COLORADO FARM BUREAU

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Mr. Thomas Dowd
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: Regulatory Information Number 1205-AB55

Dear Mr. Dowd:

Colorado Farm Bureau (CFB) is Colorado's largest general farm organization with members engaged in all aspects of farming and ranching, including fruit and vegetable production (both processed and fresh), livestock, dairy, and row crops. We submit this statement in response to the department's solicitation for comments on the above-referenced rulemaking, which would revise the existing regulations that govern the H-2A program.

Colorado is ranked 16th in the nation in agriculture production. In 2007, Colorado's farmers and ranchers exported a record $1.39 billion in agricultural goods. Colorado needs approximately 9,000 – 10,000 seasonal workers annually but currently only about 1,000 workers are obtained through the H-2A program. Colorado's farmers and ranchers for many reasons continue to face worker shortages. In order that our agricultural producers are able to obtain an adequate, legal workforce, we strongly support revisions to the current H-2A program. Colorado Farm Bureau, while submitting these comments on behalf of our state organization, also strongly supports comments submitted by the American Farm Bureau Federation.

INTRODUCTION

Revision of the H-2A program is a matter of critical importance to our members, many of whom use the program despite its manifest and well-documented infirmities. Many more of our members have tried to utilize the program and failed, either in whole or in part, for a variety of reasons. In some instances, the department has refused to qualify farmers (such as dairy producers) for participation. In other instances, growers who have wanted to use the program have hesitated to do so after witnessing the tactics of self-styled "worker advocates" who, motivated by antipathy to guest worker programs in general and H-2A in particular, have resorted to litigation to frustrate the public purposes of the law. In still other instances, farmers are forced under H-2A to pay an adverse effect wage rate (AEWR) that is significantly higher than prevailing wages paid to citizen workers under current labor markets. Thus, attempting to use H-2A would mean adopting a very uncompetitive labor cost structure. Small- and medium-sized operations with short growing seasons face particular challenges that the existing program cannot meet.

The list of deficiencies, costs and burdens of H-2A is long, well-known and beyond dispute. These failings, in fact, are so numerous that they cannot be remedied by one rule, although we commend the department for undertaking this effort. At the same time, we must caution the department, as it embarks on this effort, not to encumber the program further and make it more expensive or harder to use. We elaborate below on specific aspects of the proposed rule that we believe may prove problematic for potential users of the program. The H-2A program must be made more responsive to growers' needs if it is to succeed as Congress intended. We want particularly to note that the program, implemented with a one-size-fits-all approach, could further drive consolidation in the agricultural sector at a time when there is growing consumer demand and acceptance for locally grown produce. There is a rising fear among growers that an expensive, bureaucratic or inflexible program will impede, if not make impossible, their ability to meet challenges in the marketplace. These growers, who may have smaller farms or produce crops with shorter growing seasons or have only relatively brief demand for hired labor, will be forced fundamentally to alter their operations or go out of business. Transitioning from such a system to the kind of formalized, structured recruitment patterns mandated in any H-2A program will require a wholesale change in how such a farmer does business. It is open to question whether the H-2A program can be implemented in a way to meet growers' needs. For some, recruitment demands, also pose a significant challenges to operations. Having to grapple with the demands of the 50 percent rule present a challenge; facing potential lawsuits for the first time from "worker advocates," who dislike the H-2A program, present an additional financial risk. While the use of associations and master applications may eventually provide a mechanism for adapting to the program, such changes simply will not happen overnight.

Each of these examples underscore the need for a revitalized, reformed H-2A program that is flexible, adaptable, and responsive to the needs of growers around the country who grow different crops, experience different needs and have a different history in dealing with labor and worker issues. The fundamental purpose of H-2A, we emphasize, is to help keep farmers *in* business, not to force them out of business. A critical measure of the department's success in effecting a revitalized, streamlined, reformed H-2A program will be its ability to meet the needs of all components of agriculture – farms that are small as well as large; extensive operations that utilize workers for many months and those that need workers for only a few days or a few weeks; and growers in all regions of the country.

Those who work in the United States should be those who are authorized to be employed. While critics of guest worker programs seem to chafe at the mere notion that such programs exist, it is beyond dispute that Congress feels the H-2A program has an appropriate role to play in providing workers to agriculture without limitation. Provided no eligible domestic workers are available and the employment of H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers, Congress has expressly approved use of the H-2A program.

Hobbled for years through regulatory and judicial hurdles erected by its critics, the H-2A program is at a crossroads. It has the potential to play a vital and supportive role in meeting the needs of U.S. agriculture. It must be allowed to do so and meet the goals set for it by Congress. The agricultural sector as a whole cannot move forward, cannot grow, cannot thrive without access to a legal supply of labor. This is especially true for small- and medium-sized operations with short growing seasons.

