September 24, 2019

BY ELECTRONIC SUBMISSION

Adele Gagliardi, Administrator
Office of Policy Development and Research, Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N–5641
Washington, DC 20210

In re: *DOL Docket No. ETA–2019–0007*
RIN 1205–AB89
Temporary Agricultural Employment of H–2A Nonimmigrants in the United States
[Federal Register 84:144, p.36168ff]

Dear Administrator Gagliardi:

This letter presents the comments of the U.S. Apple Association (USApple) on the above referenced proposed rule. In addition, we support the comments of the National Council of Agricultural Employees of which we, and many of our growers, are members.

USApple is the national trade association representing all segments of the domestic apple industry. USApple's members include state and regional apple associations representing 7,500 apple growers throughout America, as well as more than 400 individual firms involved in the apple business.

The United States is the world's second largest producer of apples, behind the People's Republic of China. With a USDA estimated farm gate (wholesale) value exceeding $3.5 billion in 2017 and downstream economic impact of roughly $14 billion, apples are the third most valuable fruit produced in the U.S. behind only grapes and all citrus. Apples are the most valuable fruit export. Roughly 25 percent of the 2017 U.S. fresh apple crop was exported with a value of more than $1.1 billion.

Apple production is labor intensive. More than 50 percent of the total cost of production can be attributed to labor. While growers in New England and the Southeast have long relied on the H-2A program, a shrinking and unpredictable domestic workforce has driven growers in all the major production states into the program. Much of the increase in the H-2A program can be attributed to the apple industry.

While the workers brought in under the H-2A program are generally excellent, getting them here is bureaucratic, often subject to delay and quite expensive. The costs associated with the program are pushing many growers further within the margins as they must pay an Adverse Effect Wage Rate (AEWR) as high as $15.03 an hour in addition to transportation, housing and administrative costs.

The cost growth of the program is becoming unsustainable. Therefore, USApple appreciates and commends the Department for seeking ways to streamline and improve the program.

Wage Rates, AEWR and Labor Surveys – 20 C.F.R. § 655.120

The overall costs of the H-2A program, the free housing and transportation which are of benefit to the worker and the administrative costs from visas, attorney's fees, etc. which fall upon the grower, all serve as an economic deterrent to using the program. That, coupled with the lack of available domestic workers, calls into question whether an adverse effect even exists.

Therefore, USApple recommends that the Secretary should, on an annual basis, determine whether there is an adverse effect on U.S. workers created by the employment of H-2A workers per statutory requirements. If there is no adverse effect, there is no need for an Adverse Effect Wage Rate.

If the AEWR is maintained, benefits accrued to the worker, such as housing and transportation, should be factored in. If the purpose behind the AEWR is to set a wage rate such that employing an H-2A worker is not less expensive than employing an able, willing, and qualified U.S. worker, then it only stands to reason that the full cost of employing the H-2A worker must be considered.

In addition, the current AEWR is calculated based on the Farm Labor Survey (FLS) which is flawed for many reasons. The sample size is too small and measures "gross earnings" that include bonus pay and piece rates which skew the results, as well as overtime pay in some states. The mean of the data rather than the median is then used, further distorting the results.

Furthermore, as the H-2A program continues to grow it will become more and more difficult to find growers to survey outside the system further compounding the problem and skewing the results. Once H-2A usage reaches a threshold where a survey of "domestic workers" is no longer statistically valid, the survey should be eliminated.

The proposed rule calls for the disaggregation of wage data into eight occupational classifications. While disaggregation should result in a more accurate wage rate, USApple believes the eight categories proposed will overly complicate the system and could result in unintended consequences.

USApple would recommend five classifications: (1) Farmworkers and Laborers, Crop, (2) Farm Workers and Laborers, Farm, Ranch and Aquacultural Animals, (3) Agricultural Equipment Operators, (4) Graders and Sorters and (5) Supervisors. This will still serve DOL's goal of a more accurate survey, without splintering the agricultural workforce so much that statistically valid findings would be impossible.

In addition, for disaggregation to have the intended effect there needs to be a clear threshold at which point an H-2A worker would be paid at a different classification. Smaller orchards, in particular, may have crop workers who must occasionally operate equipment or perform a task in another wage category. USApple recommends that the worker be classified and paid based on their "primary" occupation, i.e., at the classification level that covers at least 50 percent of their duties over the life of

the contract. In the alternative, we would propose returning to the 2008 H-2A rule promulgated by the Bush Administration, which permitted up to 20% of work outside the narrow list of duties described in the job order.

