ 501.15, 501.16(a), and 501.19(c), as well as the Proposed 29 CFR §§ 501.15, 501.16(a), and 501.19, 84 Fed. Reg. 36168, 36297-8 (July 26, 2019).
[44] 20 CFR § 655.122(i)(1), which states, in relevant part, that this guarantee begins on the later of the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need. Thus, employers must contemplate this guarantee before the H-2A workers begin their performance under the employment contract. The Proposed 20 CFR § 655.122(i)(1) contains the same language, 84 Fed. Reg. 36168, 36269 (July 26, 2019).

The Requirement to Contact Former U.S. Workers Should Not be Extended to the Employees of Farm Labor Contractors or to Former Employees That Were Dismissed for Cause or Abandoned Their Job

Currently, employers seeking to utilize the H-2A program must contact ***their*** former U.S. workers that were employed by them in the previous year and attempt to solicit their return to the job that they are seeking to fill for the current season. The current rule contains an exception to this requirement; employers are not required to contact former U.S. workers who were dismissed for cause or abandoned the worksite.[45] The Department's proposal seeks to impose a greater burden upon agricultural employers in two key respects. First, this proposal conditions the employer's usage of the current exception regarding employees terminated for cause or those who abandoned their employment at the farm on whether the employer properly and timely notified the National Processing Center of the termination or abandonment of employment.[46] Second, the proposal seeks to extend this requirement to cover individuals that were employed as farm labor contractors on the employer's farm in the previous year.[47] The Department should abandon these two proposed program changes.

The Chamber opposes the Department forcing employers to contact workers who either abandoned their previous job with the employer or were terminated for cause simply because the employer failed to timely notify the NPC of the worker's termination or abandonment. While it is understandable that the Department would want to create incentives for employers to notify the NPC in a timely manner of these circumstances, requiring an employer to contact someone that they, for all intents and purposes, will not offer employment to is a waste of both the employer's time and the former employee's time. There are other ways that the Department can help ensure that employers properly notify the NPC of these terminations or abandonments. For example, DOL could establish some form of a nominally reasonable "late fee" for not notifying the NPC of these situations in a timely manner that will ensure H-2A employers will comply with these notification requirements, but forcing employers to contact former employees where there might be a history of bad blood is unnecessarily punitive.

Likewise, the Chamber is opposed to the requirement that an employer must contact the employees of another employer, in this case, a farm labor contractor that the employer was involved in a business arrangement the prior year for labor. The employees of the farm labor contractor are not the employees of the employer in this situation. Given that the employer had a prior business relationship with the farm labor contractor, this new requirement would blur the lines between the employees of one company and another. We fear that this gives the Department the potential to find the existence of a joint employer relationship where none has existed historically. Furthermore, this requirement would force employers to attempt to "poach" the farm labor contractor's employees. This is not only a state of affairs that both the employer and the farm labor contractor might find inappropriate such that it could ruin an existing business

[45] 20 CFR § 655.153.
[46] Proposed 20 CFR § 655.153, 84 Fed. Reg. 36168, 36211 (July 26, 2019).
[47] Id, at 36212.

relationship, but in many cases, this type of practice might be in violation of the contractual agreements that the employer made with the farm labor contractor. Given these likely outcomes, we hope that the Department reverts to the current rules regarding this requirement when it moves to finalize this proposal.

Joint Employer Filing Requirements Need to Be More Flexible to Deal with Market Realities

The Chamber appreciates the Department's efforts to generally maintain the Department's current statutory interpretation, as well as its current policies and practices, towards the concept of joint employment under the H-2A program.[48] However, the proposed requirement that each employer in a joint employer situation must employ all of their H-2A workers for the equivalent of one workday during each workweek[49] is needlessly inflexible and should be amended to confront common occurrences in production agriculture.

The feedback from our members on this issue is that oftentimes, joint employers in agriculture are smaller operations that jointly file an application to share workers over a similar period of time in a given area of employment. Imposing a condition of H-2A program eligibility on the fact that each employer in a joint employer relationship must employ each H-2A worker they share for the equivalent of one workday each workweek might sound reasonable on its face to a layman, but it ignores the realities of agricultural employers and it unnecessarily frustrates the utility that joint employers seek to obtain when they enter into these types of arrangements.

For example, assume there are two agricultural businesses, Bert's Farm and Ernie's Homestead, both of which are of modest means and they file as joint employers under the H-2A program. Bert grows asparagus and kale; Ernie grows carrots and lettuce. An unexpected cold snap occurred with a few nights of frost, which harmed Ernie's carrots and lettuce, but Bert's hardier asparagus and kale were better able to weather the dip in the temperature. As such, Bert has a need for workers for the next several weeks because his vegetables are coming in, whereas Ernie won't have much to harvest for a few weeks due to the setbacks caused by the frost. As such, Bert has the H-2A workers at his farm for the next couple of weeks to harvest his crops first, and then the H-2A workers will leave to pick Ernie's crops once his carrots and lettuce mature later on in the season.

In these types of situations, it does not make sense to punish both Bert and Ernie with a program violation because of the different times in which their respective crops were ready to be harvested. If Ernie has no need for the H-2A workers at the same time that Bert is desperate for workers, these H-2A workers that are employed by both Bert and Ernie should not be forced to work for the equivalent of a day at Ernie's farm if there is no work for them to perform there in a given workweek. This type of scenario shows that there is no need for each joint employer to employ all their H-2A workers for at least one day each workweek. Joint employers should be able to utilize the workers per their business needs, not because of a government mandate. If the

[48] 84 Fed. Reg. 36168, 36174-5, (July 26, 2019).
[49] Proposed 20 CFR § 655.13(b)(1)(ii), 84 Fed. Reg. 36168, 36273 (July 26, 2019).

Department is viewing this requirement as necessary to ensure that all employers in a joint employer relationship have reasonable access to the employees when their business needs them, a more preferable approach might be that the Department takes into account the total length of time where the H-2A workers are expected to work under the employment contract and the Department would establish a "minimum" amount of time during that contract wherein each joint employer is guaranteed to have the H-2A workers working at their farms. The key is flexibility; the government should not be forcing employers and employees to engage in inefficient business practices.

CONCLUSION

We appreciate all the effort the Labor Department put into this proposal to modernize the H-2A program and enhance the efficiencies of its operations. Several suggested reforms to the existing regulations are welcome developments. This proposed rule is not perfect; there are some provisions in the proposal that we hope the Department revisits or discards when it moves forward to finalize this rule. Nevertheless, we look forward to working with the Department of Labor to build upon this initial proposal and incorporate the necessary changes that will help agricultural employers across the country meet their workforce needs, which in turn will allow their businesses to expand their operations and create jobs for American workers.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Executive Director, Immigration Policy
U.S. Chamber of Commerce