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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

RE: RIN 1205-AB58, Proposed Rule: Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States

I. THE ECONOMIC POLICY INSTITUTE SUPPORTS THE PROPOSED RULES

The Economic Policy Institute (EPI) **supports** the proposed rules at 20 C.F.R. part 655 and 29 C.F.R. Part 503, which modify and improve the existing rules governing many aspects of the H-2B temporary nonimmigrant worker program. However, we also wish to offer suggestions to the Department regarding areas where the rules could be further strengthened in order to improve their consistency with Congressional intent.

The need for changes in the H-2B regulations is obvious from the fact that despite the unemployment and underemployment of 27 million Americans during this Great Recession, employers are still able to obtain labor certifications and visas to bring tens of thousands of low-wage workers into the U.S. from abroad. On the face of the matter it is almost impossible that the importation of landscape laborers, hotel and restaurant workers, and construction workers is not “displacing qualified United States workers available to perform such services or labor.” The unemployment rate for workers with a high school diploma is above 10% and above 15% for workers without a high school diploma. More than a million construction workers have been unemployed for the past three years.

The Immigration and Nationality Act (INA) at § 101(a)(15)(H)(ii)(b) defines an H-2B worker as a person coming to the United States to work temporarily “if unemployed persons capable of performing such service or labor cannot be



found in this country.” EPI does not believe that enough is being done to require employers to recruit the millions of unemployed workers in the United States before they turn to foreign guestworkers. In addition, the tens of thousands of H-2B guestworkers who join the U.S. labor force each year are displacing U.S. workers and having a negative impact on their wages and working conditions, despite the fact that under Department of Homeland Security (DHS) regulations at 8 C.F.R. §214.2(h)(6)(i)(A), H-2B nonimmigrant workers should only be authorized to enter and work in the United States if they will not be “displacing qualified United States workers available to perform such services or labor,” and if their “employment is not adversely affecting the wages and working conditions of United States workers.”

H-2B guestworkers are causing these outcomes in part because they work in the U.S. with limited labor and employment rights. H-2B guestworkers do not have labor mobility because employers own the rights to their work visas. Because they often arrive in the United States owing large sums of debt to the recruiters and labor contractors that seek them to fill the labor demands of U.S. employers, they are unwilling to complain about poor wages and abusive working conditions – because if they complain, they can easily be fired, instantly rendering them removable from the country and unable to pay their debts or to earn a salary. H-2B workers in our country deserve more protection under U.S. law, and U.S. workers deserve more protection from displacement and the deterioration of their basic standard of living.

For these reasons, while EPI supports the proposed rule, which is a vast improvement over the current regulations, we wish to suggest to the Department some basic improvements that should be made to the H-2B program. These comments discuss EPI’s support for the rule and make specific recommendations to the Department where appropriate.

II. DEFINING KEY TERMS

A. “Full Time” Workweek Should be Defined as 40 Hours

The Department proposes to redefine the meaning of the term “full time” for the purposes of the H-2B program at proposed rules 20 C.F.R. §655.5 and 29



C.F.R. §503.4, and utilizes the updated term in the regulations at sections 20 C.F.R. 655.18(g) and 655.20(d). The updated definition states that full time will now “mean[] 35 or more hours of work per week for the purposes of the H-2B program.” The existing definition, found at 20 C.F.R. §655.4, sets the work week at “30 or more hours per week, except that where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 30 hours per week, that definition shall have precedence.” Increasing the full time workweek for H-2B workers to 35 hours from 30 hours or less is a welcome improvement – but in order to be consistent with the DOL’s own statistical understanding and analysis of what constitutes full time work – a “full time” workweek should consist of **40 hours** unless a shorter work week is normal and customary for the industry. The Department has failed to offer any evidence or data to support the decision to define the workweek as only 35 hours long – thus, setting the workweek at anything less than 40 hours would be arbitrary and capricious.

At page 15136 of the NPRM the Department cites Bureau of Labor Statistics (BLS) data estimating that full time workers in the United States work an average of 42.2 hours per week, and the Department states the common understanding that the 40-hour work week “is more in line with what the U.S. labor market generally considers as full time.” Despite this evidence the Department argues that it is “proposing 35 hours instead of 40 because 35 hours is more consistent with the Department’s historical practice for the H-2B program, and should therefore not pose difficulty for the regulated community.” This justification falls short of complying with the language of the INA statute and congressional intent.

