Congress of the United States

House of Representatives

Washington, DC 20515

April 10, 2015

The Honorable Jeh Johnson
Secretary of Homeland Security
U.S. Department of Homeland Security
Washington, DC 20528

Re: Regulation of the H-2B Visa Program

Dear Secretary Johnson,

We have been closely monitoring the actions of the Department of Homeland Security (DHS) and the Department of Labor (DOL) with respect to recent litigation involving the H-2B temporary non-agricultural guestworker program and have serious concerns about these actions. Specifically, the two agencies announced on March 13, 2015 that they intend to issue a "joint interim final rule (IFR) by April 30, 2015" to "fill the regulatory gap" resulting from DOL's attempts to issue formal rules without Congress having granted it the power to do so. For the reasons set forth below and in the strongest possible terms, we urge you and DHS not to issue such a joint rule with DOL. It is contrary to well-established Congressional intent, is not necessary and will certainly lead to years more litigation. It is our belief that the Department of Labor is attempting to overstate its role in the H-2B process. Instead, DHS should act as Congress has always intended, consulting other agencies (including DOL) where necessary, but ultimately acting as the agency with sole responsibility for the H-2B program and as the final rule maker, adjudicator and enforcement agency for the program.

DOL Lacks Statutory Authority to Issue any H-2B Rules

Congress has made it clear that the Department of Labor has no authority to issue rules with respect to the H-2B program. Authority over the H-2 program, as created in the Immigration and Nationality Act of 1952, rested squarely with the former Immigration and Naturalization Service (INS). When the H-2A agricultural guestworker and H-2B programs were separated in the Immigration Reform and Control Act of 1986, Congress authorized DOL to have specific rule making and decision making power over the H-2A program, but such authority remained with INS with respect to the H-2B program. This was not an oversight but deliberate Congressional intent. DOL has never had more than a consultative role as to the H-2B program. *See* 8 U.S.C. § 1184(c)(1).

In the 2005 Emergency Supplemental Appropriations Act (P.L. 109-13), Congress allowed DHS to delegate to other agencies *enforcement authority* over fraud "in the petition to admit" and impose civil monerary penalties in certain situations if DHS so chose and the other

agency agreed. At no point has Congress authorized DOL to promulgate binding regulations as to the H-2B program, either directly or in concert with another agency.

DHS Has Rule Making Authority for the H-2B Program

Since the creation of DHS, the department (through its immigration benefits granting agency, U.S. Citizenship and Immigration Services (USCIS)), has sole statutory authority over the H-2B program. The most recent iteration of DHS' rules for the H-2B program, issued in 2008, already contains a regulatory framework to operate the H-2B petition process without DOL's 2008 or 2012 attempts to issue rules regulating H-2B program participation by employers. For example, 8 C.F.R. § 214.2(h)(1)(ii)(D) provides that "The temporary or permanent nature of the services or labor described on the approved temporary labor certification are subject to review by USCIS." Even where DOL has issued a final labor certification approving a job order as stating a temporary or seasonal need, USCIS will still perform its own independent review of whether the petition meets the "seasonality" requirement. Similarly, even where DOL has found that qualified workers in the United States are not available and that an alien's employment will not adversely affect wages and working conditions of similarly employed United States workers, this is considered by USCIS to be merely "advice" (*see* 8 C.F.R. § 214.2(h)(6)(iii)(A)).[1]

USCIS defines a temporary need as one in which the "period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years (*see* 8 C.F.R. § 214.2(h)(6)(ii)(B)." DOL had attempted in 2012, and may try again in the proposed joint-IFR, to change DHS' existing definitions and replace them with provisions borrowed from the separate H-2A agricultural guestworker program, defining "seasonal" as having a hard-and-fast 9-month or 10-month limit. We would ask that you resist any such efforts by DOL and retain your existing power to determine and define the seasonal need for workers.

Joint Rules with DOL Are Not Necessary or Appropriate

The current process by which a small or seasonal business applies for H-2B workers involves a significant amount of duplication of effort between the DOL and USCIS processing requirements. Multiple agencies each conduct similar reviews of an employer's submission. *See n*ote 1, below. USCIS can administer this program on its own and can do so in a more streamlined and efficient manner by not relying on DOL to conduct an unnecessary review of the same materials. USCIS already requires employers to certify compliance with the rules

[1] The exact wording on CIS Requests for Further Evidence (RFE) is as follows: "Although the U.S. Department of Labor (DOL) has approved your Application for Temporary Employment Certification (ETA Form 9142), such certification merely serves as advice to U.S. Citizenship & Immigration Services (USCIS) on whether or not U.S. workers are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers. Certification by DOL does not establish that the petitioner has met USCIS requirements for H-2B classification."

governing the H-2B program and can enforce or modify these rules where it deems necessary to protect fully the balance between providing the labor force that employers need and protecting qualified, willing and able U.S. workers, including:

- requiring employers to place job orders with the applicable State Workforce Agency for posting on an online jobs database without having to place duplicative newspaper advertisements, but at the same time not rejecting U.S. worker applicants for improper reasons;
- requiring employers to comply with the terms and conditions of the job order for all H-2B workers and U.S. workers hired in response to recruitment efforts during the petition process and to perform the specific job for which the employer seeks foreign workers;
- requiring employers to pay the prevailing wage to H-2B workers;
- prohibiting employers from laying off similarly employed U.S. workers for improper reasons;
- prohibiting H-2B workers from staying in the U.S. indefinitely in H-2B status;
- permitting employers either to name beneficiaries who will receive the H-2B visas or use "blanket unnamed" petitions for a specific number of unidentified H-2B visa beneficiaries;
- permitting employers to file the required documents through agents as their authorized representatives;
- allowing "staggered crossings" by which the H-2B workers covered by a single USCIS-approved petition may enter the U.S. at separate times during an employer's period of need;
- defining the location(s) where the work will be performed, including on approved itineraries for employers operating at multiple locations; and
- using a defined list of approved "sending" countries from which H-2B workers may be hired.

