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Administrator, Office of Policy Development and Research
U.S. Department of Labor
200 Constitution Ave. N.W.
Room N-5641
Washington, DC 20210

DOL Docket Number ETA-2018-0003: Public Comment of the Immigration Reform Law Institute Regarding Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States

Dear Administrator Gagliardi:

The Immigration Reform Law Institute (IRLI) submits the following public comment to the U.S. Department of Labor (DOL) in response to the Agency's notice of proposed rulemaking (NPRM), as published in the Federal Register. *See Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States*, 83 Fed. Reg. 55977 (Nov. 99, 2018).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI, on behalf of its parent organization the Federation for American Immigration Reform (FAIR), has long worked to protect the job opportunities, wages, and working conditions of American citizens from the adverse effects of alien labor. IRLI's advocacy has included the submission of detailed comments to the U.S. Department of Labor

(DOL) regarding failures of federal temporary worker programs to protect American workers from the adverse consequences of nonskilled alien labor in non-agricultural sectors of the U.S. economy. *See, e.g.*, FAIR Public Comment (July 26, 2000) re *Labor Certification Process for the Permanent Employment of Aliens in the United States; Refiling of Applications*, 65 Fed. Reg. 46082 (DOL NPRM Aug. 24, 2000); FAIR Public Comment, (July 5, 2002) re *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 67 Fed. Reg. 30465 (DOL NPRM May 6, 2002); FAIR Public Comment (Mar. 27, 2005) re *Post–Adjudication Audits Of H-2B Petitions In All Occupations Other Than Excepted Occupation In The United States*, 70 Fed. Reg. 3393, (DOL NPRM January 27, 2005); IRLI Public Comment (Oct. 20, 2009) re *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 Federal Register 45906 (DOL NPRM September 4, 2009); IRLI Pubic Comment (Mar. 17, 2011) re *H-2B Prevailing Wage Determinations*, 75 Fed. Reg. 61578 (DOL NPRM October 5, 2010), 76 Fed. Reg. 3452 (DOL NPRM January 19, 2011); IRLI Public Comment (May 13, 2011) re *H-2B Labor Certification*, 76 Fed. Reg. 15130 (DOL NPRM March 18, 2011).

IRLI recommends that the Interim Final Rule (IFR) be **rescinded**, and replaced with a rule that follows the recommendations below.

As the NPRM notes, over the past two decades, H-2B recruitment, compensation, and working conditions have been the subject of nearly continuous litigation challenging DOL authority to jointly regulate the employment of H-2B nonimmigrants. 83 Fed. Reg. 55978, n.2. In this context, the U.S. Departments of Homeland Security (DHS) and Justice (DOJ) have jointly issued an IFR that would revise the H-2B U.S. worker recruitment regulations by dropping the existing requirement for print newspaper advertisements, and instead requiring only electronic advertisements posted on the internet, with the stated goal of providing "a more effective and efficient means of disseminating information about job openings to U.S. workers." 83 C.F.R. § 55977.

Abuses by recruiters of alien applicants for H-2B positions are well-known. *See, e.g.*, Jennifer Gordon, *Regulating the Human Supply Chain*, 102 Iowa L. Rev. 445 (Jan. 2017) (describing pervasive systemic abuses in overseas recruitment of H-2B workers). The employment of nonimmigrant guest-workers at government-set prevailing wages and working conditions for which U.S. workers will in practice not accept employment functions as a subsidy for employers in the occupational fields regulated under the H-2B program. In IRLI's view, these subsidies stifle innovation, impede mechanization, retard development in source countries, and bring into question the professed belief of the federal government in the benefits of free trade based on comparative advantage.

DOL has also recognized its susceptibility to the capture of its agenda by industry lobbyists, and its reluctance to enforce meaningful sanctions against offending employers. U.S. Gov't Accountability Office, GAO-15-154, *H-2a and H-2b Programs: Increased Protections Needed for Foreign Workers* at 53 (2015) (finding DOL's "inability to consider disbarment as a remedy" to be unacceptable).

I. By including employer convenience as a primary justification for changes to the DOL certification process, the IFR evokes frequently litigated jurisdictional concerns.