The INA requires that H-2B workers be authorized for jobs only “if unemployed persons capable of performing such service or labor cannot be found in this country.”¹ Most unemployed workers are searching for full time work, which is generally considered to be 40 hours, because they need to work enough hours to earn enough to pay for their necessities for survival. This is especially true for jobs that pay low wages or wages at or near the minimum wage, as unskilled jobs filled by H-2B workers often do. If a job does

¹ INA §101(a)(15)(H)(ii)(b)



not guarantee 40 hours of work per week, U.S. workers will be less likely to accept employment on these terms and may opt to remain unemployed while searching for jobs that guarantee more hours. Thus, permitting employers to offer a 35-hour work week sacrifices the statutory mandate to ensure that there are no able and available unemployed U.S. workers willing to take the job – in order to “not pose difficulty” for employers. The INA does not create a right for employers to be free from any additional regulatory burdens; the plain language of the statute protects the rights of U.S. workers, and requires an adequate test of the labor market to ensure that U.S. workers are preferred for H-2B jobs. Moreover, as the Department notes, the “substantial majority” of H-2B employers already have their employees working for more than 35 hours; thus only a limited number of employers will be impacted by the requirement of a 40-hour workweek. In addition, most employers have options in this regard: as the Department cites, “66 percent of employers in FY2010 requested at least ten employees to work in the same occupation in the same area of intended employment, suggesting that some employers can avoid any adverse impact by requesting fewer workers and scheduling each to work several more hours per week.” The solution is simple, employers may hire fewer employees and give them more hours – this financially benefits both the employer and the H-2B employee because the worker will earn more during his temporary stay in the country (improving the worker’s quality of life), and the employer will save money by not having to pay the required fees and expenses for an additional worker.

It is true that under 20 C.F.R. §655.135(f), the H-2A program for temporary foreign agricultural workers² sets the minimum “full time” workweek hours at 35. Employers might argue that this means a 35-hour workweek is also appropriate for H-2B workers, but the two programs are not analogous. First, agricultural employers who hire H-2A workers arguably need the flexibility to sometimes offer workers only 35 work hours in a week because of the uncertainties they face when growing and harvesting crops, especially in terms of the unpredictability of weather and crop yields. Second, H-2B nonagricultural workers are more akin to H-1B “specialty occupation” temporary workers,³ because they, like H-2B workers, are also nonagricultural

² INA §101(a)(15)(H)(ii)(a)

³ INA §101(a)(15)(H)(i)(b)



workers – and a full time workweek for H-1B workers is set at a minimum of 40 hours.

B. The Exclusion of Job Contractors From the H-2B Program is Appropriate and Rational, and Furthers the Mandate to Protect Against Adverse Effects on the Wages and Working Conditions of U.S. Workers.

EPI supports the definition of “job contractor” at 20 C.F.R. §655.5 and the explicit exclusion of job contractors from the H-2B program at 20 C.F.R. §655.6. This is one of the most important changes to the H-2B program made in the proposed regulations. U.S. employers that are temporarily experiencing a labor shortage are the H-2B program’s intended beneficiaries: they are provided with a temporary source of labor so they can conduct their business. A job contractor, on the other hand, *always* needs a supply of workers – that is the nature of a job contractor’s business model. A job contractor must always have a steady supply of workers in order to market them to employers who have projects that require workers to complete them. Thus, while the ultimate employer who hires H-2B workers through a job contractor might have a need that is temporary in nature, as the NPRM and §655.6 explain, “[t]he need of a job contractor is inherently permanent in nature.” And if a job contractor cannot find a temporary employer for the contractor’s permanent H-2B workforce, then the H-2B workers will be left without adequate, or any, amount of work hours and pay. This leaves the H-2B workers in a desperate situation where they will be willing to accept the lowest levels of pay and even abusive working conditions from any employer they can find, and because they are competing with similarly situated U.S. workers for these jobs, their desperation and willingness to work for less pay and in worse conditions than U.S. workers adversely affects the wages and working conditions of U.S. workers by putting downward pressure on them.

