Delivering Economic Opportunity

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May 17, 2011

Michael Jones, Acting 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

Re: Comments on RIN 1205-AB58, Temporary Non-Agricultural Employment of H-2B Aliens in the United States (Employment and Training Administration, 20 CFR Part 655 and Wage and Hour Division, 29 CFR Part 503)

Dear Mr. Jones:

These comments are submitted in response to the United States Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM), RIN 1205-AB58, Proposed Rules 20 CFR Part 655 and 29 CFR Part 503, "Temporary Non-Agricultural Employment of H-2B Aliens in the United States," 76 Fed. Reg. 15129 – 15207 (Mar. 18, 2011). We write in support of regulations proposed by the Employment and Training Administration and the Wage and Hour Division to strengthen the H-2B program for temporary employment of immigrants in the United States. The new proposals will go a long way towards eliminating the history of abuses ranging from labor violations to discrimination, wage and hour violations, visa fraud, debt peonage, involuntary servitude and labor trafficking that have long plagued this under-regulated program.

The proposed rules for the H-2B non-agricultural temporary worker program are a significant improvement for workers both within and outside the United States. Temporary "guestworker" programs have long worked to the detriment both of the U.S. workers who are bypassed in favor of foreign workers, and for the foreign workers who fall prey to unscrupulous employers and their labor contractors. Dozens of criminal and civil prosecutions have been launched against employers and recruiters for filing fraudulent applications for non-existent jobs, for race and gender discrimination, for human trafficking and wage and hour violations. [1] As DOL notes in its preamble to the proposed regulations,

[1] See also, *Magnifico v. Villanueva,* 2011 WL 1584841 (S.D.Fla.)(civil prosecution based on allegations of forced labor and human trafficking in addition to violations of both federal and state fair labor laws); *Gaxiola v. Williams Seafood of Arapahoe, Inc.,* 2011 WL 806792 (E.D.N.C.)(class of H-2B worker certified where defendants made loan repayment deductions from wages for the transportation, and visa expenses and fees); *Gonzalez v. Ridgewood Landscaping,* 2010 WL 1903602 (S.D.Tex.)(H-2B workers claiming overtime and minimum wage violations); *Teoba v. Trugreen Landcare LLC.,* 2011 WL 573572 (W.D.N.Y.)(Employer's motions to dismiss denied on H-2B workers' claim for recruiting, visa, and transportation costs paid to recruiters affiliated with company); *U.S. v. Farrell,* 563 F.3d 364 (8th Cir. 2009)( Hotel owners were convicted of peonage, conspiracy to commit peonage, making false statements, visa fraud, and document servitude in connection with employment of temporary workers from the Philippines).

several of these violations have occurred in just the past two years under the 2008 regulations that these rules would replace. 76 Fed. Reg. 15129, 15132. Just last Thursday, the New York Times reported on the plight of 50 Vietnamese welders who had been brought to the United States under a temporary worker program, and who contend that they faced conditions of servitude in this country.[2] The proposed rules will help reverse these trends and help make certain that the program is used consistently with its aims – to ensure temporary workers are hired for jobs where U.S. workers are not available, and to ensure these workers are treated fairly.

The National Employment Law Project (NELP) is a national advocacy organization that works in partnership with community groups, workers centers, unions and lawyers to advance workers' fundamental rights within the United States. NELP has extensive experience in both direct and indirect representation of U.S. and temporary guestworkers. In addition, NELP has submitted comments on rulemaking proposals in the H-2B program, testified in Congress regarding the need for adequate enforcement in the program, and written scholarly articles about the shortcomings of the program from a policy and human rights standpoint.[3]

It is by now beyond dispute that temporary "guestworker" programs have long worked to the detriment both of the U.S. workers who are bypassed in favor of foreign workers, and for the foreign workers who fall prey to unscrupulous employers and their labor contractors.[4]

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[2] James C. Mckinley Jr., *In Debt, Far From Home and Claiming Servitude*, N.Y.TIMES, May 12, 2011 at http://www.nytimes.com/2011/05/13/us/13welders.html?scp=1&sq=welder&st=cse.