H-2A can play a vital role in efforts to assist the sector but those who have not been able to reconcile themselves to the H-2A program have a stark choice. They can work to improve the

program to help keep agricultural production in the United States or they can continue their war of attrition and in so doing send U.S. agricultural production outside our borders.

With the advent of new policies such as the proposed "no-match" rule and new state statutes mandating the use of E-Verify, need for a functional H-2A program is greater and growing more acute. If we are to shore up U.S. agriculture's health and not jeopardize billions of dollars of U.S. production – much of which occurs in rural areas and helps to sustain rural communities and their economies – it is essential that the United States have a stable, legal supply of labor.

This reality, which is occurring today in farms and ranches of America, stands in stark contrast to the perspective of "worker advocates" who have already commented to the department. These interest groups do not support the H-2A program. They are clearly entitled to such a viewpoint. That viewpoint, however, is wholly inconsistent with the department's mandate, at the core of which is the obligation to adhere to congressional intent to provide U.S. farmers and ranchers the opportunity to obtain the labor they need when domestic labor is not available. That approach must inform the rule the department promulgates to revise the H2-A program and its ultimate success will depend on how well the department meets that challenge.

PREAMBLE

According to the department's own estimate, H-2A provides approximately 6% of the agricultural work force. Unfortunately, however, with no data, no proof, and no evidence whatsoever to buttress its claims, the department catapults from what is a seemingly innocuous statistic to making a series of unfounded statements that have no place in the administrative record. These assertions mischaracterize hiring practices in the sector and the conduct of agricultural employers while paying no attention to Federal law and what actually occurs today in businesses across the country. We urge the department to correct the docket on this fundamental point.

In its preamble to the rule and stating its predicate for reforming the program, the department makes the following statements:

> *Facing a shortage of available U.S. workers, agricultural employers have been left with the untenable choice of either (a) attempting to legally employ temporary foreign workers through an H–2A program that is widely decried as dysfunctional, but risking losing crops if inefficient program administration results in the workers arriving too late for harvest; (b) using illegal workers, and incurring the risk that the workers, and consequently the crops, will be lost to immigration enforcement; or (c) not hiring any workers at all—in effect, ending U.S. farming operations.*
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> *It is entirely unacceptable, but perhaps unsurprising, that many agricultural employers have chosen in recent years to take their chances with undocumented workers—if for no other reason than a lack of viable alternatives. The willingness of agricultural employers to hire illegal workers has created a continuing economic magnet encouraging illegal workers to enter the U.S.…*
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> …..
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> *Consequently, the program* [i.e., H-2A] *continues to be regarded with trepidation by many agricultural employers who continue to make the unacceptable choice to employ an undocumented workforce rather than face the program's many complexities.*

At the outset, the department has recognized a reality: there is "a shortage of available U.S. workers" and while farmers are engaged in a continual search to employ domestic labor, that labor is simply not a "viable" alternative. The department, however, cannot jump from these facts to conclusions that paint with a broad brush the conduct of agricultural employers. In evaluating job applicants, an employer is prohibited by law from discriminating against individuals based on citizenship or national origin; the employer must accept documents proffered to him or her in the I-9 process if those documents appear reasonably genuine on their face. An employer is prohibited – at the risk putting him- or herself in legal jeopardy with the US Department of Justice – from requesting additional or different documents in such circumstances. We disagree with the department's assertion that agricultural employers "make the unacceptable choice to employ an undocumented workforce." They obey the law as written by Congress in 1986. The defects in that law have in large measure brought us to the predicament in which we find ourselves today; but defects in the statute are not the same thing as attributing to agricultural employers motives or actions that have no basis in fact.

The department would be well advised to consult websites operated by two of its sister agencies, the U.S. Department of Justice and the U.S. Department of Agriculture. Both speak to the legal obligations that attach to agricultural employers. Had the department consulted these websites before drafting the NPRM, we feel confident it would not have used the language above, which misstates the decisions made by agricultural employers.

The Department of Justice states:

> *Employers must permit employees to present any document or combination of documents acceptable by law. Employers cannot prefer one document over others for purposes of completing the I-9 Form, and cannot require non-citizens to show particular documents issued by the Department of Homeland Security (or the former Immigration and Naturalization Service (INS)). Authorized aliens do not all carry the same documents. For example, not all aliens who are authorized to work are issued "green cards." As long as the documents are allowed by law and appear to be genuine on their face and to relate to the person, they should be accepted. Not to do so may constitute unlawful discrimination.*
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> ……
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> *If an employee's name and SSN don't match SSA's records, doesn't that mean the employee is not authorized to work?*
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> *No. Just because there is a mismatch between your records and SSA's records, you should not assume that the employee lacks work authorization. …You should not use the mismatch letter by itself as the reason for taking any adverse employment action against any employee. Doing so may put you in violation of the antidiscrimination provision of the immigration laws, the equal employment opportunity laws, or the labor laws.*

Agricultural employers are no different from other employers in the economy: they must adhere to the law and are prohibited from discriminating against prospective employees. They do not choose to hire undocumented workers. Documents may be inauthentic or otherwise fraudulent, but if they appear reasonably genuine on their face farmers and ranchers must accept them and cannot demand more or different documents. We refer the department to the

statements of the Department of Justice above: "Employers must permit employees to present any document or combination of documents acceptable by law."

