May 17, 2011

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

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

Dear Mr. Jones:

On behalf of the horticultural and landscape services sector of the nation's green industry, we submit the following comments on the Proposed Rule ("rule") cited above. The proposed rule would have significant adverse impacts not only on the landscape industry, but also on the entire vertically integrated green industry. The combination of the proposed rule and the January 19, H-2B prevailing wage rule will make the H-2B program virtually unusable for seasonal employers. We urge Department of Labor (DOL) to rescind both the final wage rule and the proposed rule.

The H-2B program is vitally important to the landscape industry because of the difficulty in finding American workers willing and available to perform the manual labor associated with seasonal landscaping services. The difficulty in recruiting seasonal U.S. workers stems from temporary nature of the positions, as well as the fact that these jobs require a great deal of manual labor. According to DOL's *Occupational Outlook Handbook, 2010-11 Edition*, "Many grounds maintenance jobs are seasonal, available mainly in the spring, summer, and fall, when most planting, mowing, trimming, and cleanup are necessary. Most of the work is performed outdoors in all kinds of weather. It can be physically demanding and repetitive, involving bending, lifting, and shoveling."[1]

For nonagricultural positions throughout the green industry, the H-2B temporary guest worker program is the only legal way to hire seasonal, nonimmigrant foreign workers. Many of the returning workers in the landscape sector have been with their companies for several years, gaining a tremendous amount of skill and experience in the installation of plant material, hardscapes, and irrigation systems in commercial and residential landscapes. Many nursery and greenhouse growing operations are diversified businesses, and some growers also employ seasonal H-2B workers for nonagricultural positions in

[1] U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-2011 Edition (Washington, DC: U.S. Bureau of Labor Statistics, 2010) 499.

these businesses. Despite paying good wages and making extensive efforts to recruit domestic laborers, it has been the experience of green industry employers that American workers demonstrate virtually no interest in these labor-intensive, seasonal positions. This lack of interest is primarily a function of the fact that the employment is of limited duration or is intermittent, rather than because of the wages. Employers have experienced recruitment challenges even during these tough economic times.

The Department of Labor's proposed rule would be extremely harmful not only to small landscape companies and seasonal employers, but also to the entire vertically integrated green industry and to the American and foreign workers it currently employs.

Economic Impact of the Proposed Rule

The economic impact of the green industry on the U.S. economy is significant. According to a May 2011 report, *Economic Contributions of the Green Industry in the United States, 2007,* prepared by the University of Florida and Texas A & M University, the "Total economic contributions for the United States Green Industry in 2007, including regional economic multiplier effects, were estimated at $175.26 Billion in output (revenue), employment of 1.95 Million fulltime and part-time jobs, labor earnings of $53.16 Billion, and $107.16 Billion in value added (Table ES-1). Total value added impacts represented 0.76 percent of U.S. Gross Domestic Product in 2007." According to Dr. Alan W. Hodges with the University of Florida and Drs. Charles R. Hall and Marco A. Palma with Texas A&M University, the largest sector of the green industry in terms of value added impacts were landscaping services, the sector of the green industry that is most heavily reliant on the H-2B program. They calculate that landscaping services account for 1,075,343 jobs and $50.28 billion in value added impacts.[2] These jobs, as well as jobs in the entire vertically integrated green industry, will be negatively impacted by the final prevailing wage rule and will be further impacted should DOL move forward with its proposed rule. Without access to a functioning H-B program, struggling landscape companies will purchase less plant material, seed, fertilizer, pesticides, irrigation, mowing and trimming equipment, vehicles, and other products.

In comments on the prevailing wage rule, ANLA and PLANET calculated that the modified wage formula will cost an average landscape company using 26 H-2B workers well over $162,000 annually. Combining this cost with the added burdens associated with the proposed rule could make the H-2B program unworkable for many in the landscape industry.

A recent survey of approximately 500 H-2B employers by ImmigrationWorks USA found that 34% of employers would close their businesses if they could not hire H-2B workers. An additional 25% of employers said they would downsize or restructure the company. Four percent of respondents said that they would turn to unauthorized immigrants. Landscape companies and other seasonal employers that use the H-2B program not only help make local communities and green spaces more beautiful, they

[2] Alan W. Hodges, Charles R. Hall and Marco A. Palma, Economic Contributions of the Green Industry in the United States, 2007 (Southern Cooperative Series Bulletin: 2011) 4.

also provide U.S. jobs and contribute to the local and national economy. The combined impact of the final prevailing wage rule and the proposed rule will force many seasonal employers to abandon the H-2B program, which will have significant impacts on jobs and the economy.