[3] Testimony Of Catherine Ruckelshaus submitted House Committee on Oversight and Governmental Reform Domestic Policy Subcommittee, "The H-2B Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers," April 9, 2009, at http://nelp.3cdn.net/be77370eae92a01f22_bom6bnlx6.pdf; Rebecca Smith, *Guestworkers or Forced Labor*? New Labor Forum, Vol. 16, Issue 3-4 (Fall 2007); Catherine Ruckelshaus and Rebecca Smith, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POLICY (Oct. 2007); Rebecca Smith, Globalization and Migration for Work: Human Rights Questions, Labor & Employment Relations Association, HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES (3rd Edition 2009); brief *amicus curiae* in *David v. Signal,* 08-1220, U.S. Dist. Ct., E.D. La. (filed March 2008)(arguing that H-2B workers' possible application for visas as victims of trafficking not disclosable in their litigation); brief *amicus curiae* in *Castellanos-Contreras v. Decatur Hotels LLC*, 622 F.3d 393 (5th Cir. En banc 2010); brief *amicus curiae* in *Perez-Farias v. Global Horizons,* 10-35397 (9th Cir.) pending before the Ninth Circuit Court of Appeals, (H-2A program; arguing growers should be liable for agent's discrimination against U.S. farmworkers).

[4] Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States,* 2007, http://www.splcenter.org/pdf/static/SPLCguestworker.pdf; American University Washington College of Law International Human Rights Clinic and Centro de los Derechos del Migrante, Inc., *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* 84, July 2010, http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf?rd=1; Southern Poverty Law Center, *Beneath the Pines: Stories of Migrant Tree Planters*, 2006, http://www.splcenter.org/get-informed/publications/beneath-the-pines; *Closed and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse*, GAO 10-1053; Testimony submitted by members of the Guestworker Alliance for Dignity to the House Committee on Oversight and Governmental Reform Domestic Policy Subcommittee, "The H-2B Program and Improving the

From the point of view of U.S. workers, NELP advocates have been involved in cases where U.S. workers were bypassed in favor of foreign workers, sometimes through bogus advertisements in media designed to avoid U.S. workers, through unreasonable job qualifications, or through simple lack of follow up with qualified U.S. workers. One media investigation reported that an East Coast visa fraud conspiracy simply scheduled interviews with U.S. applicants for inconvenient times, such as 6 p.m. on Christmas Eve. The few Americans who actually appeared reported later that the interviewers were "intimidating" and made the jobs sound "as bad as possible." [5] Yesterday, a Georgia news outlet reported cases involving employers who allegedly advertised H-2B jobs far from the actual location of the jobs, and refused to hire qualified workers referred to them by the state workforce agency.[6]

The general U.S. unemployment rate hovers around 9 %. According to the Bureau of Labor Statistics, the nationwide unemployment rate for NAICS 23 (construction) is currently 17.8%.[7] In NAICS 72 (accommodation and food service) unemployment stood at 11.7% in April.[8] Yet construction workers, housekeeping, kitchen helpers and dining room attendants are five of the top ten job classifications in which the H-2B program has been used in the past ten years. Nine states, including California, Florida, Michigan, and Nevada, continue to face unemployment rates of more than 10 percent. Yet employers applied for certification for 10,673 H-2B applications in these four states alone in 2010.[9] Where unemployment in particular geographical areas and among particular segments of the labor market continues at a tragically high rate, we applaud the enhanced recruitment requirements and the inclusion of U.S. workers in all assurances made under the program.