DHS requires that employers petitioning DHS for H-2B visas must "apply for a temporary labor certification with the Secretary of Labor." 8 C.F.R. § 214.2(h)(6)(iii)(A). Temporary labor certification

> serves as *DOL's advice to DHS* that the employer has tried unsuccessfully to recruit sufficient U.S. workers at a DOL–determined prevailing wage … and that the employer has provided assurance that it will pay its H-2B workers and any successfully recruited U.S. workers at least the same prevailing wage.. . . DHS relies on USDOL's advice in this area, as the appropriate government agency with expertise in labor market questions, to fulfill *DHS's statutory duty* of determining that unemployed persons capable of performing the relevant service or labor cannot be found in the United States and to approve H-2B petitions.

Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24047, 24048-49 (DHS/DOL IFR April 24, 2013) (emphasis added).

The IFR claims that the IFR is a regulation "jointly" issued by DHS and DOL to govern the standards and procedures applicable to Office of Foreign Labor Certification (OFLC) issuance of temporary labor certifications under the H-2B program. 83 Fed. Reg. 55978. Only DOL Employment and Training Administration (ETA) regulations, however, would be amended by the IFR. No judicial consensus exists as to the exact scope or statutory basis of DOL authority vis-à-vis DHS. *See Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 2018 U.S. Dist. LEXIS 155984 (D. Md. Oct. 11, 2018) (reviewing the conflict between the Third and Eleventh Circuits on H-2B rulemaking authority, finding adequate DHS statutory authority, but questioning the "joint authority" doctrine as applied to the H-2B program).

DOL has justified the proposed changes in large part on the claim that the revised internet recruiting will be less costly and burdensome to recruiters and employers. 83 Fed. Reg. 55797 ("electronic advertisements offer employers a less expensive, more convenient means of broadly disseminating information about their job opportunities…"), 55983. This concern,

however, is not a permissible basis for DOL regulatory discretion. Nowhere do relevant statutes and current or proposed regulations provide that reducing recruiting costs and burdens incurred by H-2B employers is a cognizable purpose of a temporary labor certification issued by DOL.

To the contrary, the H-2B regulations "must be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible." 20 C.F.R. § 655.0(a)(3) (cited case precedent omitted). Only DOL's ETA may make a determination of no adverse effect, and may do so only where the "availability of U.S. workers has been tested." 20 C.F.R. § 655.0(a)(2). Testing can "only" be done "if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher." *Id.*

To the extent that Congress intended that the interests of H-2B employers and U.S. workers in recruitment practices are balanced in the award of H-2B visas, that balancing cannot be conducted by the ETA, which advises exclusively on whether the employer has tested the availability of U.S. workers through active recruitment. Given the past and current litigation challenging the entire H-2B program, IRLI believes that it would be *ultra vires* and thus arbitrary for DOL to include employer cost efficiency as a heavily-weighted factor in redesigning recruitment methods for temporary labor certification.

II. The factual basis for the proposed procedures for web-based recruitment of U.S. workers is defective and incomplete.

ETA regulations require employers seeking temporary labor certification to, among other things, actively recruit for U.S. workers, before submitting H-2B petitions to DHS.

ETA Office of Foreign Labor Certification (OFLC) standards and procedures governing recruitment of U.S. workers generally are set forth in 20 C.F.R. §§ 655.40 to 655.48. An employer seeking a temporary labor certification must meet three important requirements: First, the employer must place two print advertisements, which must meet the minimum content requirements in § 655.41(b), in a newspaper of general circulation serving the area of intended employment. § 655.42(a). Second, the employer must contact former U.S. workers employed in the previous year to solicit their return. § 655.43. Third, the employer must contact the bargaining unit, if one exists, to seek referrals of U.S. workers. If a bargaining unit does not exist, the employer must post the job opportunity at the place of employment for at least 15 consecutive business days. 20 C.F.R. § 655.45. Additional recruitment may be required if the OFLC Certifying Officer (CO) determines there is a likelihood that qualified U.S. workers will be available to fill the job opportunity. 20 C.F.R. § 655.46(a).