C. The Proposed Rule’s Definition of “Temporary Need” is an Improvement from the Current Rule, but Should be Amended Further

The proposed rule shortens the definition of an employer’s “temporary need” to nine months, while it is currently set at 10 months under the amendments made in the 2008 Final Rule. Although this is an improvement and brings the rule closer to representing an actual “temporary need” for labor, EPI believes



that nine months is still too long a period to certify as “temporary.” Such a long “temporary” period allows employers to use H-2B workers for 75% of an entire year – which means that U.S. workers have fewer opportunities to apply for and obtain the jobs that go to H-2B guestworkers.

EPI recommends that the certification period for H-2B workers last no more than six months. Half a year is a reasonable amount of time for an employer to have an unskilled guestworker, because there are currently millions of unemployed unskilled U.S. workers seeking employment across the country. Shortening the authorization/certification periods for H-2B workers will compel employers to increase recruitment of U.S. workers (because they will have to recruit more often), which better achieves the statutory mandate not to use H-2B labor unless “unemployed persons capable of performing such service or labor cannot be found in this country.”⁴

The Department also failed to propose a change to maximum duration of a “one-time” event or occurrence in the context of an employer’s “temporary need.” The Department continues to apply the DHS definition found at 8 C.F.R. §214.2(h)(6)(ii)(B), which permits an employer’s temporary need to last up to three years. We believe this to be an irrational interpretation of the word “temporary” as it applies to the labor market. Given that the median tenure in private sector employment is only 3.9 years, a definition that comes close to making the median job duration temporary robs the concept of common sense.

Prior to the Final Rule adopted in 2008, the DHS definition allowed temporary need to last one year or less. The Department should redefine a one-time occurrence or event to mean one year or less as it did prior to 2008 – otherwise employers will continue to hire H-2B workers for three-year long positions that are inherently permanent, and not temporary in nature – to the detriment of millions of U.S. workers that are desperate to find employment across the country.

⁴ INA §101(a)(15)(H)(ii)(b)



III. EPI SUPPORTS THE IMPROVED EMPLOYER REGISTRATION AND RECRUITMENT REQUIREMENTS, ADDITIONAL MEASURES TO TEST THE LABOR MARKET AND PROCEDURES TO BETTER ATTRACT UNEMPLOYED U.S. WORKERS SEEKING EMPLOYMENT.

We strongly support the Department’s decision to require a separate registration and application process for employers. If employers have already been pre-registered by the Department before applying for H-2B workers, the Department will have more time to adequately review the information submitted by employers to determine if their labor needs are legitimate in each particular application for temporary labor.⁵ We also believe it is appropriate for the Department to return to using a labor certification process instead of the current attestation based model that has been utilized since 2009. An attestation-based model relies too much on the honesty of the employer, by trusting the employer to “attest” that they have adequately recruited U.S. workers and that they have complied with the applicable regulations, while burdening employees by requiring them to report employer violations to the Department. GAO has found that the attestation process used by H-1B employers has led to extensive fraud and violations of the law. After the fact audits are inadequate to protect the rights of U.S. and H-2B workers. The rights of the H-2B workers are especially vulnerable because employees who fear retaliation and deportation (because the rights to their H-2B visa are held by their employers) cannot be expected to risk losing their job in order to report employer violations, especially when so many have incurred massive debt in order to partake in the program.

EPI strongly supports the proposed rules that redefine the role of the State Workforce Agencies (SWA). The 2008 Final Rule modified SWA involvement to support the attestation process. The proposed rule will now “eliminate the employment verification responsibilities the SWA has”⁶ while allowing the SWAs to focus on additional recruitment of U.S. workers for open positions. This is a welcome shifting of responsibilities, because the SWAs can play an important role in the recruitment of U.S. workers for open positions, by

⁵ Proposed sections §§ 655.11 and .12

⁶ 76 Fed. Reg. 15173



providing expertise and assistance about the makeup of local labor markets, and because of the direct contact the agencies have with unemployed workers. The additional amount of time an employer must now recruit through the SWA (“until the later of the date the last H-2B worker departs for the job opportunity or 3 days before the date of need”)⁷ will ensure that U.S. workers can find information about open positions much closer to their start date, instead of only being able to view postings for jobs that will not begin until four months later.⁸

The creation of a national H-2B job registry is another proposal that EPI supports. This registry will act as a job order database that unemployed U.S. workers may access publicly when searching for employment, and this in turn will better connect unemployed U.S. workers to employers across the country in search of labor. This will bring an additional degree of transparency to what has been an opaque process in the past – because it will allow workers, their representatives and unions and other advocates to review and assess the terms and conditions of job offers to H-2B workers across the country. In order to make the registry even more useful to workers, all other additional documents obtained by the DOL in the employer’s file that relate to the H-2B application process should also be included in the database (including, for example, contracts between employers and foreign recruiters).

