



## MEMORANDUM

To: AHC Organizations

From: American Horse Council

Re: Department of Labor Proposes Changes to H-2A Visa Process

Date: March 17, 2008

### **Introduction**

The U.S. Department of Labor (Department or DOL) has proposed to amend the regulations governing the certification and admission of temporary or seasonal foreign workers employed in H-2A agricultural jobs, including those at horse farms. The proposed changes are characterized by the Department as an effort to “modernize the broken H-2A program so that it can serve its intended purpose of providing farm employers with a legal means to hire agricultural workers when no U.S. workers can be found.”

Any comments on the proposed changes to the current rules must be filed by March 31, 2008

To satisfy the need for workers, horse owners and breeding farms and facilities use the H-2A agricultural worker program to bring aliens into the U.S. as temporary workers. There are many drawbacks to the current application process, some of which these proposed changes attempt to address.

### **Proposed Changes**

DOL has proposed several changes to the H-2A program intended to simplify the application process, make it more efficient and encourage more employers to use it.

#### **One Application Proposed**

Under the proposed rules, employers would file their H-2A applications solely with the DOL, rather than both the DOL and the State Workforce Agencies (SWAs) and the Department’s Employment and Training Administration (ETA). The application would be filed directly with the National Processing Center (NPC) having jurisdiction over the employer’s place of employment.

#### **Attestation to Replace Certification**

The proposal would also amend the current application process by implementing an “attestation-based” labor process in place of the current “labor certification” process,

which requires DOL to certify that there are no qualified Americans available for the job involved. Under the new process an employer would be required to attest, under threat of penalties, including fines, revocation of certification, and program debarment, that it has fully complied with all program requirements for recruiting, including requesting that the job order has been posted through SWAs, that wage requirements are met, housing inspections performed, and, in short, that it has complied with all of the obligations on employers to satisfy the H-2A program requirements.

Employers would be required to keep documents supporting their attestation for five years for possible audit.

### New Audit Process

DOL will institute a new auditing program to ensure employers have complied with program requirements and met their responsibilities under the new attestation process.

### Housing Inspections

The proposal would increase the amount of time states have to conduct required housing inspections in response to delays often caused by SWAs overwhelmed by employer requests for pre-certification housing inspections. This reform creates consistency between the housing inspection process under H-2A and the housing inspection process under the Migrant and Seasonal Workers Protection Act, which protects U.S. farm workers.

### Recruitment Requirements

Current rules require employers to fulfill a recruitment process to ensure that there are no qualified American workers able and available for the temporary job involved. The Department does this now by requiring a combination of SWA-supervised recruitment by employers, the posting of job orders in the Interstate Employment Service System, and the independent contracting of other sources of potential labor. These activities take place in a narrow 15-day period based on current regulatory requirements.

The Department is proposing to change the rules to require employers to conduct the recruitment of U.S. workers for temporary agricultural job opportunities for a substantially longer period of time before the job begins by requiring recruitment be started well in advance of the employer filing the application papers. Employers would be required to substantially increase the duration of time they spend recruiting, thus giving U.S. workers additional time to apply for jobs before the employer resorts to hiring H-2A workers.

This additional recruitment effort would require employers to place three advertisements, instead of the currently-required two, in a local newspaper of general circulation most appropriate for the agricultural employment involved and most likely to reach the U.S. workers who will apply for the job opportunity. The Department would require that one of the three newspaper advertisements appear in a Sunday edition, if available. This could also include a trade publication in place of the two required newspaper ads, but not the Sunday ad. The rules would also require employers to recruit in one newspaper in a state designated by the Secretary as a source of labor for the place where the work is to be performed.

Employers could begin advertising job opportunities no earlier than 120 days and no later than 75 days before the date on which the foreign workers would begin work.

The proposed rules also require that employers continue to recruit through the SWA having jurisdiction over the place of intended employment.

#### Wage Rate

The proposed changes would revise the methodology used for determining the government-mandated Adverse Effect Wage Rate (AEWR) to more accurately measure market-based wages by occupation, skill level, geographic location and market conditions for each locality. This would make the H-2A program consistent with the wage calculation methodology used in other temporary worker programs administered by DOL. The Department proposes to institute an alternative method for determining the AEWR that will utilize the Bureau of Labor Statistics (BLS) Occupational Employment Survey (OES) data instead of USDA Farm Labor Survey data.

#### Application Fee

The changes would increase the current twenty-year-old application fee to an amount sufficient to recover the reasonable costs of processing applications.

#### Prohibition on Cost-Shifting and Limits on Foreign Recruiters

Employers would be prohibited under the proposed changes from passing along to workers any of the costs incurred as a result of participating in the H-2A program, including the cost of preparing and filing an application, attorney fees, and recruiting costs. In addition, employers that utilize foreign recruiters must also contractually prohibit them from passing on such costs.

#### Employment Eligibility Verification Requirement Clarified

The rule proposal notes that SWAs must verify the employment eligibility of any worker referred to an employer in response to an H-2A job order. DOL has previously recommended that the SWAs use the Department of Homeland Security's E-verify system to ensure that the workers being referred to employers are eligible for employment. This clarification is consistent with existing statutory requirements.

#### Foreign Labor Contractors

Under the proposed rules, foreign contractors would be required to maintain a surety bond (in an amount based on the number of workers employed) throughout the effective period of the labor certification.

#### Maximum Fines

Fines for willful failure to meet a condition of the work contract, or discrimination against a U.S. or H-2A worker, or interference with an investigation would increase from \$1,000 to \$5,000.

Fines for willful failure to meet a condition of the work contract that results in displacement of a U.S. worker would increase from \$1,000 to \$15,000.

Fines for housing violations or transportation safety and health standards causing serious injury or death would be established at \$50,000 per worker and \$100,000 for willful or repeat violations.

### **Comments**

These proposed changes are quite technical. Please give us any comments that you might have on them.

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