For H-2B workers themselves, key aspects of the program have long led to human rights violations such as debt peonage, labor trafficking and involuntary servitude. These include the use of an often criminal band of labor recruiters, called “enganchadores” (after the word for “hook”) in Spanish-speaking countries, who lure impoverished and desperate foreign workers to jobs within the United States described as plentiful and lucrative. Too often, the opportunity to work in the U.S. comes with an intolerably high price tag, for inflated transportation, visa, border crossing and other costs, and for

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Department of Labor’s Enforcement of the Rights of Guestworkers,” April 9, 2009; International Labour Organization, *The Costs of Coercion: Global Report under the Follow Up to the ILO Declaration of the Fundamental Principles and Rights at Work,* International Labour Conference, 98th Sess. 2009 Report I(B), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_106230.pdf.

[5] Mark Morris, *Fraud’s welcome mat; Even the most flagrantly bogus documents let workers slip through and become targets for abuse,* KANSAS CITY STAR, Dec. 15, 2009, http://www.kansascity.com/trafficking/day3/.

[6] *Thousands Of Ga. Jobs Given To Foreign Workers,* WSB ATLANTA, May 16, 2011, http://www.wsbtv.com/news/27914098/detail.html.

[7] United States Department of Labor, Bureau of Labor Statistics, About Construction, http://www.bls.gov/iag/tgs/iag23.htm#about.

[8] United States Department of Labor, Bureau of Labor Statistics, Industries at a Glance: Accommodation and Food Service, http://www.bls.gov/iag/tgs/iag72.htm.

[9] HD Net, H-2B Temporary Guest Workers: Search H-2B Applications, http://www.hd.net/guest-worker-coverage/h2b/.

"recruitment fees."[10] Too often, workers literally mortgage family properties in order to meet these obligations.[11] Companies within the United States claim no knowledge of their recruiters' actions and have escaped legal liability on these grounds. The recruiters themselves often remain beyond the reach of the U.S. legal system.

Once guestworkers arrive in the United States, the well-paid jobs that have been offered do not materialize. Workers are left without work at all, or without work for the length of time promised them. Favorable terms and conditions of work offered in the home country are replaced by harsh conditions. Job contractors transfer workers, for a price, to other contractors.[12]

Workers who are dissatisfied with the jobs face overwhelming subtle and not-so-subtle pressures to acquiesce. Passports and other immigration and identity documents are confiscated to ensure that workers do not run away. Families back home are threatened with physical violence, as well as family bankruptcy due to loss of their investment in the worker. And workers who dare speak up for their rights face job loss, followed by deportation to their home countries and blacklisting.

As noted in a recent ILO report, these conditions create a program that is ripe for human rights violations.[13] Given these characteristics of the temporary guestworker programs in the United States, it is no surprise that the biggest human trafficking prosecution in the history of our country arose under one of these programs.[14] Even so, the prosecution of Global Horizons and its president Mordechai Orian came out of the substantially more regulated H-2A program and not the largely unregulated H-2B program. In order to protect the human rights of workers, DOL has rightly chosen to impose reasonable regulation on the H-2B program.

In several key areas, including the stepped up oversight of the process, from registration of employers through debarment of non-compliant employers; the substantive protections that they offer to ensure that H-2B and U.S. workers' jobs are as promised and without abusive recruitment charges; and greater transparency that they bring to the program, we strongly support the rules. Below, we review the rules

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[10] For example, 100% of the women interviewed for the study of H-2B crab pickers in Maryland said they had paid a fee to their recruiter. *Picked Apart,* 1. See also, *Recinos-Recinos v. Express Forestry, Inc.,* 2008 WL 4449973 (E.D.La.)(ordering return of illegal transportation fees and hotel deposits charged to H-2B workers); *De Leon-Granados v. Eller & Sons Trees, Inc.,* 581 F.Supp.2d 1295 (N.D.Ga. 2008) *aff'd*. 497 F.3d 1214 (11th Cir. 2007)(Employer ordered to reimburse temporary foreign workers for passports, visas and visa processing, travel, and border crossing expenses).