USApple does not believe that it is necessary to conduct state prevailing wage surveys to begin with and a variety of factors make it nearly impossible to establish an accurate rate. In some states, employers responding to the survey pay higher rates to compete with the employers who use the H-2A program, thereby distorting the results.

State prevailing wage surveys must be designed to measure the prevailing wage over the course of the year or season. Surveys designed to capture only the peak time of need distorts the results and should not be accepted by the Department. Wages should be determined based on the median and not the mean. The Secretary should only approve surveys appropriately performed and statistically valid.

USApple supports the proposed change in the ETA Handbook 385 regarding reporting of average wages. However, we oppose many of the proposed changes to the surveys as the criteria outlined are insufficient to obtain statistically valid results. Specifically, while the goal of requiring responses from at least 5 employers is an improvement over Handbook 385, which has no such minimum requirement, the transition from sample sizes of at least 300-400 workers to one requiring only 30 workers in an entire state to be surveyed could lead to wildly inaccurate results.

Assuming the final rule addresses this concern and the Department is confident that a state prevailing wage survey yields an accurate result, that result may be higher or lower than the applicable AEWR based on the FLS or DOL Occupational Employment Statistics (OES) data. If a state prevailing wage is continued and it is found to be lower than the AEWR then that should be H-2A wage rate. There is no logic to support requiring the payment of a wage higher than the wage that the same agency has determined and announced to be an accurate gauging of the prevailing wage for that specific crop activity in that specific area.

Fairness requires that if the state prevailing wages can be used to depart upwards from AEWR, they must be used to depart downwards from AEWR where appropriate.

The proposed rule allows the continuation of mid-contract wage increases while prohibiting mid-contract downward wage adjustments. USApple opposes mid-contract adjustments. The contract should be binding.

Application and Certification Process

USApple supports the proposed requirement that all employers file their application electronically. 20 C.F.R. § 655.130. USApple supports the post-certification amendments, which better reflect the changing and unpredictable nature of agriculture. USApple also supports and appreciates the move toward scanned or electronic signatures. The current requirement of "wet" signatures is unnecessary and often adds to further delays.

Additionally, filers should be able to see or receive notice of activity by the State Workforce Agency (SWA). For example, whether or not the housing documentation or recruitment results were sent. This would improve the application transparency and expedite resolution of deficiencies.

USApple also appreciates the publication of the final rule moving from print to electronic advertising. 84 Fed. Reg. 49439 (Sept. 20, 2019).

Currently, both the Department of Labor (DOL) and the Department of Homeland Security (DHS) must both determine if a job is "temporary or seasonal." The proposed rule recommends moving to a single agency and asks for recommendations as to which agency should make the determination. USApple believes USDA is the closest to the agricultural sector and understands the nature of specific jobs and operations better than DOL or DHS.

That being stated, USApple would prefer DOL make the determination than the current split or moving it solely to DHS. DOL is very familiar with the H-2A program. In addition, DOL has a much better track record of being responsive to inquires or problems. This is critical as many of these decisions are time sensitive and can impact the timely arrival of the H-2A workers.

Here are some notes on the joint employment language in the proposed rules (20 C.F.R. § 655.103(b); 29 C.F.R. § 501.3(a)), and areas it would impact:

USApple opposes the proposed changes to joint employer applications. The proposed requirement that all joint employers share the same start date and that each employer provide at least one workday per week will cause a level of inflexibility which will result in some employers no longer being able to utilize the program. The proposed rule does not account for employers who may have a lighter crop load on a given week, a smaller employer who may have short dates of need within a larger employers' season and family business' with joint management who have historically jointly provided full-time work to a single workforce.

In general, we want to keep this as flexible as possible due to varying circumstances among employers and seasons that result in a need to jointly file. It's been very useful to small growers or those who don't have full time work for workers.

Recruitment and Start Date

USApple opposes the proposed change to require an H-2A employer to contact the U.S. employees of a Farm Labor Contractor (FLC) utilized by the employer the previous year. This provision should apply only to the employer's own employees and not those of a third-party contractor. The grower who hires an FLC has no control or other authority over the employees of an FLC and requiring it to attempt to hire away the FLC's workers raises a number of legal concerns that are simply unnecessary. The advertising of the H-2A position and the requirement to hire any U.S. applicants will ensure that employees of the FLC who prefer to work directly for the H-2A employer will be able to do so without requiring the grower to interpose itself in the middle of the FLC's contract with its employees.