Access to reliable labor is the biggest limitation to industry growth. Even in tough economic times, the landscape industry has difficulty attracting workers to do manual labor jobs. During the 2002 to 2007 time period, the landscape industry would not have been able to create new American jobs without access to H-2B workers. Supervisory and other permanent positions in the landscape industry, most often held by American workers, are reliant on an adequate number of seasonal laborers during the busy spring and summer seasons.

Further, as the economy recovers and grows, access to reliable seasonal workers will become even more important to the industry. These seasonal workers will also support the growth of more permanent and higher skilled positions – the jobs generally filled by U.S. workers. According to DOL's Bureau of Labor Statistics, *Occupational Outlook Handbook, 2010-11 Edition*:

> Employment of grounds maintenance workers is expected to increase by 18 percent during the 2008—18 decade, which is faster than the average for all occupations. In addition, grounds maintenance workers will be among the occupations with largest numbers of new jobs, with around 269,200. More workers will be needed to keep up with increasing demand for lawn care and landscaping services both from large institutions and from individual homeowners.
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> Major institutions, such as universities and corporate headquarters, recognize the importance of good landscape design in attracting personnel and clients and are expected to continue to use grounds maintenance services to maintain and upgrade their properties. Homeowners are also a growing source of demand for grounds maintenance workers. Many two-income households lack the time to take care of their lawns so they increasingly hire people to maintain them. Also, as the population ages, more elderly homeowners will require lawn care services to help maintain their yards.
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> Employment of tree trimmers and pruners should grow by 26 percent from 2008-18, which is much faster than the average. In order to improve the environment, municipalities across the country are planting more trees in urban areas, increasing demand for these workers.[3]

As the demand of seasonal labor in the industry increases, growth in the industry will be confined by the difficulty in recruiting U.S. workers for seasonal positions, as well as the

[3] U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-2011 Edition (Washington, DC: U.S. Bureau of Labor Statistics, 2010) 500-501.

H-2B program's arbitrarily low 66,000 annual cap. Making the H-2B program unworkable, as the combination final prevailing wage rule and the proposed rule will do, with greatly restrict economic growth in the industry.

ANLA and PLANET oppose the draft rule because it would create uncertainty in the workforce and make the program more complicated and costly to use. The proposed rule could actually lead to job losses. From a consumer perspective, landscape services are discretionary. There is a limit to how much consumers will pay for professional landscaping services before they choose to simply forgo them. Greatly increased operating costs would certainly result in a loss of business since the price for services would have to be increased to allow companies to remain profitable. Higher prices translate to a lower volume of business, and reduced need for year-round U.S. workers employed as managers, foremen, designers, office staff, and so forth.

Concerns with the Proposed Rule

We share DOL's goal to ensure protection of U.S. workers and to adequately test the U.S. labor market. However, we do not believe that the proposed rule is needed to accomplish this goal. Rather than ensuring compliance with the H-2B program, the proposed rule would simply cause many employers to abandon the use of the program. Instead of effectively shutting down an important program for seasonal employers, DOL should simply enforce against the few bad operators that do not comply with the program requirements.

The DOL proposed H-2B regulations in 2005 that were never enacted. The DOL then tried again in 2008 and issued a new rule that included, among other things, an attestation-based case processing model. An August 2010 court case invalidated various provisions of the 2008 rule, including the prevailing wage rate for the separately promulgated wage rule. The DOL published a final rule on January 19, 2011 that addresses the calculations used to set wage rates for H-2B workers.

The DOL is now seeking to further refine the H-2B labor certification process to focus on enhanced U.S. worker recruitment and strengthened worker protections. Among other things, the proposed rule includes:

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

- New definitions for "full-time, seasonal work"; and
- New liability standards.

While we believe many aspects of this rule will be burdensome for employers and we will discuss in more detail below, the above are our most serious concerns with this proposed policy change.

We urge DOL to keep the current H-2B program (without the new wage determination) until long-term legislative changes can be made, including changes to the arbitrary 66,000 cap. While we welcome efforts to make the H-2B program more usable and more efficient for employers, we believe that this rule will provide few if any benefits in that regard, while imposing substantial burdens on users of the new system. We urge DOL to rescind the proposed rule.

According to DOL, the proposed rule is needed because of concerns that the 2008 rule did not sufficiently ensure access to jobs for U.S. workers and that the 2008 rule's attestation-based resulted in high rates of employer noncompliance. DOL cites an OFLC audit of "a random sample of cases," which found overall a 55 percent compliance rate. This statistic is misleading given that: (1) DOL did not disclose the total number of cases it audited; and (2) DOL appears to have counted all violations with equal weight.