[11] See, e.g., *De Leon-Granados*, 581 F. Supp. 2d 1295 at 1325 (N.D. Ga. 2008) (where workers contended Defendant H-2B employers required them to leave property deeds as a condition of accepting work).

[12] See, e.g., news accounts of the Giant Labor Supply prosecution in Kansas City, where workers recruited by one company for a hotel job in Kansas City arrived in the U.S. to find their employment was with another company, making DVDs in Alabama. Mark Morris, *Fraud's welcome mat; Even the most flagrantly bogus documents let workers slip through and become targets for abuse,* KANSAS CITY STAR, Dec. 15, 2009.

[13] Id., ILO, *The Costs of Coercion.*

[14] Julia Preston, *Indictment Accuses Firm of Exploiting Thai Workers,* N.Y. TIMES, Sep. 3, 2010, http://www.nytimes.com/2010/09/04/us/04trafficking.html?scp=19&sq=guestworker&st=cse

in each of these broad areas, and make suggestions for further protections that will prevent abuse, protect workers, and provide for adequate enforcement of the minimum standards.

**Major Positive Components of the Proposed Rules**

The rules advance workers' rights in five basic areas:

**Stepped up oversight.** The proposals restore appropriate government oversight of employer H-2B applications, and return to the certification process that existed prior to the rules changes in 2008, as required under the Immigration and Nationality Act at 8 C.F.R. § 214.2(h)(ii)(D). In addition, we applaud the restoration of the critical role of State Workforce Agencies in the recruitment and oversight process, and the added registration process whereby employers must first make a showing of a truly "temporary" need for workers before they submit a formal application.

**A true test of the labor market through required active recruitment.** At this time of chronic, lengthy high unemployment within the United States, where there are approximately 4.5 workers for every available job, we welcome the requirement that an employer make real attempts to recruit U.S. workers, including contacting former employees, community organizations and unions. Most importantly, we welcome the requirement that employers maintain a record of their recruitment activities. These steps will help forestall cheating by H-2B recruiters who told undercover Government Accountability Office workers how to avoid hiring U.S. workers by providing "good excuses" to help "weed out" prospective U.S. workers.[15]

**Stronger worker protections for U.S. and H-2B workers.** Key provisions of the proposals include that all protections of the program are extended to both H-2B workers and U.S. workers employed alongside them. Additionally, the rules require that employers offer work hours equal to at least ¾ of the monthly workdays included in the job offer and full-time work of 35 hours per week, to address the practice of "benching" workers. While we support these steps, we believe that a 100% guarantee of work at 40 hours per week is more in keeping with standard practices in this country and urge that this standard be adopted.

**Stemming recruitment abuse**. Exploitation of foreign guestworkers has frequently begun in their home countries, where they pay recruiters huge sums of money – sometimes literally mortgaging the family farm – for the privilege of working in the US. The new rules remove many of the features of the system that make it ripe for forced labor. We support the requirement that employers provide copies to DOL of all agreements with recruiters, and that they contractually forbid recruiters from charging illegal fees. In keeping with key legal decisions under both the H-2A and H-2B programs and consistent with the goal of avoiding wage depression, DOL rightly states that certain costs are for the "benefit of the employer" and therefore the employers must pay or reimburse (up to the "offered wage") transportation and subsistence for workers to and from the worksite; provide all tools, supplies and equipment; and pay or reimburse all visa, border crossing and other fees.

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[15] Id., GAO, *Closed and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse.*

**Enforcement of core protections.** DOL's Office of Foreign Labor Certification, which processes employer applications, has authority under the regulations to audit applications and to require more intensive recruitment, revoke certification, and debar employers from further applications. Building on the 2008 regulations, the DOL's Wage and Hour Division is appropriately given the power to investigate employers, revoke certifications, and debar employers, their agents and their attorneys. The WHD has crucial power to order payment of back wages, including recovery of prohibited fees paid or impermissible deductions, and it can enforce the provisions of the job order; assess civil money penalties; order make-whole relief for any person who has been discriminated against; order reinstatement and make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced.

