

May 17, 2011

VIA ELECTRONIC SUBMISSION

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

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

Re: *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*; 76 Fed. Reg. 15130 (March 18, 2011).

Dear Secretary Solis and Mr. Jones:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration is pleased to submit these comments to the Employment and Training Administration of the U.S. Department of Labor (DOL) regarding its proposed rule, *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*.

Advocacy believes that DOL's Initial Regulatory Flexibility Analysis underestimates the economic impact of this rule on small businesses. The administrative burdens and compliance costs created by the new requirements will make it more difficult for small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do unskilled seasonal work. The agency's analysis also fails to analyze the cumulative impact of these requirements with DOL's recently finalized rule that will increase the wages of H-2B workers by \$3-\$10 per hour, when both of these rules may be implemented in the same season. Advocacy believes that DOL's recent rulemakings may shut small businesses out of the H-2B visa program, and urges DOL to consider the significant alternatives to this proposed rule recommended by small entities that would meet the agency's objectives.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

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

Background

The H-2B visa program allows non-agricultural employers facing a shortage of U.S. workers to have access to temporary and seasonal unskilled foreign workers. This program is predominantly used by small businesses in the landscaping, hotel, construction, amusement, restaurant and forestry industries.⁵ There is a numerical cap of 66,000 workers who can enter the United States under the H-2B program. To hire an H-2B worker, employers must first attempt to recruit U.S. workers and pay the foreign workers a salary that will not adversely affect the wages and working conditions of similarly employed U.S. workers.

The H-2B program has undergone many changes in the last few years. In 2008, DOL finalized a rule creating an attestation-based filing model for this program. To cut down on delays in the application process, employers could "attest" or promise that they completed recruitment procedures instead of Federal and state oversight of these activities. DOL currently reviews recruitment compliance through audits.⁶

On August 30, 2010, the U.S. District Court in the Eastern District of Pennsylvania ordered DOL to promulgate new regulations for determining the prevailing wage rate paid to workers in the H-2B program due to a procedural defect in the 2008 final rule.⁷ In

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

³ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁴ *Id.*

⁵ 76 *Fed Reg.* at 15161.

⁶ *Id.* at 15131.

⁷ *Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010). The court found that DOL's 2008 H-2B rulemaking adopted earlier agency guidance on both the methodology for determining the prevailing wage rate and the data source utilized in these determinations, without specifically asking the public to comment on these issues, and therefore the agency would have to cure this procedural defect under the Administrative Procedure Act.

January 2011, DOL finalized a rule that increased the wages for H-2B workers by \$3-\$10 an hour, starting January 1, 2012.⁸ Advocacy submitted a comment letter to DOL citing the potential harmful economic impacts of these wage increases on small H-2B employers.⁹

In March 2011, DOL released a rule that proposed major changes and new requirements for the H-2B program:

- A bifurcated application process with a registration phase evaluating an employer's temporary need and an application phase that addresses recruitment;
- Increased recruitment oversight (eliminating the attestation method of recruitment), recruitment periods and requirements;
- A requirement to guarantee pay (3/4 of every month and 35 hours a week);
- A requirement to pay worker transportation, daily subsistence and housing (for certain workers);
- A requirement to pay corresponding U.S. workers the same wages and benefits as H-2B workers.

Regulatory Flexibility Act Requirements

Under the Regulatory Flexibility Act (RFA), when an agency proposes a rule, it must perform an Initial Regulatory Flexibility Analysis (IRFA), unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.¹⁰ The requirements of an IRFA include: 1) a description of the reasons why action by the agency is being considered; 2) a succinct statement of the objectives and the legal basis for the proposed rule; 3) a description of the number of small entities to which the proposed rule will apply; 4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule; 5) an identification of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule; and 6) a description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact.¹¹

Advocacy Comments on DOL's Initial Regulatory Flexibility Analysis

DOL completed an IRFA for this rulemaking. Advocacy recently hosted a small business roundtable attended by DOL staff and small business stakeholders from the construction, hotel, restaurant, landscape, construction, seafood processing, recreational and

⁸ *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program Final Rule*; 76 Fed. Reg. 3452 (Jan. 19, 2011).

⁹ Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, and Thomas Dowd, Administrator, U.S. Department of Labor (October 27, 2010) at: <http://www.sba.gov/content/letter-dated-102710-department-labor-employment-and-training-administration>.