We also oppose the requirement that employers contact former employees who were terminated or who abandoned employment simply because the employer did not notify the National Processing Center of the U.S. worker's abandonment or termination. 20 C.F.R. § 655.153.
Currently there are no requirements that the SWA check the work-authorization of employees they refer. USApple recommends this be changed and that the SWA should be required to confirm work authorization for all referrals.

USApple supports the proposal to require specific analysis by the Office of Foreign Labor Contracts of out-of-state referrals before finding that a state is a labor supply state. 20 C.F.R. § 655.154(d). The move to online advertising, which is global in reach, rather than local print newspaper advertising will allow any interested worker to apply for and obtain employment in another state if they make the choice to do so. The outdated requirement of targeting recruitment to states that are already using the H-2A program because of their own farm labor shortages should finally be eliminated.

USApple strongly supports the proposed change to continue hiring qualified domestic workers for 30 days after the first date of need. 20 C.F.R. § 655.135(d). The current 50 percent rule is problematic as the pool of domestic workers able and willing to perform these jobs is so small. Those who seek employment rarely stay longer than a few days or, more often, just a few hours. The employer must expend time and money with paperwork and training. Ideally, the Department would move to the hiring requirement recently implemented for H-2B and require employers to hire applicants during a set period, pre-season, ending no later than when the H-2A workers depart from their home country to travel to the United States. For all other jobs, applicants are expected to come forward and apply for a job while it is still open, not after someone else has been hired for the position.

USApple strongly supports the proposal to allow for staggered entry of H-2A workers as well as the proposed flexibility on the start date. 20 C.F.R. § 655.130(f). Allowing for a 14-day window for the anticipated start date is very helpful as variations in the weather make it difficult to predict an exact start or finish date. Allowing for the same flexibility on the backend would also be helpful as an employer can accurately predict how many days the workers will be needed in total, but the end date is connected to the start date. The worker visa is supposed to be valid for 30 days after the end of the contract, the employer should have the flexibility to retain the worker for up to 14 days after the anticipated end date without filing an extension.

Transportation & Housing

USApple supports the proposal concerning travel reimbursement. 20 C.F.R. § 655.122(h)(1). The proposal to define "place from which the worker departed" as the applicable U.S. Consulate or Embassy in the worker's home country rather that the worker's permanent residence provides clarity and reasserts the Department's longstanding interpretation. The worker is recruited and departs from their home country beginning at the consulate where they receive the work contract and apply for their visa.

USAppple is concerned with the proposed change indicating that state and local housing standards must address health and safety concerns in OSHA temporary labor camp standards. Many hotels and

motels may not be able to meet these standards creating an additional barrier for employers in certain parts of the country.

Eligibility

USApple recommends removing the requirement for packing houses that at least 50 percent of the fruit must be from the employer in order to utilize the H-2A program. 20 C.F.R. § 655.103(c)(1)(D). Securing an adequate workforce for the packing house is becoming increasingly challenging. These are positions that are eligible for the H-2A program except for the requirement. The H-2B program is over-subscribed and the timing of the packing house needs makes it nearly impossible to secure workers under that program.

Furthermore, weather conditions and crop size often dictate the breakout of the fruit's origin. In the event of a hailstorm or other weather-related crop loss particularly late in the season, a packer who usually has 50 percent or more of his own fruit might have to turn to his neighbors to keep this packing lines running and fulfill contacts. Or, more often, a neighbor's packing operation might be idle, meaning that the packer suddenly and through no fault of his own finds himself packing 50% or more of other growers' apples. The nature of the work is exactly the same – packing a bag of apples does not change based on where the apples were grown. It is arbitrary and artificial to exclude the same work from the program based on this factor.

In conclusion, USApple appreciates the efforts of the Secretary and of the Administration to streamline the H-2A Temporary Agricultural Labor Program. This program is critical to the apple industry with more and more growers entering the program each year. However, it is bureaucratic, expensive and out of touch with the realities of today's production agriculture.

Sincerely,

Diane C. Kurrle
Senior Vice President
U.S. Apple Association