**Weaknesses of the Proposed Rule**

In our view, the major weaknesses of the proposed rule are in enforcement of employer obligations. The long history of the program abuse has shown that neither U.S. nor foreign workers can be protected from violations ranging from discrimination to forced labor unless they can protect themselves, and unless employers are held accountable for all recruitment violations. In order to fully protect workers, DOL must:

- Make clear that H-2B job orders are binding, enforceable contracts;
- Make clear that employers are strictly liable for recruitment violations, for failure to report a violation by recruiter and for failure to disclose the identity of a recruiter;
- Make clear that employers must publicly disclose all recruiters and sub-recruiters in order to avoid the charging of illegal fees, and that their agreements should be available publicly on the web;
- Provide for notice to and intervention by workers in all DOL administrative actions;
- Make clear that retaliation protections are extended to worker consultations with workers' centers, labor unions, and community organization; and
- Require employers to keep track of amounts paid to whom, by whom, and when for all fees and include in recruitment report to DOL and to retain such document for DOL inspection.

We will treat each of these subjects in more detail below.

**The Rules provide for appropriate increased DOL oversight of applications, including limitation on the entities that may file applications and the inclusion of a registration and certification process, will prevent abuse.**

The proposals restore and increase reasonable government oversight of the application process by requiring both registration for users of the system and a certified H-2B application, in place of the attestation process in the current regulations. As DOL notes, its own audits have found that more than half of the employers currently using the attestation-based program are in violation of program regulations. 76 Fed. Reg. 15132.

We support the separation of a new registration process from that of the approval of an employer's H-2B application. The registration process outlined in 20 C.F.R. § 655.11, requiring an employer to meet a threshold showing of temporary need for workers, that the jobs are non-agricultural and that the number of worker positions requested is justified and that there is a bona fide job opportunity available, will avoid some of the visa fraud issues that have been the result of the current program.

We support as well the proposed amendment 20 C.F.R. § 655.6 that job contractors be excluded from participation in the H-2B program. Elimination of job contractors – who themselves often have no jobs available, but acquire visas and workers who they then deal to others – will protect workers from trafficking and forced labor.

**The rules offer greater substantive protections to guestworkers and U.S. workers that will keep many from falling into situations of labor exploitation.**

We believe that a number of the substantive provisions proposed in the rules, coupled with the transparency and enforcement provisions we outline below, will help eliminate the trickery that often lies at the heart of labor trafficking claims.

As noted above, we are pleased to see the addition, in the program assurances of compliance with Federal, State and local laws, of a specific reference to compliance with the TVPRA; in particular its provisions that an employer may not hold or confiscate passports, visas or immigration documents in proposed 20 C.F.R. § 655.20(z).

In particular, we commend the DOL for its provisions related to cost-shifting by employers. As noted above, exploitation of foreign guestworkers has frequently begun in their home countries, where they pay recruiters huge sums of money for the opportunity to work in the U.S. We especially applaud key provisions that outlaw charges for transportation, subsistence, border crossing, visas and other fees, and provide that agreements between employers and agents must provide that these fees must not be charged to workers. 20 C.F.R. §§ 655.9 and 655.20; see, e.g., 20 C.F.R. §§ 655.72, 655.73 and 503.23. The Department's proposed language 20 C.F.R. § 655.20(k) is an important step for protecting wages by requiring the employer to provide workers with tools necessary to perform the job. Employers have frequently undermined minimum wage provisions by passing these costs on to workers -- the study of H-2B crab pickers working on Maryland's Eastern Shore found that 54% of those interviewed received deductions from their weekly paychecks because their employers shifted the costs of tools and/or protective equipment, including knives, gloves, aprons, boots and hairnets.[16]

Provisions requiring a bi-weekly pay day with an earnings statement, reflected in proposed 20 C.F.R. § 655.18(e) and § 655.20(h)(1), will also allow workers to claim, on a regular basis, the salaries promised to them at home, and prevent involuntary servitude. We support as well the provisions of 20 C.F.R. § 655.18 regarding the contents of the job order, including prohibitions against preferential treatment, bona fide job requirement, benefits, wages, and working conditions covered under the program, the contractual guarantee, limits on transportation and visas fees and other limits on cost shifting by the employer.