EPI strongly supports the proposed rule’s additional recruitment requirements at 20 C.F.R. §§ 655.40 – 655.48. Past recruitment requirements have been woefully inadequate and have failed to recruit unskilled unemployed U.S. workers even while the national unemployment rate remains near 9%. The new requirements include accepting U.S. worker referrals “until the later of the date the last H–2B worker departs for the job opportunity or 3 days before the date of need,”⁹ and hiring and preferring any U.S. applicants “who are qualified and who will be available,”¹⁰ while prohibiting discriminating against U.S. workers when conducting interviews.¹¹ The proposed regulations in this section also provide for additional advertising

⁷ 76 Fed. Reg. at 15188-89

⁸ 20 C.F.R. §655.15(e)

⁹ 20 C.F.R. § 655.40(c)

¹⁰ 20 C.F.R. § 655.40(e)

¹¹ 20 C.F.R. § 655.40(d)



of the terms of the job¹² and require that employers contact their former employees,¹³ labor organizations¹⁴ and bargaining representatives¹⁵, and compel employers to prepare a post-recruitment report detailing the recruitment undertaken by the employer.¹⁶ The Department has also taken an important step by empowering Certifying Officers (CO) to require employers to conduct additional recruitment in areas of substantial unemployment (ASU)¹⁷ – which is exactly where such additional measures are needed, because these localities are where most unemployed U.S. workers are likely to be found – and by requiring employers to document and prove that they complied with the additional recruitment requirements.

We strongly believe that these provisions will lead to increased recruitment of U.S. workers, but these rules could also be easily improved. First, the recruitment period should be extended to make it more analogous to the longer H-2A recruitment period.¹⁸ In the H-2A program, agricultural employers must hire qualified U.S. worker applicants up through the first 50 percent of the contract period. Extending the recruitment period in this way will allow more time for U.S. workers to find out about the available positions and for the SWAs to conduct more extensive recruitment efforts. If no U.S. workers are qualified and available for these positions, as employers claim, then H-2B employers will not be burdened by such a rule. But if qualified U.S. workers simply need more time to learn of and apply for such positions, a 50% rule would better accomplish the statutory preference that U.S. workers be hired.

Secondly, employers should be required to contact and inform all appropriate unions in the state and locality where the H-2B job will be located, about any potential H-2B job openings, instead of only contacting unions if the job is one in which “the occupation or industry is customarily unionized.”¹⁹ As the DOL

¹² 20 C.F.R. § 655.41

¹³ 20 C.F.R. §655.43

¹⁴ 20 C.F.R. §655.44

¹⁵ 20 C.F.R. §655.45

¹⁶ 20 C.F.R. §655.48

¹⁷ 20 C.F.R. §655.46(a – c)

¹⁸ See, 20 C.F.R. §655.135(d)

¹⁹ 76 Fed. Reg. 15189



notes in the NPRM, “unions have traditionally been recognized as a reliable source for referrals of U.S. workers.”²⁰ In light of historically high unemployment across the country, there may be many unions with unemployed members looking for work outside of their usual or preferred “occupation or industry.” Five million manufacturing workers have lost jobs in recent years that are unlikely ever to return. They – and the unions that represented many of them – cannot reasonably expect them to find work in occupations that are customarily unionized, especially when unionization in the private sector has fallen to 7%. H-2B jobs normally require very few skills or prior job training, which could make these jobs attractive to, and viable options for, unemployed U.S. workers who may have been previously employed in other sectors of the economy. Thus, all unions within the state should be notified. DOL could work with unions in every state in order to create a simple way (an email listserve, for example) for employers to notify them quickly about job openings.