As we noted in our comments to the proposed rule in 2008, we supported the move to an attestation-based system and encouraged DOL to adopt this proposal as it was simpler for employers to use and streamlined processing. We also supported the proposed lengthening of the maximum period of time that can be considered "temporary" to three years. This was a realistic acknowledgement of employers' needs and would have been a useful change to the H-2B program. Reversing this trend and, as proposed in the rule, defining a temporary need as nine months or less is overly burdensome and not in keeping with a true seasonal, peakload, and "one-time need" definition.

DOL has not given the 2008 rule and its attestation-based system a chance to be successful. Revamping the existing program and weighing it down with burdensome procedures is a waste of government resources. While we believe the DOL's findings are suspect, we agree that H-2B program violators exist. We encourage the DOL to use its enforcement authority and take action against bad actors rather than overhauling the program and instituting burdensome processes.

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

The rule requires that H-2B employers accept all qualified U.S. applicants until the third day before the date of need. The DOL says that "[t]his timeframe increases the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer." This requirement is problematic for several reasons. First,

employers cannot wait until three days before the date of need to arrange for travel and long-term housing for its foreign workers. Many landscape companies assist their H-2B workers by arranging for housing for them. Housing leases are often secured months in advance. Employers are committed to these leases even if the H-2B workers are told not to come because U.S. workers are found at the last minute. This requirement is unworkable for most employers given the investment required when sponsoring H-2B workers and bringing them to the U.S. The requirement is also unfair to H-2B workers who have been offered positions, only to have the offer potentially rescinded as they are about to depart for the United States.

Second, this requirement exacerbates the problem of disingenuous applicants and State Workforce Agency (SWA) referrals. Given that the employer must accept applicants up till three days before the employment begins, should those last-minute applicants quit, the employer will have to start the H-2B process all over and will be significantly delayed. Due to the arbitrarily low cap, in a strong economy, a delay could mean being shut out of the program for an entire season, resulting in significant economic hardship for the company.

Unfortunately, we have seen numerous cases of U.S. workers being referred to landscape companies by the SWA and then not showing up for work, or only working for a limited duration. A recent ImmigrationWorks USA study asked employers the following question: "In the past, when U.S. workers have applied for and accepted jobs advertised as part of the H-2B process, how long did those U.S. workers remain employed by your company? Did they usually remain through the season? Half the season? A matter of weeks or days?" Of the approximately 500 respondents, 22% of employers said that they offered the U.S. applicants the position, but the applicants did not report for the first day of work. The study found that 71% of applicants worked for less than one month. Only 6% of U.S. applicants worked for the entire season.

In addition, many landscape companies gradually ramp up their workforce as the seasonal work load increases. This provision would mean that the confusion associated with whether or not H-2B workers will be available could stretch through most of the season. Businesses strive to create as much certainty as possible. The 3-day requirement will keep employers in a constant state of uncertainty about their labor force.

The 3-day provision also fails to provide any protection for the H-2B worker, who plans to work in the U.S. and then is told a few days before he will travel to the U.S. that he is no longer needed. This rule may create a liability for the employer in terms of its agreement with the H-2B worker.

Finally, this provision is unlikely to result in many more U.S. workers applying for H-2B jobs. Most applicants who respond to H-2B ads do so within the first week of the newspaper ad being published or the SWA job order being posted. Ten days is more than adequate to reach the applicant pool. We suggest that DOL close the recruitment phase at the time the job order closes. The appropriate length of time should be determined by the SWA and is generally between 10 and 30 days. While 10 days is more than adequate, if

DOL strongly feels it needs to extend the amount of time U.S. workers are referred to H-2B positions, we suggest keeping the job orders open for no more than 30 days. Some states, such as New Jersey, already require this. At the end of 30 days, the SWA would close the job order and the employer would update and retain a final recruitment report (to be submitted in the event of an audit). Keeping the job order open for 10 to 30-days accomplishes the Department's goal of adding more protections for U.S. workers while balancing the interest of employers to have regulations that they can understand and follow.