[16] Id., *Picked Apart,* 84.

**Needed Improvements.**

We welcome the proposal that workers be protected by a guarantee of a minimum number of hours of work. While the proposed rules, at 20 C.F.R. § 655.18(h) and 655.20(f), in parallel with the H-2A rules, suggest a ¾ guarantee, we believe that a full guarantee is more consistent with standard labor contracts. In any other context apart from temporary worker programs, a worker who is contractually promised full time work would be able to enforce that promise. H-2B workers and their U.S. worker counterparts should have that same right. In the same vein, we support the proposal to increase the definition of "full time" as proposed in 20 C.F.R. §§ 655.5, 655.18(g) and 655.20(d), but we believe that the rule should, rather than 35 hours, require 40 hours as full time work. As the DOL recognizes, 40 hours is "in line with what the U.S. labor market generally considers full time." 76 Fed. Reg. 15136. In other employment contexts, a worker promised a certain numbers of hours per week in a written contract would have the ability to fully enforce that promise. Workers under the H-2B program should have the same right.

**Stemming Recruitment abuse: The rules will bring greater transparency to the H-2B system, allowing for earlier and more frequent detection of abuse.**

The substantive provisions of the regulations that we support will not be realized without greater transparency, and this DOL has included in its proposed rules. Three elements of transparency are included in the regulations: clear public disclosure of key assurances and protections, preparation and retention of key documents, and disclosure to workers of the rights they have and the assurances that have been made to them.

With respect to transparency in the application process, DOL will maintain an electronic file publically available with information on employers applying for H-2B certification. 20 C.F.R. § 655.63. DOL is considering requiring employers to place a notice of filing in the Federal Register along with future electronic filing of the application. 20 C.F.R. § 655.15. DOL will place the job order posted by the state workforce agency on the Department's e-registry until the end of the recruitment period, § 655.34. DOL rightly makes clear that information received in the course of processing an application may be shared with appropriate investigative agencies. 20 C.F.R. § 655.15. These steps will make the process more accessible to the public and enlist groups such as ours to ensure that the process is working towards its goals of hiring U.S. workers where possible, and treating foreign workers lawfully and with dignity.

**Needed Improvements.**

We believe that in addition to the above steps and the required disclosure of agent agreements and foreign worker recruiters listed in 20 C.F.R. § 655.8 and 655.9, DOL should make clear that employers must disclose the identities of all recruiters and sub-recruiters, and that employers' agreements with recruiters should also be available to the public.

With respect to document preparation and retention, we applaud the requirement of a recruitment report in 20 C.F.R. § 655.48, and the document retention rules in § 655.56. We believe that in addition and to further reduce unlawful fees, employers should be required to keep track of the details of amounts paid for all transportation, subsistence, visa and other fees and include this information in recruitment reports to DOL. In addition, employers should be required to state that they have not – and will not – collect prohibited fees from workers.

With respect to disclosures to workers, we suggest that DOL make its required written disclosure to workers of the job order at a time that is earlier than that suggested in the regulations as written. The rules provide that H-2B workers get the order no later than the time that the worker applies for a visa. This should instead occur at the time of recruitment, as is provided under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), in order to allow workers full access to terms and conditions of employment before they make a substantial commitment to come to the United States. See 20 C.F.R. § 655.20(l).

We applaud the provisions requiring notice of workers' rights in a language common to the workers. We believe that the worker's rights notice in § 655.20(m) should instruct workers that they can make complaints, and tell them how to do so, including by listing the telephone numbers for the Wage and Hour hotline (866-4US-WAGE (487-9243)) and the National Human Trafficking Resource Center hotline (888-373-7888).