Finally, in addition to posting jobs on the national H-2B registry, employers should also be required to post job openings on commonly used web sites that list them, such as CraigsList and Monster.com. DOL could cooperate with one of these major employer recruitment websites in order to have a separate space on the site for listing H-2B jobs. The DOL could set up the computer program for the H-2B job registry in a way that is programmed to feed job listings directly and automatically into a site such as Monster.com. Listing the jobs on a more commonly used website such as Monster.com in this way would also be cost effective – because it would most likely be free and would not require additional DOL staff time, and the benefit of doing so would be great, because many workers are likely to visit the more popular job searching websites before going to the DOL’s H-2B job registry database.

IV. EPI SUPPORTS THE OTHER EMPLOYER RESPONSIBILITIES AND RESTRICTIONS THAT ARE OUTLINED IN THE PROPOSED RULE, AND WE BELIEVE THAT THEY ARE BOTH REASONABLE AND NECESSARY.

²⁰ 76 Fed. Reg. at 15151



The proposed rule at 20 C.F.R. §655.18(e) requires that employers disclose on the job order “that the employer will provide, pay for, or fully reimburse the worker for inbound and outbound transportation and daily subsistence costs” and “that the employer will reimburse the H–2B workers for visa and related fees.”²¹ The next section at §655.20 contains the actual requirement that employers make these payments or reimbursements to the worker. These transportation and visa costs are often the principal reasons why H-2B workers arrive in the United States with large debt obligations that leave them in indentured servitude,²² not only because of their actual monetary cost and value, but because foreign recruiters or other agents (sometimes in the H-2B worker’s home country) will exploit workers by charging them exorbitant fees for whatever service they provide. If properly enforced, this rule will help remove the profit motive that foreign labor recruiters and agent have to find guestworkers and send them to the United States, regardless of the actual needs of the labor market. And because the Department had determined that transportation and the acquisition of a work visa for the H-2B worker is primarily for the benefit of the employer, the regulations reasonably require that the employer-beneficiary pay these fees.

Unfortunately, what is missing from these provisions is a requirement that employers be held strictly liable for any impermissible costs and fees charged to foreign workers by any of the employer’s partners, agents, affiliates or recruiters, especially those that are located outside of the United States. Employers can easily shirk any responsibility to comply with section 655.20(o) by entering into agreements with their foreign partners and recruiters that state that the partner will not charge the H-2B worker for any impermissible fees. But because the Department does not have extra-territorial jurisdiction to regulate these foreign entities or individuals, it is reasonable to hold U.S.

²¹ 76 Fed. Reg. 15142

²² See, *Close to Slavery: Guestworker programs in the United States*, Southern Poverty Law Center, March 2007, available at http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf (last visited May 15, 2010); and *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry*, Centro de los Derechos del Migrante, Inc. and American University Washington College of Law, July 2010, available at: http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrhc_picked_apart.pdf?rd=1 (last visited May 15, 2010).



employers strictly liable for the actions of their foreign agents. Employers are best situated to make demands on their foreign partners, and to terminate their relationship with them if they fail to comply with the rules of the H-2B program.

The proposed rule's requirement that employers of H-2B workers offer and provide to U.S. workers the same wages, working conditions and transportation benefits they offer and provide to H-2B workers is vitally important. The notion that there should be no preference for and no incentive to hire foreign workers instead of U.S. residents is fundamental to the Immigration and Nationality Act, yet for many years the Department of Labor's regulations have not fully prohibited a number of practices that hurt the employment prospects of U.S. workers.

In particular, employers have not been required to offer to pay the transportation costs of U.S. workers when they offer or provide those payments for foreign workers. Clearly, for an unemployed U.S. worker needing to relocate from one state to another, or even within a very large state like California or Texas, transportation costs to and from the employer's location could be an insurmountable hurdle, preventing acceptance of a job. Compelling equal treatment for U.S. and foreign workers will make it possible for more U.S. workers to apply for and take jobs that would otherwise be offered to H-2B workers.

We applaud that the proposed rule specifies that employers must pay the daily transportation costs of U.S. workers if they pay those costs for H-2B workers. EPI Vice President Ross Eisenbrey personally witnessed how unequal treatment with respect to daily transportation denied job opportunities to otherwise qualified and available African American workers in Baltimore, Maryland.