The IFR justifies the change in recruitment methods based on a vague "due consideration" standard. 83 Fed. Reg. 55979. The agencies "believe that advertisements posted on the types of websites described below will reduce burdens on employers and applicants, and be a more effective and efficient means of recruiting U.S. workers than the print newspaper advertisements that section 655.42 currently requires." *Id.*

The factual basis for this conclusion is tenuous to say the least. The IFR states that "available data suggests that U.S. workers are now much more likely to turn to the internet…." 83 Fed. Reg. 55979 (citing February 2018 Fact Sheets published by the Pew Research Center). The IFR then predicts that the "trend is likely to continue as U.S. workers gain increased and more convenient access to the internet via smartphones…," with a corresponding decline in daily newspaper circulation. *Id.*

But a general trend towards cell phone ownership, even if real, does not establish that abolishing print recruitment will produce more U.S. worker applicants for H-2B jobs. The Departments have presented no evidence at all to show that U.S. citizens who are unemployed but seek temporary work in H-2B occupations have the same capability to search the internet for job openings as U.S. citizens at large. In recent years, the top occupations certified by the DOL's Employment and Training Administration (ETA) have included landscaping and groundskeeping workers, forest and conservation workers, amusement and recreation attendants, maids and housekeeping cleaners, and construction laborers. Catherine DiSanto, *Beauty and the H-2Beast: How the Equality State Fails its Female Guest Workers*, 18 Wyo. L. Rev. 321, 339 (2015) (citing ETA Office of Foreign Labor Certification, Annual Report 49 (2015). The IFR provides absolutely no explanation of how recruitment would occur for the declining but still significant percentage of U.S. workers who still have no access to online employment-related media. These omissions should be a significant concern, given that the pool of U.S. nonskilled workers in these H-2B occupations is likely to be much poorer, much less educated, much less mobile, and more isolated linguistically and in internet access than U.S. citizen workers on average.

The IFR references "anecdotal" comments from two "stakeholders," the American Immigration Lawyers Association (AILA) and the Northwest Workers Justice Project (NWJP). 83 Fed. Reg. 55979. This reliance on endorsements from AILA and NWJP as an evidentiary basis for the IFR is arbitrary and capricious. Both organizations represent primarily aliens and H-2B employers, not the citizens whose employment opportunities ETA is mandated to prioritize and protect "wherever possible." 20 C.F.R § 655.0(a)(3). The inherent anti-U.S. worker bias of this "evidence" is all the more telling given that DOL is unable to identify any evidence from "stakeholders" that actually represent U.S. citizen workers supporting its retrograde approach to online recruiting.

III. The proposed procedures for web-based recruitment of U.S. workers ignore and conflict with widely adopted best practices for electronic recruitment of low-skilled workers.

To IRLI, the actual procedures proposed for online recruitment are archaic, bureaucratic, and designed for failure.

Essentially, ETA is proposing to replicate the structure of its existing print advertisement recruitment regulation on the internet. The proposed rule would not mandate that an employer post its advertisement on a specific website. 83 Fed. Reg. 55980. Rather, proposed 20 C.F.R. § 655.42(a) would allow "an advertisement on any of a variety of websites that are widely viewed and appropriate for use by workers who are likely to apply…" The proposed regulation "[a]lso contemplates the use of websites that are not specifically directed at workers in the area of intended employment or the particular occupation, so long as the website is appropriate… and adequately serves the area of intended employment…." *Id.*

Proposed 20 C.F.R § 655.42(b) specifies that an employer's advertisement must be clearly visible on the website's homepage or be easily retrievable using search tools on the website. 83 Fed. Reg. 55980. Electronic advertisement is still required only for a period of at least 14 consecutive calendar days, and is to be publicly accessible at no cost to an applicant, compatible with current commercial web browser platforms, and easily viewable on mobile smartphones. *Id.* The advertisement must "continue to duplicate" the dense and convoluted minimum content requirements in 20 C.F.R. § 655.41. As for evidence of compliance at an "active recruitment" level, proposed 20 C.F.R. § 655.42(c) would require employers to print and retain screen shots of the web pages establishing the path used to access the advertisement, a media technology that is decades out-of-date.