Similarly, while we support the proposed regulations at 20 C.F.R. § 655.44 require that notice of the job opportunity be provided to labor organizations "[w]here the occupation or industry is customarily unionized." We believe that there is likely to be confusion over precisely what occupations and industries are considered to be "customarily unionized." We suggest that the construction, hospitality, food service, janitorial and health care assistant industries (including nursing home attendants), each of which include a substantial number of H-2B workers and a large number of unionized workers, be expressly identified in the regulation as industries which are "customarily unionized." In addition, the AFL-CIO state federations, which exist in every state in the country, should be notified in every instance of such job opportunities.

**Stepped up protection against retaliation and enforcement of workers' rights will help to detect human rights abuses.**

The rules make it clear that employers who violate workers' rights may face debarment, revocation of their certifications, civil money penalties, and traditional remedies such as payment of back wages and impermissible fees and deductions, as well as reinstatement for workers improperly rejected for employment. These are all important tools to encourage compliance, since the substantive advances that are promised in the regulations will simply not take hold in the employer community without a robust enforcement scheme. It is, however, in the area of enforcement that we find the regulations somewhat lacking. The long history of the program has shown that neither U.S. nor foreign workers can be protected from violations ranging from discrimination to forced labor unless they can protect themselves from retaliation, and unless employers are held fully accountable for all recruitment violations.

We support the provisions in the Wage and Hour Division enforcement sections that explicitly refer to criminal penalties for certain violations of the regulations. These include, in proposed § 503.8, for false and fraudulent statements under 18 U.S.C. § 1001, and in proposed § 503.25, for interference or refusal to cooperate with federal officer in course of official duties under 18 U.S.C. §§ 111, 114. The inclusion of these provisions makes it clear to employers that serious consequences may follow criminal acts.

**Needed Improvements.**

**Intentional, rather than willfulness standard.** In order to fully protect workers, we urge that DOL amend the current proposed willfulness standard in 20 C.F.R. § 655.72, § 655.73 and § 503.19. Both the ETA Integrity section and the Wage and Hour enforcement regulations say that sanctions can be levied when an employer "substantially" fails to comply with terms and conditions of an approved certification. DOL defines "substantial failure" as a "willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification." The standard of willfulness to prove a violation is too high, and is inconsistent with rules on debarment under the Job Service Complaint system and under the Migrant and Seasonal Agricultural Worker Protection Act, AWPA, at 29 U.S.C. § 1854 and 20 C.F.R. § 658.418.

**Strict liability for acts of agents.** 20 C.F.R. §655.72, §655.73 and §503.23. In perhaps what is the most important move forward represented in the proposed rules, they outlaw charges for transportation, subsistence, border crossing, visas and other fees, and provide that agreements between employers and agents must provide that these fees must not be charged to workers. 20 C.F.R. § 655.9 and § 655.20. However, unless employers are strictly liable for such charges, the restrictions are, as a practical matter, unenforceable. This is true because actions by workers against recruiters operating overseas may be impossible due to issues of personal jurisdiction, solvency, cost and collectability. We have learned from long years of experience with labor intermediaries such as labor brokers, farm labor contractors and employment agencies that the company that uses the services of these entities is in the best position to ensure that violations don't occur.

**Additional debarrable actions.** While the list of debarrable actions is expressly not intended to be comprehensive, the rules should add as a debarrable action or an action that subjects an employer to civil money penalties the following: the failure of an employer to disclose a recruiter's identity under §655.9, the use of a debarred recruiter, and the failure of an employer to report a violations of these regulations to OFLC and WHD. DOL should maintain a publicly available list of debarred recruiters for employers to consult.