Two years ago, Eisenbrey spoke to a landscaping contractor in the Baltimore suburbs who hired a large crew of laborers from the Caribbean each year when there were thousands of unemployed young men less than 20 minutes away in Baltimore city. The contractor offered to hire any qualified American Eisenbrey could identify, but when, with the help of the mayor's office in Baltimore, he did identify a number of available young men, the contractor



refused to hire them because the young men could not get to the various landscaping jobs on their own each day. The H-2B workers, on the other hand, could get to them because the contractor picked them up from the residence where he housed them and drove them in vans to each of the jobs. When Eisenbrey told him it was only fair that he send vans to pick up the workers in Baltimore the contractor simply refused.

Requiring employers to pay both the initial transportation costs and transportation costs to and from the workplace on a daily basis will encourage more U.S. workers to apply for and accept these jobs which were previously out of reach. When employers know that they will be responsible for paying these costs, they will have an incentive to recruit U.S. workers instead of workers in other countries because of the lower cost of domestic travel, and employers will also be less likely to request more workers than they need if they are responsible for inbound and outbound travel and subsistence costs.

EPI strongly supports the requirement in the proposed rule that employers must guarantee a minimum number of work hours for H-2B workers. Foreign workers traveling to the United States should be afforded the peace of mind of knowing that they are not making a huge gamble by leaving their homes and families behind – indeed, their decision to work in the U.S. on an H-2B visa is an investment they make to better their lives by providing labor for the benefit of U.S. employers. It is simple fairness that these foreign guestworkers have a minimum degree of job security and work hours every month. Otherwise, they might not even earn enough to pay for the basic necessities of food, shelter, utilities and transportation while they are working in the United States, much less support their families in their home countries.

The proposed rule's minimum work guarantee at 20 C.F.R. § 655.20(f) sets this requirement as "a total number of work hours equal to at least three-fourths of the workdays in each 4-week period."²³ This 75% guarantee of work hours is modeled after a similar three-fourths guarantee in the H-2A program at 20 C.F.R. 655.122(i). Although EPI supports the spirit of the rule to guarantee a minimum amount of work hours every month, we strongly urge that the Department require a 100% work hours guarantee, and define the

²³ 76 Fed. Reg. 15184



workweek as 40 hours as discussed above. Employers should be able to determine whether their need for temporary labor will require a full-time employee working 40 hours a week, every week, before they apply for H-2B workers from abroad, and if they cannot, then employers should be required to apply for fewer workers and offer them more hours.

If this three-fourths rule is considered in conjunction with the 35-hour workweek as defined in proposed rule 20 C.F.R. §655.5, an absurd and unacceptable result occurs. Three-fourths, or 75% of a 35-hour minimum workweek over 4 weeks, equals 105 hours every 4 weeks. To give an example of what this would mean: if a worker earns \$8 an hour, the worker would only earn about \$840 in a month, before deductions – and over the course of a year, this would equal an amount just \$30 over the federal poverty line for a family of one.²⁴ Foreign guestworkers, like U.S. workers, face ever-increasing costs of living and are not likely to be able to afford them if they only work 105 hours per month or only 26 ¼ hours per week on average over 4 weeks, especially if they are earning the low wages usually associated with the unskilled jobs filled by H-2B workers. U.S. workers will also be less likely to apply for these positions, and may instead opt to continue to search for employment that can guarantee 40 hours per week, which is generally considered a full-time work week.²⁵ The use of the three-fourths guarantee in the H-2A program is reasonable in light of the uncertainties that farmers and agricultural employers face due to the weather and crop yields, which may impact the need for labor in a given month. H-2B employers on the other hand, are less at the mercy of the weather, and thus should not benefit from the three-fourths rule or the 35-hour workweek at the expense of workers traveling from abroad, especially when the employers have viable options such as hiring fewer workers or increasing work hours for other workers.

EPI applauds the Department for the “Prohibition against preferential treatment of foreign workers” provision at proposed section 20 C.F.R. §655.20(q). This section requires that employers offer U.S. workers the same benefits, wages and working conditions that are offered to H-2B workers (e.g., for transportation, see above), and prohibits employers from “impos[ing] on

²⁴ The 2011 HHS Poverty Guidelines, available at <http://aspe.hhs.gov/poverty/11poverty.shtml> (last visited May 15, 2011).