¹⁰ 5 U.S.C. § 603, 605.

¹¹ *Id.* at 603.

reforestation industries. Based on this input, Advocacy believes that DOL's IRFA is inadequate because it fails to properly evaluate the number of small businesses impacted by this rulemaking, underestimates the economic impact of this rule on these entities and does not discuss significant alternatives that may minimize the impact of this rule on these small businesses.

I. DOL's IRFA Incorrectly Concludes that a Substantial Number of Small Entities Are Not Affected by the Rule

Although DOL completed an IRFA for this rule, the agency's position is that an IRFA is not required because the "Department believes that this NPRM is not likely to impact a substantial number of small entities."¹² DOL's position is 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 by the program."¹³ Advocacy strongly disagrees with DOL's RFA analysis.

Courts have held that an agency's RFA analysis should evaluate the economic impact of a rule only to those small entities that are regulated by that rule.¹⁴ DOL's analysis is incorrect because it analyzes the economic impact of the H-2B rule on over one million small businesses in five industries, when almost all of these businesses do not utilize this program.¹⁵ DOL should have instead evaluated the economic impact of these regulations on the 6,980 small entities that DOL estimates actually utilize the H-2B program.¹⁶ The question would then have become: how many of these 6,980 small entities would experience a significant economic impact. Advocacy believes that DOL's miscalculations regarding the small entities that are affected by this rule dilute the true economic impact of this rule and hinder the agency's ability to produce regulatory alternatives that minimize the costs of this rule for small entities.¹⁷

¹² 76 Fed. Reg. at 15166.

¹³ *Id.* at 15167.

¹⁴ *Southern Offshore Fishing Association v. Daley*, 97-1134-CIV-T-23C, *slip op.* at 4 (Oct. 16, 1998) (court invalidates RFA analysis for a shark fishing quota because the agency relied on a pool of 2,000-plus individuals who held shark fishery permits as the universe of fishermen potentially affected by the quotas, even though three-fourths of the permittees were not expected to land even one shark); *North Carolina Fisheries Association vs. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) (court remanded a fishing quota because the agency utilized the total number of fishing vessels issued flounder permits as the universe for determining economic impacts, instead of fishermen who actually fished for flounder).

¹⁵ 76 Fed. Reg. at 15166. DOL evaluates the economic impact of this rule to the total number of firms classified as small entities in these industries (over 1.1 million small entities): Landscape Services, 63,210; Janitorial Services (hotel industry), 45,495; Food Services and Drinking Places, 293,373; Amusement, Gambling and Recreation, 43,726; and Construction, 689,040.

¹⁶ *Id.* at 15168.

¹⁷ The H-2B Workforce Coalition, a consortium of various seasonal employers that utilize the H-2B program, commented that DOL utilizes contradictory reasoning on the potential economic impact of these regulations on the small business community. On one hand, DOL cites the adverse effect of the employment of H-2B workers as the main policy reason for the rule, while on the other hand DOL discounts the impact of these regulations because they only impact a small fraction of the employment in the U.S. economy.

II. DOL's IRFA Underestimates the Economic Impact of the Proposed Rule

Advocacy believes that DOL's Initial Regulatory Flexibility Analysis is inadequate also because it underestimates the true economic impact of this proposed rule on small H-2B employers, hindering the agency's ability to properly evaluate regulatory alternatives that may minimize the economic impact of this rule on small businesses. According to DOL's IRFA, the average annual costs for employers from this proposed rule in the top five industries range from \$614 to \$2,851.¹⁸ Small business representatives attending Advocacy's roundtable stressed that this estimate is extremely low, and disregards many of the major compliance costs imposed by the corresponding employment, payment guarantee, recruitment and transportation provisions discussed below. The H-2B Workforce Coalition commented that the costs of this proposed rule are so high that if this NPRM were finalized as proposed, a majority of their employers could not afford to use the H-2B program. They recommended that DOL review the economic impact of the elimination of the program on small H-2B employers in its IRFA.¹⁹

DOL's analysis fails to analyze how the proposed rule's numerous provisions might interact together to create a complicated new administrative process and onerous compliance costs for small entities. The agency's analysis also does not analyze the cumulative impact of these new burdensome requirements with the recently finalized DOL rule that will increase the wages of H-2B workers by \$3-\$10 per hour, when both of these rules may be implemented in the same season. Small business representatives at Advocacy's roundtable believe that DOL's recent rulemakings will shut small businesses out of the H-2B program.