Three-Fourths Guarantee of Payment of Wages is Unfair

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

The Application of 'Corresponding Employment' is Burdensome

The rule requires that employers provide to workers engaged in corresponding employment at least the same protections and benefits as those provided to H-2B workers. The DOL defines corresponding employment as the employment of non-H-2B workers in any work included in the H-2B job order or any work performed by the H-2B workers during the validity period of the job order. This definition will significantly affect small businesses where many employers have positions that combine duties. For example, an H-2B worker's primary job may be mowing lawns. If that employee were to call-in sick, it would not be uncommon in a small business for a supervisor or owner to assume mowing duties for the day to make sure the job is completed on-time. Under the proposed rule, the H-2B workers and the supervisor or owner would be considered "corresponding employees." This provision makes no sense.

According to the U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook, 2010-2011 Edition,* "Grounds maintenance workers can be divided into several specialties, including landscaping workers, groundskeeping workers, pesticide handlers, tree trimmers, and grounds maintenance supervisors. In general, these specialties have varying job duties, but in many cases their responsibilities overlap."[4]

The corresponding employment requirement, when combined with the prevailing wage rule and the three-fourths guarantee (discussed above), will result in mandatory payment

[4] U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-2011 Edition (Washington, DC: U.S. Bureau of Labor Statistics, 2010) 498.

of artificially high wages to the majority if not all of an employer's workforce. This requirement takes away an employer's flexibility regarding its workforce. To avoid this draconian result, an employer will be forced to monitor its employees and ensure they remain within the confines of their job description.

The Suggested Elimination of the Use of Agents is Problematic

In its preamble, the DOL states that it is concerned about agents' involvement in and contributions to what it sees as a lack of compliance in the H-2B program. Again, as explained above, we believe the DOL's finding that the majority of H-2B users are non-compliant is baseless and erroneous. We acknowledge bad actors exist in the H-2B program and, again, we encourage the DOL to enforce the existing regulations to root out fraud.

We agree with the DOL's proposal to require agents to submit copies of their agreements with employers to verify that a relationship exists between the employer and agent. We do not want agents using employer information to file fraudulent applications. However, bona fide agents are essential to the success of the H-2B program. Because the program is so complicated, many landscape industry employers turn to agents to help them navigate the H-2B program requirements. DOL's own statistics show that in FY2010, only 14% of employers filed H-2B applications without using an agent and, of these cases, 38% were denied. The H-2B program is very complicated and agents help guide employers through the process. We encourage the DOL to crack down on fraud using its enforcement authority rather than rather than prohibiting agents from preparing and filing H-2B applications on behalf of employers.

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

Defining a temporary need as less than nine months is burdensome because some employers will no longer be able to participate in the H-2B program. For the landscape industry, the length of a season generally corresponds to geography. For example, due to the weather, a landscape company in the northeast will likely have a shorter season than a landscape company in the southeast. A temporary need should not be quantified in the regulations. In addition, as part of the proposed bifurcated registration process, the DOL is adjudicating H-2B applications to determine temporariness. Each employer should be able to argue that its need is temporary and consistent with the definition of seasonal or peak load.

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

We oppose the requirement that employers pay daily subsistence and transportation to and from work as overly burdensome, especially given the corresponding employment requirement. Payment of transportation and subsistence costs should be at the discretion of the employer. This requirement is especially problematic in terms of the problem of disingenuous U.S. worker applicants. Employers should not have to pay transportation

and subsistence costs of an employee who quits after only a few days of work. As an alternative, we suggest that the DOL require a certain amount of employment before employers are required to reimburse employees for these costs.

The Strike, Lockout and Layoff Provisions are Too Broad

The proposed strike definition is broader than the current definition and includes any concerted work stoppage as a result of a labor dispute and covers the entire worksite instead of just the position. The rule would require a certification that there is currently no "strike, lockout, or work stoppage … at the same place of employment." H-2B workers are not used as strikebreakers, which is what this is probably intended to address. However, even assuming this is the goal, this language is too broad. The language should say "strike or lockout in the course of a labor dispute...for the positions sought to be filled." The regulations should also specify that this provision is not intended to address annual layoffs that occur due to the end of the peak season.

Requiring Additional Recruitment in an Area of Substantial Unemployment is Unnecessary

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

Changing the Definition of Full-Time Work is Burdensome

The proposed change in the definition of full-time work from 30 hours to 35 or even 40 hours a week is burdensome when considered along with the new prevailing wage rule, corresponding employment and the three-fourths guarantee, increasing the work-week from 30 hours to 35 hours poses a significant burden for employers. The definition of full-time work should remain as it is.

The Change in the Standard for Debarment is Unfair

The new standard for debarment of substantial failure rather than willful failure is unfair because employers may be barred from using the program for negligent rather than knowing failures. This is a slippery slope and can only lead to debarment actions that do not include "intent." In addition, an employer could be debarred for mere technical violations. An employer should not be penalized with debarment for procedural failures.