²⁵ 76 Fed. Reg. 15136



U.S. workers any restrictions or obligations that will not be imposed on the employer’s H-2B workers.” This will help attract more U.S. workers to open positions that would otherwise be filled by H-2B workers because U.S. workers will now know that employers can no longer legally discriminate against them in terms of benefits and pay, and it will guard against discriminatory application requirements, such as in-person interviews for U.S. workers but not for foreign workers (because they are located abroad and cannot travel to the job site) or the requirement of criminal background checks for U.S. workers but not for foreign workers (because of the difficulty of obtaining criminal records in jurisdictions outside of the United States). This rule helps even the playing field both during the application phase and while on the job.

V. EPI SUPPORTS THE SECTIONS OF THE PROPOSED RULE THAT PROTECT THE RIGHT TO ORGANIZE FOR H-2B WORKERS AND SHIELD THEM FROM RETALIATION FROM EMPLOYERS.

The proposed rule at 20 C.F.R. §655.20(n) protects against the unfair treatment of workers and retaliation against them by their employers for engaging in protected activities listed at §655.20(n)(1-5). These protections are essential to the labor and employment rights of workers, because without them, workers will be too frightened to complain about abusive working conditions suffered at the hands of employers. They rightly are afraid they will be retaliated against and lose their job, which would result in removal from the country and the inability to earn the wages that the worker expects to earn as listed on the job order or job contract. As discussed previously, not having the chance to make enough to survive day-to-day or to pay back the debts incurred in order to partake in the H-2B program can have a disastrous impact on the lives of guestworkers.

The Department’s rule is praiseworthy because it goes beyond a simple protection against unfair discharges – it also prohibits blacklisting, coercion and other threats made by employers. Nevertheless, the rule needs to be amended in order to reflect the realities faced by H-2B guestworkers who encounter abusive conditions in the workplace. In part because private attorneys are unaffordable for H-2B workers and because Legal Services



Corporation (LSC) rules do not allow LSC attorneys to represent most H-2B guestworkers, the scope of protected communications should be expanded to include other appropriate parties. Oftentimes, the first person with whom an H-2B worker discusses problems in the workplace is a staff member or representative of a union, workers' center or another public interest advocacy organization or non-profit organization – thus, §655.20(n) should be amended to include communications with these actors as part of the explicitly protected activities. This will ensure that H-2B workers can speak openly and frankly about workplace conditions with members of unions and civil society that have the knowledge and resources to help them assert their rights under the law. It may also lessen the burden on DOL investigative staff because unions and workers' centers often have the expertise and resources to gather evidence and statements which could then be turned over to DOL in order to help the Department enforce the regulations.

Section 655.20(n) should also be amended to address a key obstacle to the right to organize for H-2B guestworkers: their labor mobility. Since employers are the owners of the visa rights of H-2B workers, the workers themselves are not allowed to change jobs on their own. The ability to change employers is recognized as a fundamental way that U.S. workers can protect themselves from retaliation against employers – but H-2B workers do not have this option and must either suffer abusive conditions or be unemployed. Even in cases where it is likely that DOL would find that an H-2B worker had been treated unlawfully by an employer, the H-2B worker may prefer to stay on the job and not complain in order to continue earning wages for the remainder of time the worker has left on the H-2B visa – in other words, it might simply make more sense economically to continue to suffer. In order to protect against this, EPI recommends that DOL include a provision in this section that allows an H-2B worker to remain in the United States and to work for another employer during the time that remains on the original H-2B visa authorization – plus any time that the worker has not been able to earn wages as a direct result of the alleged retaliation by the employer. This would allow the H-2B worker to at least earn what he or she reasonably expected in good faith to earn during their temporary employment in the United States. This would be the best way to make the worker whole. If DOL finds that it does not have the appropriate authority to authorize the workers' stay in the United States for the remainder of the visa period after they have left the job, the Department



could cooperate with the DHS in order to develop a process that allows the worker to remain in the country for the remainder of the visa period, and perhaps require that the worker apply for and be granted a USCIS Employment Authorization document.²⁶

VI. EPI SUPPORTS THE ENFORCEMENT PROVISIONS IN THE PROPOSED RULE WHICH BETTER GUARANTEE THE PROTECTION OF THE RIGHTS OF U.S. AND H-2B WORKERS, BUT URGES THE DEPARTMENT TO EXPLICITLY GRANT WORKERS A PRIVATE RIGHT OF ACTION AND THE RIGHT TO INTERVENE IN DOL ADMINISTRATIVE AND ENFORCEMENT ACTIONS IN ORDER TO ADEQUATELY PROTECT THE INTERESTS OF H-2B AND U.S. WORKERS.