1. DOL Does Not Consider the Impact of Wage Increases Imposed by the Corresponding Employment and Payment Guarantee Provisions

Advocacy believes that DOL's IRFA underestimates the impact of this proposed rule because the agency analyzes the costs and benefits of this rule with the wage rate of the 2008 final rule, instead of the recently finalized H-2B wage rule which increased the wages for H-2B workers by \$3-\$10 per hour. When the requirements of this wage rulemaking go into effect, H-2B employers will pay higher wages to U.S. workers under the corresponding employment provision and higher wages for both U.S. workers and H-2B workers under the payment guarantee provisions because of the previous H-2B wage rule. Therefore, in order to properly assess the impacts of this rulemaking, DOL must use as the higher wage rates mandated in the H-2B wage rule to calculate the compliance costs in this rule.

¹⁸ 76 Fed Reg. at 15171.

¹⁹ Comment letter from the H-2B Workforce Coalition to Mr. Michael Jones, Acting Administrator, U.S. Department of Labor 4 (May 17, 2011).

Corresponding Employment

The corresponding employment provision requires employers to provide to U.S. workers engaged in corresponding employment (workers who “perform the same work”) at least the same wages, benefits and protections as those provided to H-2B workers.²⁰ Small businesses are concerned that DOL’s IRFA does not estimate any compliance costs or burdens for this provision. This provision would require that corresponding U.S. workers and applicants would also receive the increased wages of \$3-\$10 per hour; DOL fails to estimate any of these costs. Small businesses have told Advocacy that this higher wage rate will become the new minimum wage for a company’s entire workforce, with compensation rising commensurately across the board.

DOL’s IRFA states that it cannot quantify these costs because the agency does not have any data on how many corresponding workers there are working at H-2B employers. DOL estimates other compliance costs in its IRFA by utilizing the assumption that a “hypothetical” small entity of average size fills 50 percent of its workforce with H-2B workers; DOL could use a similar model to calculate some costs due to this provision.²¹ DOL also collects data from employers seeking H-2B workers on how many U.S. workers they currently have in their workforce that could be utilized for this analysis.

Roundtable participants were also concerned about the administrative burdens this provision would create for small businesses where many employers have positions that combine many duties. For example, small landscaping companies often hire H-2B workers for the primary job of mowing lawns. However, supervisors often complete this job if an employee were to call in sick or for other reasons. Under this provision, the supervisor and the H-2B worker would be “corresponding employees” and the employer may have to pay the H-2B worker the higher wages of the supervisor.²² A restaurant representative stated that many of the employees do all of the tasks at a small restaurant, and it would be a regulatory nightmare to keep track of what task every employee was doing or to try to segregate duties to avoid paying higher supervisory wages. Small businesses also believe that they would be subject to liability based on this provision. Additionally, this provision would result in H-2B employers paying increased costs to U.S. workers for other new requirements of this rule such as transportation costs.

Small businesses recommend that DOL reconsider the corresponding worker provision, as it may add excessive administrative burdens and costs for small H-2B employers.

Payment Guarantees

DOL proposes to require that H-2B employers guarantee payment for three-fourths of the work days of each 4-week period and a 35-hour minimum workweek.²³ Advocacy is concerned that DOL’s IRFA does not estimate any compliance costs or burdens of these

²⁰ 76 *Fed Reg.* at 15171.

²¹ *Id.* at 15168.

²² Comment letter from Robert Dolibois, Executive Vice President, EVP, and Sabeena Hickman, CEO, American Nursery and Landscape Association to Mr. Michael Jones, Acting Administrator, U.S. Department of Labor (May 17, 2011).

²³ 76 *Fed Reg.* at 15143.

payment guarantees. There are no current work guarantees in the H-2B program, and employers will now have to pay employees for instances when there is no work. DOL's position is that these guarantees "will impose no burden on employers that have accurately stated their need for workers."²⁴ Additionally, H-2B employers will pay higher wages for both U.S. workers and H-2B workers under the payment guarantee provisions because of the previous H-2B wage rule; DOL has not counted these costs.

According to a recent survey of 501 H-2B employers conducted by ImmigrationWorks USA, 34 percent of the H-2B employers stated that the payment guarantees would have severe consequences for their company's bottom line.²⁵ The industries most affected were landscapers, seafood processors, ski resorts, summer resorts and forestry, who would be unable to meet these guarantees at the beginning and end of their seasons.²⁶ For example, the outdoor amusement industry told Advocacy that their members cannot implement this provision due to the wide fluctuation of hours in their members' season—workers can work very long hours during the summer months and fewer hours during the other months.