**Intervention by workers**. Neither the OFLC nor the WHD processes formally allow for intervention in the proceedings for affected workers. 20 C.F.R. § 655.70-73 and § 503.19-56 should be amended to provide for notice to workers and a right to intervene in all DOL administrative actions. Since workers are most likely to be able to provide information about issues ranging from the appropriateness of job qualifications to the assessment of illegal recruitment fees, both sections should allow for notice of the proceedings and intervention by workers. In the case of OFLC audits, notice could go to the same entities who are listed as potential recruitment sources in § 655.43-46 – former employees. For the WHD enforcement process, notice should go to existing employees, including both similarly situated U.S. workers and H-2B guestworkers.

**Job Orders as Enforceable Contracts.** DOL should make clear in § 503 what is implicit in its rules overall: that workers are the intended beneficiaries of the H-2B job orders, and that they can therefore enforce them in private litigation. We take issue with DOL's statement 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." DOL should make clear that it

does not embrace the holding of *Garcia v. Frog Island Seafood, Inc*, 644 F. Supp.2d 696 (E.D.N.C. 2009). Its regulations should instead clearly state that employers' assurances, applications and H-2B job orders form binding and enforceable obligations. H-2A regulations specifically state that in the absence of a separate, written work contract, the job order functions as a work contract. § 655.122(q) (2010). There is no reason that H-2B contracts should be treated differently.

**Retaliation protection for workers who complain to community organizations.** Retaliation against workers who have the temerity to claim their rights is an ugly reality under all labor laws and in all Workplace contexts, but it is all the more abhorrent in the context of temporary worker programs, where a mild complaint may result in job loss and the loss of the right to stay in the United States.[17] Guestworkers are therefore hugely vulnerable to intimidation, retaliation and the chilling of dissent. Many guestworkers who would complain are geographically and culturally isolated, and lack the familiarity with the local community that is required to seek help. Therefore, protections against retaliation should extend beyond complaints that they make to a lawyer or legal services office to other community groups, as well as worker centers and unions that may find themselves in a position to offer supprt. This should be evident by many of the actions of workers centers in support of guestworkers, in particular, the National Guestworker Alliance. 655.20(n)(4) should be amended to extend protection to anyone who has "consulted with staff of a workers' center, labor union, community organization, anemployee of a legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 28 C.F.R. part 504, or this subpart or any other Department regulation promulgated thereunder."

**DOL's rules should extend to workers the ability to change jobs in certain circumstances.**

We appreciate the proposed increased focus on nondiscrimination and nonretaliation protection included in 20 C.F.R. § 655.20(n). In some circumstances, including those where a worker has been a victim of retaliation, but also including contracts that are breached due to an "Act of God" or impossibility of fulfillment,[18] workers would be better protected with the inclusion of a requirement that the CO (i) consult with workers directly (ii) provide information regarding potential transfer to corresponding employment; and (iii) document these attempts in the file. Where transfer is not possible, DOL should commit in the regulations to requesting deferred action, humanitarian parole, or other status from DHS, valid for the amount of time on the visa during which the guestworker was unable to work the

[17] See, e.g., *Roslies-Perez, v. Superior Forestry Service, Inc.,* 652 F.Supp.2d 857(M.D. Tenn. 2009)(contempt proceeding against employer's recruiter and his supervisor engaged in contumacious conduct by the recruiter's intimidating presence at a meeting by counsel for plaintiffs); (*Does I Through XXIII v. Advanced Textile Corp.,* 214 F.3d 1058 (9th Cir. 2000)(court allows H-2B textile workers to proceed as Jane Does in their action against employer due to fear of retaliation).

[18] See, Tamar Lewin, *Mexican Guest Workers, Laid Off, Want BP's Help,* N.Y.TIMES, Aug. 5, 2010, http://www.nytimes.com/2010/08/06/us/06guest.html?scp=5&sq=guestworker&st=cse.

promised hours, and which would allow the employee to lawfully continue to work in the United States during that time.

Thank you for the opportunity to comment on the proposed H-2B regulations.

Sincerely,

Rebecca Smith
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NELP