EPI supports the enforcement provisions found in both of the relevant proposed sections at 20 C.F.R. §§ 655.70-73 and at 29 C.F.R. §§ 503.19-56. We believe that these enforcement provisions are one good way to ensure compliance by employers in order to protect H-2B workers from abuse and U.S. workers from being adversely affected in terms of their wages and working conditions. Therefore, we support the provisions that empower the Certifying Officer to conduct audits and assisted recruitment, as well as provide the DOL with authority to revoke an employer's labor certification and/or debar the employer from being issued future labor certifications if the employer has substantially failed to comply with the terms and/or conditions of the labor certification, or fails to cooperate with the DOL or impedes an investigation, or if the employer has engaged in fraud or materially misrepresented a fact on the registration or application for labor certification. We also support and recommend a grant of additional authority to WHD – which we believe should also have the independent authority to debar employers; and we also suggest that ETA be granted its own revocation authority.

A simple way to improve these enforcement procedures would be to require that H-2B workers receive notice when an investigation, or administrative

²⁶ Form I-765, Application for Employment Authorization, USCIS, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited May 15, 2011).



debarment or revocation review of the worker's employer has begun, and to allow the worker to formally intervene and participate in those processes, whether undertaken by the OFLC or the WHD. Workers should have the right to know when and why the DOL is investigating or considering debarment or revoking their employer's labor certification in order to determine if they have been affected – and the DOL should formalize a process that will allow affected workers to intervene and participate in the proceeding, since such a process does not currently exist. Allowing workers to intervene in these proceedings will assist the DOL with fulfilling its mandate to protect the wages and working conditions of U.S. workers by guarding against impermissible or unjustified labor certifications. This will result because affected workers are likely to have valuable information and first hand accounts of the employer's practices. In addition, the Department must balance the interests of the employer and the employee²⁷ – and if the employee does not have an opportunity to be heard and assert his or her interests, then the Department may lack adequate evidence to properly adjudicate a resolution to the matter.

In addition to the right to intervene and participate in DOL proceedings, workers should also have the right to enforce job orders and job terms through private civil litigation.

DOL should explicitly state in 29 C.F.R. §503 what is implicit in its rules overall: that workers are intended beneficiaries of H-2B job orders, and therefore, workers may enforce the job orders and their specific terms in private civil litigation. DOL could alternatively require that H-2B workers and employers enter into binding contracts – but in the absence of this requirement, the regulations could be amended to include a clear statement that H-2B job orders shall be considered work contracts between the employer and the worker. EPI urges DOL not to accept the conclusion at 76 Fed. Reg. 15143, that “[a] guaranteed number of hours, enforceable by WHD, may well be the only protection H-2B workers have if employers misrepresent the amount of work the worker will actually be provided.” The DOL should make clear that it does not embrace the holding of *Garcia v. Frog Island Seafood, Inc.*,²⁸ which is inconsistent with significant litigation across many circuits enforcing contract

²⁷ See, *Florida Fruit & Vegetable Assoc. v. U.S. Department of Labor*, Office of Administrative Law Judges, Case No. 91-TLC-0004, order of August 7, 1991.

²⁸ 644 F. Supp.2d 696 (E.D.N.C. 2009).



claims by guestworkers – and that the Department believes that H-2B workers, among others, are intended beneficiaries of the guarantees and assurances provided by employers in their H-2B certification applications. We also urge the Department to adopt EPI’s view that private parties seeking to enforce H-2B job orders and the specific terms therein are complementary to, and consistent with the Department’s overall enforcement objectives and priorities with respect to the H-2B program.

VII. CONCLUSION

EPI would like to express its gratitude to the Department for the opportunity to be heard in the process of this rulemaking. We appreciate the Department’s efforts to improve the H-2B guestworker program, and hope that additional protections for H-2B and U.S. workers will result from the notice and comment period.

Sincerely,

A handwritten signature in cursive script that reads 'Ross Eisenbrey'.

Ross Eisenbrey
Vice President
Economic Policy Institute

A handwritten signature in cursive script that reads 'Daniel Costa'.

Daniel Costa
Immigration Policy Analyst
Economic Policy Institute