Participants at Advocacy's roundtable are concerned that this provision will be costly and unworkable for seasonal industries that cannot predict work hours on a regular basis due to the weather, acts of God and acts of man. For example, forestry contractors cannot schedule tree planting in advance because the weather changes for weeks at a time—the ground can be too hot, too frozen, too wet or too dry to plant. Small seafood processors in Louisiana and Maryland told Advocacy that this industry faces many unpredictable events that are acts of God (such as hurricanes, cold weather and droughts) and man-made events (such as the recent oil spill and current flooding) that can affect the timing and extent of the seafood harvest without any warning.

The proposed regulations state that the Certifying Officer (CO) can terminate the employer's obligations under the guarantee in the event of fire, weather, or another act of God that makes the fulfillment of the job order impossible.²⁷ Small businesses have stated that this safety valve will not be very helpful for small H-2B employers. Employers would bear the burden of informing DOL in a timely manner of these events or they could be held liable for payment. Additionally, the only remedy for employers is to terminate the job order.

Small businesses recommend that if DOL adopts the three-fourths guarantee, this guarantee should be for the duration of the contract period instead of every four weeks. This three-fourths guarantee parallels the guarantee requirement for the H-2A program, which allows employers to hire agricultural guest workers. Small businesses also recommend that this "termination" clause also include manmade events, such as an oil spill or a controlled flood. Additionally, COs should be given the authority under this clause to allow employers to obtain interim relief from payment guarantees. For example, the outdoor amusement industry discussed the recent downpours in the Midwest, where some

²⁴ 76 *Fed Reg.* at 15144.

²⁵ Tamar Jacoby, President, ImmigrationWorks USA (at the request of the National Restaurant Association and the H-2B Workforce Coalition), *RIN 1205-AB58: The Likely Economic Impact* (May 17, 2011) (*ImmigrationWorks USA Survey*).

²⁶ *Id.*

²⁷ *Id.*

fair operators were only able to provide 20 hours of work during this weather pattern. This particular small business should be able to request a short reprieve from these payment guarantees, rather than to void their H-2B employment contract.

2. *DOL's IRFA Does Not Adequate Estimate Other Compliance Costs*

Recruitment of U.S. Workers Until 3 Days of Date of Need

Small business representatives at Advocacy's roundtable were most concerned with a provision that requires that employers list a job order with a State Workforce Agency (SWA) and hire American workers until 3 days before H-2B workers are expected to start work.²⁸ Currently, job orders are listed for only 10 to 30 days (depending on a State's rules) and employers are only required to accept referrals until shortly after the job order closes. DOL acknowledges that this is a substantial change from the current practice, but states that this is needed to ensure that U.S. workers are provided a meaningful opportunity to apply for employment.

Advocacy is concerned that DOL's IRFA does not estimate any compliance costs or burdens from this requirement. Small business representatives have told Advocacy that this provision may actually result in hundreds or thousands of dollars in compliance costs, administrative burdens and liability for H-2B employers. The ImmigrationWorks USA study found that 74 percent of responders believed that this provision would "severely" affect their bottom line.²⁹

Small businesses are concerned that this provision will disrupt an employer's hiring and training plans. This proposed rule requires an employer to start the H-2B application process by registering with DOL four to five months in advance and continue the recruitment process until 3 days before an H-2B worker starts. At three days before the H-2B worker starts, an employer would have already expended high costs for completing visa paper work, transportation and arranging housing. Under this provision, an employer could have an H-2B employee at the worksite and have a U.S. worker apply for the job just days before the start date. The employer may have to send an arriving H-2B worker immediately home and also pay for a U.S. worker's last-minute airplane flight (creating increased transportation costs). This employer could also keep both the H-2B worker and the additional U.S. worker, but this employer may face problems not having enough work for this unexpected number of workers (triggering the payment guarantee costs). This provision may also create liability for the employer, who has to fulfill contracts made with H-2B workers.

Small businesses at Advocacy's roundtable stressed that it is essential that they have access to the H-2B program because they have a difficult time recruiting and retaining American workers to do seasonal and temporary unskilled jobs. Participants stated that they were concerned that the last-minute U.S. workers would not show up or stay the duration of the season based on their past experience with this program, and it would leave these employers without any workers during this critical time despite all of these efforts.