Bifurcating the Process is Burdensome and Time Consuming

The imposition of a bifurcated application process is burdensome because the addition of a registration step in an already complicated and onerous process. We also question whether the DOL will be able to complete its adjudication in time to allow employers to subsequently apply with DHS and then the H-2B employee to apply with the Department

of State to allow for timely arrival of employees. In a strong economy when there is a demand for the program, any processing delays could result in an employer getting shut out of the program due to the arbitrary 66,000 cap. The attestation process is more streamlined. Again, we encourage DOL to exercise its enforcement authority rather than instituting a new and burdensome application process.

In addition, please clarify at what point during the application process an H-2B number will be allocated. As mentioned above, processing time is a significant concern due to the cap.

Statement on the Cap

The H-2B cap of 66,000 is very low, and simply not reflective of workforce needs. H-2B employers urgently need this issue to be remedied by Congress. While DOL cannot address the cap number, we do suggest that after the annual cap has been met that DOL consider "replacement" labor certifications for H-2B workers who are issued a visa but either do not report for work or leave before the validity period of the labor certification has expired. This would allow employers to fully utilize the H-2B "slot" that they have invested in when a worker leaves while still respecting the annual cap.

The Regulatory Flexibility Analysis is Flawed

The Regulatory Flexibility Act (RFA) requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. DOL contends that the proposed rule is not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility Analysis is not required by the RFA. The conclusion is short-sighted and incorrect. The DOL's attempt to provide an Initial Regulatory Flexibility Analysis is flawed in its calculations, but even more flawed in its narrow coverage of the true impact of this rule and this rule in conjunction with the prevailing wage rule set to be implemented on January 1, 2012.

Before addressing our concerns with DOL's analysis, we would like to point out DOL's contradictory reasoning. On the one hand, DOL cites the adverse effect of the employment of H-2B workers on U.S workers as a main policy reason for the rule, while, on the other hand, DOL explains that employment in the H-2B program "represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program." It is curious how such a small fraction of the employment of the U.S. economy can pose such a threat to U.S. workers.

The DOL's analysis is flawed for a number of other reasons. The DOL fails to take into account how the inability to access and use the program caused by the substantive and procedural changes proposed by this rule will render the program virtually unusable by the H-2B community. The DOL should review the economic impact of the elimination of the program on a substantial number of small entities. Additionally, the changes

proposed in the rule together with the changes finalized in the prevailing wage rule render the program unusable.

According to the DOL the proposed rule is not expected to have a significant economic impact on a hypothetical small entity that applied for enough workers to fill 50 percent of its workforce. To evaluate this impact, the Department calculates the total cost burden as a percent of revenue for each of the top five industries. The analysis is flawed because, as stated above, of the failure to address the overarching unworkability of the proposed program revisions. In addition, DOL based its analysis on a comparison with the 2008 rule and did not include the new prevailing wage rule in its analysis. Failing to take into account the new prevailing wage methodology, which will exacerbate the effect of the proposed rule's corresponding employment and three-fourths guarantee provisions, renders this analysis misleading and inaccurate.

In fact, the DOL does not include an analysis of more significant rule changes in its RFA. For example, the DOL fails to analyze the burden of the corresponding employment requirement because the DOL lacks the data to calculate the impact and does not mention the three-fourths guarantee requirement in its RFA. The DOL's analysis regarding the requirement to recruit up to three days before the date of need or the date the last foreign worker departs suggests that the only additional cost of the extended recruitment is the cost of determining and then reporting the date to the DOL. The DOL ignores the effect of this requirement in terms of the significant investments employers make when bringing in foreign workers, including travel and housing costs.

Conclusion

The combination of the final prevailing wage rule and the proposed rule will make the H-2B program so costly and complicated that many in the landscape industry will abandon the program and suffer great economic losses that could lead to the closure of the business or layoffs of U.S. workers. Landscaping companies are already suffering during a tough economic climate.

Further, the economic impacts will reach beyond small landscaping companies and impact the entire vertically integrated green industry. Struggling landscape companies will purchase less plant material, seed, fertilizer, pesticides, irrigation, mowing and trimming equipment, vehicles, and other products than they would have had they had access to a workable H-2B program. For this reason, we urge DOL to abandon the proposed rule.

Thank you very much for your consideration of these comments.

Sincerely,

Robert Dolibois
Executive Vice President
American Nursery and Landscape Association

Sabeena Hickman, CAE, CMP
Chief Executive Officer
Professional Landcare Network