DHS and USCIS are properly equipped to process employer petitions under these rules and should resist DOL's efforts to introduce unauthorized and improper restrictions on employers, as proposed in DOL's invalidated 2012 H-2B rules. Some of those restrictions, which have been struck down in Federal Court and have never taken effect, include requiring employer "registration" before participating in the H-2B program and limits on "normal and accepted qualifications and requirements" for the terms and conditions of a job.

While DHS and USCIS are statutorily authorized to consult with DOL (or any other agency) with respect to the H-2B program, there should be very little consultation required. Employers could provide USCIS with the description of job duties, the number of workers for whom they are seeking H-2B visas, the start and end dates of the job opportunity, the location of the work to be performed, evidence of recruitment efforts directed at potential U.S. employees

and rely on USCIS to determine the proper prevailing wage for the position, submit a prevailing wage consistent with prevailing wage determinations under the Immigration and Nationality Act, or rely on third-party wage surveys that meet USCIS standards.

Since DOL currently undertakes initial processing of H-2B petitions before they are reviewed by USCIS, much of the timeline for employers to commence the process is governed by DOL's invalidated program regulations. USCIS could easily update its regulations to direct employers to file their petitions with the agency by a certain date prior to their start date of need for H-2B workers, so that USCIS would complete its review by at least 30 days before that date. Communication between the employer and USCIS would be via electronic means (fax or email) or overnight mail, to expedite the process. To the extent that USCIS deems it necessary, an internal administrative appeal process on employers' requests for review of denials of petitions could be established as well, with specific deadlines for the employer to request review. USCIS need not - indeed, absolutely should not – cede its decision making authority with respect to H-2B petitions to DOL or any other agency.

Enforcement

USCIS' 2008 H-2B rules already set forth the agency's enforcement authority with respect to the petition process. DOL Field Assistance Bulletin No. 2007-1 explicitly acknowledged that agency's lack of enforcement authority, "The INA and its implementing regulations provide [DOL's Wage & Hour Division] WHD **no** direct authority to enforce the conditions of H-2B visa petitions, including the prevailing wage." (Emphasis in original). Of course, the Wage & Hour Division has considerable enforcement authority with respect to other statutes, including some that may apply to certain H-2B workers such as the Fair Labor Standards Act, the Migrant and Seasonal Worker Protection Act and the Occupational Health and Safety Act. USCIS should possess and retain its own authority to conduct employer audits and take all necessary steps to ensure employer compliance with the USCIS regulations governing the H-2B petition process, including through appropriate penalties for noncompliance.

USCIS can also issue more specific rules over ancillary issues of H-2B employment and should resist DOL's repeated efforts to inject itself into such regulations. DOL will likely try to include in the IFR its rejected 2012 rules as to reimbursement by employers for inbound or outbound employee travel, the provision of housing allowances, and concepts taken from H-2A regulations such as the 50% rule for hiring new domestic workers after guestworkers have already started working. You should resist these efforts.

You should also reject other provisions likely to be sought by DOL. Neither the "job order" filed with the State Workforce Agency nor the petition filed with USCIS should be considered a contract between an employer and an employee. In addition, an employer's hiring of U.S. workers in response to the H-2B program's recruitment requirement should not reduce

the number of visas available to the employer. These concepts were not intended by Congress to apply to the H-2B program and should not be embraced by DHS/USCIS.

Conclusion

Congress has placed responsibility for the H-2B program with your agency. While USCIS has arguably acquiesced as DOL has gradually assumed an ever larger role in this program, USCIS should be the agency that operates and enforces the H-2B program. USCIS should operate this program without DOL rulemaking or decision making. Doing so could result in a far more efficient program – eliminating both redundant employer filings and the incessant litigation that arise from DOL's unauthorized insistence on carving out a role in the program. With very little additional rulemaking, USCIS could operate a streamlined and efficient H-2B program that successfully balances small and seasonal employers' need for labor with protection of qualified, willing and able U.S. workers' interested in finding employment. It is time to ensure the H-2B program resides in its proper home, to put an end to the endless waves of litigation against DOL, and to move forward with a strong and vital program that helps many small and seasonal businesses to survive and to thrive.

Very truly yours,

Bob Goodlatte
Chairman
Committee on the Judiciary

Trey Gowdy
Chairman
Subcommittee on Immigration

Mike Bishop
Member

J. Randy Forbes
Member

Ryan Zinke
Member

Kristi Noem
Member

Billy Long
Member

Lynn Jenkins
Member

Pete Olson
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Raul Labrador
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Barbara Comstock
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Robert Hurt
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Patrick Meehan
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Bradley Byrne
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Kevin Yoder
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Bill Flores
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Andy Harris
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Scott Rigell
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Scott Tipton
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Blake Farenthold
Member

Rob Woodall
Member

Dave Trott
Member

Rick Crawford
Member

John Ratcliffe
Member

Chris Gibson
Member

Earl L. 'Buddy' Carter
Member

French Hill
Member

Steve Womack
Member

Bruce Westerman
Member

Leonard Lance
Member