²⁸ 76 *Fed Reg.* at 15141.

²⁹ *ImmigrationWorks USA Survey*, at 12.

According to the results of the ImmigrationWorks USA survey, 22 percent of employers said that no U.S. workers applied for advertised openings or that the U.S. workers they hired did not show up for the first day of work. Of those businesses that hired U.S. workers, 71 percent said the employees quit within the first month; only 6 percent of employers stated that the workers stayed through the season.³⁰

If DOL decides to extend the job recruitment deadline for the H-2B program, small businesses recommend that DOL require that job orders be open for 30 days (instead implementing this 3 day rule). Some states, such as New Jersey, already require a 30 day recruitment period.

Transportation Costs

Advocacy believes that DOL's IRFA minimizes the compliance costs and burdens of the new transportation provisions, which require H-2B employers to provide both H-2B and U.S. workers and applicants in corresponding employment transportation to the worksite and return transportation to the worker's home (whether in the U.S. or abroad). Small businesses at the roundtable were concerned that DOL's estimates do not include increased transportation fees that result from the "3 day" recruitment rule, where the employer could be paying higher costs for last minute flights sending H-2B workers home or sending U.S. replacements to the worksite.

Small businesses that attended Advocacy's roundtable were also concerned that DOL's IRFA does not calculate any compliance costs that H-2B employers would incur to pay for corresponding U.S. workers' transportation to the employer's worksite. The proposed rule requires H-2B employers to recruit for H-2B and U.S. workers utilizing a national registry, and employers could pay hundreds or thousands of dollars to bring potential U.S. workers to the worksite (for example, payment for a cross-country, roundtrip flight). Small businesses were concerned that this provision may lead to disingenuous U.S. applicants that apply for H-2B positions to literally get a "free-ride" to a tourist destination without any intent to complete any work. This provision provides this incentive, as the employer must pay for this transportation before the worker departs or pay the worker in the first workweek for the reasonable costs incurred by the worker.³¹ For example, one small hotel representative stated that this has occurred at their property, where two U.S. applicants received a free regional flight, a few days stay at their hotel and free food without completing any work.

Employers should not have to pay the transportation expenses for workers who stay on the job for a short period of time or fraudulently apply for a job to obtain transportation benefits. Small businesses recommend that DOL require a certain amount or percentage of employment to be completed before reimbursing H-2B and U.S. employees for transportation costs.

³⁰*Id.*, at 14.

³¹ 76 *Fed Reg.* at 15185.

3. *DOL's Economic Analysis Does Not Analyze Possible Administrative Burdens Created By New Bifurcated H-2B Process*

DOL proposes to eliminate the current streamlined attestation method, where employers assert, and do not demonstrate, that they have performed an adequate recruitment of the U.S. market. DOL adopted this application method in its 2008 final rule in light of considerable workload increases for both DOL and the State Workforce Agencies (SWAs).³² DOL states that the agency is eliminating the attestation method because audits have shown only a 55 percent compliance rate by employers.³³ Small businesses at Advocacy's roundtable believe that this statistic is misleading, because DOL did not disclose the total number of cases it audited and DOL may have counted all violations with equal weight.

Small businesses have told Advocacy that DOL's proposed application process is complex and bureaucratic, which will make it more difficult for employers to participate in the H-2B program. The proposed rule creates a bifurcated H-2B application process, with separate registration and recruitment periods. This lengthy process begins with the registration period four or five months before the date of need, and employers must seek to recruit U.S. workers up until 3 days before the date of need. Small businesses at Advocacy's roundtable expressed concern that DOL's proposed H-2B application process creates many complicated layers of review by federal and state officials, which may add delays, requests for information and overall administrative paperwork. Small agricultural businesses have told Advocacy that these types of administrative burdens, continual requests for information, unwarranted denials and high legal costs occurred after DOL finalized and implemented similar rulemaking for the H-2A visa program (for agricultural guest workers), and it has made that program almost impossible to use.

Small businesses recommend that DOL reconsider the bifurcated application process, and retain the current attestation method.

4. *DOL's Economic Analysis Does Not Analyze Cumulative Impact of Both H-2B Rulemakings on Small H-2B Employers*

Advocacy is concerned that DOL's IRFA fails to analyze the true economic impact of this proposed rule's many burdensome requirements on the H-2B program in conjunction with agency's recently finalized wage rule that will increase the wages of H-2B workers by \$3-\$10 an hour.