Current DHS regulations already require recruiters to maintain and update a recruitment report, *see* 8 C.F.R. § 655.48, and require the CO to conduct both discretionary audits, 8 CFR § 655.70, and assisted recruitment where a violation does not warrant debarment, 8 CFR § 655.71.

The proposed regulation appears ignorant of widely espoused modern methods for recruitment of hourly workers. Successful recruitment of low skilled nonexempt workers requires what the American human resources and staffing industry calls a targeted marketing strategy, not the tokenism of the proposed regulation. Only a targeted recruitment effort coordinating relevant online job communities can provide the employer with key recruitment information on the age, gender, time spent on sites, and minimum website behavior of applicants. *See* https://www.smartrecruiters.com/blog/four-easy-steps-to-recruiting-hourly-workers/.

Human resources experts agree that the most efficient way to recruit for low-skilled hourly jobs is to install a 24/7 job hotline. *See, e.g.,* https://www.humanity.com/blog/find-awesome-hourly-employees-2017.html. Hourly employees look for convenience in the job application process above all else. *Id.* International job board Monster.com also recommends that employers "install a 24-hour job hotline and include it in your job postings. It can be as simple as an answering machine or as sophisticated as a fully automated interviewing system." The site claims that an audio-based electronic recruitment system can increase contacts with qualified applicants "by 30-50% or more." https://hiring.monster.com/hr/hr-best-practices/small-business/hiring-process/find-good-employees.aspx.

The IFR states that DOL is in the process of

> evaluating the development of a centralized platform to automate the electronic advertising of approved H-2B opportunities. DOL anticipates that this platform would maintain a standard set of data on each job opportunity that can be integrated with a wide array of job search website technologies. … Companies that operate the job-search websites would execute standard protocols to pull new H-2B jobs from the on-line platform in real time for U.S. workers.

83 Fed. Reg. 55981.

From a professional human resources perspective, DOL is proposing to reinvent the wheel to conform to its own bureaucratic limitations and prejudices. Modern recruitment services specializing in hourly workers already provide a range of diverse automated and scalable virtual applicant tracking systems (ATS) to employer clients. *See, e.g.,* https://www.efficienthire.com/7-ways-hire-hourly-workers-faster/. An ATS can immediately post to job boards such as Indeed, Monster, Careerbuilder, and those of state workforce agencies. Using an ATS, U.S. job seekers can complete applications "any time, anywhere, and from any device." *Id.* The H-2B hourly wage recruiter can analyze and prioritize which activities and job boards are bringing results. *Id.* Responses can be used to build networking and referral databases, both for current and future work seasons. Even the smallest employer can readily access free high traffic websites, such as Craigslist.org and Youtube.com, that feature lay-person analytics useful for evaluating recruitment and job candidate assessment efforts.

IV. Recommendations.

DOL should reissue a completely revised IFR that incorporates the following best practices to ensure that active recruitment has been accomplished:

(1) A requirement that temporary labor certification petitions include a description of the employer's deployment of a commercially available targeted marketing strategy suitable for low-skilled hourly workers.
(2) In lieu of a comprehensive list of requirements for a suitable targeted marketing system, a requirement that the ETA solicit requests from the human resources and staffing industries to include existing proprietary services on a public schedule, to serve as a research resource for employers.
(3) The following minimum requirements for an acceptable targeted marketing strategy:

(A) A 24/7 telephonic recruitment hotline, featuring a user-friendly interface of job descriptions, contact information, a message box for candidates, and basic analytics for verification and functionality.
(B) An ATS appropriate for recruitment of hourly workers and for development of leads and referrals, especially for employers who are accessing H-2B workers for more than one season.
(C) Continuing access by job candidates to the system through the period of temporary employment, so that leads and referrals could be developed for subsequent recruiting periods.
(D) Additional recruitment procedures for U.S. workers who do not have access to the internet or possess a smartphone.
(E) Adequate metrics software to enable both an employer and a certifying officer to assess the success of the recruitment program.
(F) An option for an employer to use an internally developed target marketing strategy, so long as the program provides data and metrics that enable a certifying officer to establish that it is a functional equivalent to a commercially out-sourced system.

Respectfully submitted,

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