Agencies are required to identify any duplicative, overlapping and conflicting federal rules in their IRFA that can add cumulative regulatory burdens on small entities without any gain in regulatory benefits, to avoid adding additional regulatory burden.³⁴ At an October

³² 76 Fed Reg. at 15141.

³³ *Id.* at 15132.

³⁴ 5 U.S.C. § 603(b)(5); *See SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 38 (June 2010). Rules are duplicative or overlapping if they are based on the same or similar reasons for the regulation, the same or similar regulatory goals, and if they regulate the same classes of industry.

2010 Advocacy roundtable on the H-2B wage regulation, representatives from the Department acknowledged that DOL had been working on a comprehensive H-2B rulemaking since 2009 and following the recent *CATA V. DOL* decision, simply excised from that large rulemaking the section dealing with the wage methodology. Advocacy recommends that DOL analyze the economic impact of both rulemakings in this IRFA, as both rules are likely to be implemented in the same season to the same H-2B employers.

The ImmigrationWorks USA survey also analyzed the cumulative effect of both H-2B rules on a landscape company that hired 85 H-2B workers this year. Currently, this company pays \$9.19 an hour for H-2B workers, and the company's two-week H-2B payroll is \$177,511. If the prevailing wage is increased by the wage rule to \$11.76 an hour, the company's two-week H-2B payroll increases to nearly \$210,000. If the proposed rule's provisions are finalized, the company's total annual payroll will come in at \$7.5 million or 23 percent more than the company's current labor costs. These labor costs may be increased further to just over \$9 million if the company has to implement the Service Contract Act wage of \$14.67 an hour.³⁵ This company's director of operations concluded that the company may go out of business if both H-2B regulations are implemented because the company's annual revenue is only \$10 to \$12 million.

Advocacy believes that implementation of both of DOL's recent rulemakings may shut small businesses out of the H-2B visa program. In the ImmigrationWorks USA survey, 59 percent of employers stated that they would downsize or close their business if they were unable to hire any H-2B workers.³⁶ Advocacy was pleased that DOL delayed the implementation of the H-2B wage rule by almost a year in recognition of the costs of this rule on small entities, making this rule effective for wages paid for work performed on or after January 1, 2012.³⁷ On March 17, 2011, Advocacy submitted a public comment letter supporting this delay, and recommending a phase-in of the H-2B higher wage rates based on business size or economic state.³⁸

III. DOL's IRFA Should Discuss Additional Significant Alternatives

Agencies must consider alternatives to regulatory proposals in an IRFA. DOL's IRFA only considered one alternative that would actually minimize the economic impact of this rule, an alternative to the three-fourths payment guarantee provision which would allow this guarantee to last for the duration of the H-2B season. Small businesses participating in Advocacy's roundtable have provided a list of significant regulatory alternatives, which Advocacy has detailed throughout this letter. Advocacy recommends that DOL consider these alternatives in order to minimize the costs of the rule on small entities. Additionally, DOL must analyze the alternatives recommended by Advocacy and small businesses in its Final Regulatory Flexibility Analysis.

³⁵ *ImmigrationWorks USA Survey*, at 12. The SBA's small business size standard for the landscaping industry is \$7 million dollars in revenue. This landscaping company almost meets this standard because its annual revenue is \$10 to \$12 million a year. Advocacy is using this example for illustrative purposes.

³⁶ *Id.*

³⁷ 76 *Fed. Reg.* at 3482.

³⁸ Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, and Thomas Dowd, Administrator, U.S. Department of Labor (March 17, 2011).

Conclusion

Advocacy believes that DOL's proposed rule creates numerous administrative burdens and compliance costs that will make it more difficult for small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do unskilled seasonal work. DOL's IRFA underestimates these compliance costs, and fails to analyze the cumulative impact of these requirements with DOL's recently finalized rule that will increase the wages of H-2B workers by \$3-\$10 per hour. Advocacy believes that DOL's recent rulemakings may shut small businesses out of the H-2B visa program, and urges DOL to consider significant alternatives to this proposed rule recommended by small entities that would meet the agency's objectives without jeopardizing small businesses.

Sincerely,

//signed//
Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

//signed//
Janis C. Reyes
Assistant Chief Counsel

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