We would not dispute the view that it is agricultural employers' adherence to the law that has exacerbated the issues facing us today; one result has been to magnify problems with the H-2A program. In the decade of the 1990's, a series of seemingly discrete yet interconnected events unfolded that served to bring us to the situation in which we find ourselves today. Early in the decade, the department modified its methodology governing the AEWR, in effect ratifying a broken mechanism that more and more severed the link between actual agricultural wages, which are driven by market forces, and the department-imposed AEWR, that reflected an academic approach having little to do with actual wages paid in the economy. For nearly two decades, the Federal government turned a blind eye to the increasing number of individuals entering our country or remaining here without authorization, most of whom came seeking economic opportunity, many in the agricultural sector. The United States at the same time, through NAFTA and other international agreements, signaled that its market was open to foreign-based growers.

That confluence of political, policy and economic forces has driven the agricultural economy for many years. Workers have pursued economic opportunity. As the market has grown, wages and productivity have risen. The USDA's National Agricultural Labor Survey shows that the average hired worker wage in 1985 was $4.50 per hour, a wage close to that of the minimum in the general economy and encompassing a limited benefits package. By 2005, the wage had increased to $9.50 per hour with an improved benefits package that pushed the average cost per worker to $11-12 per hour (compared to a national minimum wage of $5.15). Wages have risen even higher in more recent years. In 2007, the average wage in agriculture was $10.20 per hour. (It must be noted that labor costs for the H-2A program are well above those in the market as a whole. A grower who uses H-2A pays – in addition to the AEWR, which almost by definition exceeds the prevailing wage – recruitment costs, transportation costs, fees associated with border crossing, and housing costs.) Additionally, it is clear, when contrasting the U.S. agricultural wage structure with some of our foreign competitors, how market forces have been at work.

One last item bears mentioning in connection with the rule's Preamble. In this section of the proposal, the Department mentions, in conjunction with housing inspections, that in order "[t]o bring the program back into compliance with the law and ensure that determinations are made no fewer than 30 days prior to the first date of need, the proposed rule would alter the current H–2A housing inspection procedures by adopting procedures that are currently used to inspect housing for U.S. workers under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA)."

The department should clarify and re-affirm in the final rule, in clear and explicit language, that no provision of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) applies to the H-2A program. Existing law states clearly that MSPA does not include any "nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a)" [i.e., the H-2A program]. While it may not be the department's intention to introduce ambiguity into these two different statues, there is a well-founded fear among H-2A users that "worker advocates" will use any opportunity they can find in the rule to have a friendly court superimpose MSPA provisions on the H-2A program. The department should assure that the final rule does not provide any legal grounds for questioning an explicit exception in existing law.

Requests for Comments

1. Training and Educational Outreach Initiatives

In its preamble describing the new, attestation-based process, the department invites comment on a timeline for its anticipated training and educational outreach initiatives. CFB recommends that, once the final rule is promulgated and published, the department should undertake a vigorous and extensive outreach and education program. Using H-2A for many growers will be a new experience, entailing new and different obligations; some may have to modify how they operate. It will be critical for the department to do extensive, immediate and thoughtful outreach to growers who want to utilize the program. As the nation's largest general farm organization with a network in every state in the country as well as Puerto Rico, Farm Bureau is prepared to work with the department in facilitating such an educational, outreach campaign. One of the most critical aspects of such an outreach program is to inform growers how to respond to the threat of litigation which is a constant fear for users of the program. "Worker advocates," having made no secret of their hostility to the program, have indicated their willingness to sue growers who want to use H-2A. The department should provide counseling, advice and practical guidance to growers who will undoubtedly face legal threats from "worker advocates" on how they can utilize the program successfully while avoiding such legal snares. The department should also provide ample and thorough education to growers on the possibility of random audits and their obligations under the regulations to assure that they are in compliance with all program functions.

2. Electronic Filing

The department invites comments, in particular from H-2A employers, on the concept of an electronic filing process. CFB supports a filing process that is accessible and easy for growers to utilize; such a process, however, may need to be phased in for employers over a period of time. It is important to recognize that many farmers are small businesses. These are not sophisticated, large operations with large human resource departments or extensive legal staffs advising them on the intricacies of Federal programs. For some growers, electronic filing may entail little capital expense or additional training; for others, it may constitute a transition to a system they cannot readily and quickly adopt. Any mandate for filing must take into account the needs and requirements of growers: as a rule of thumb, the department should be guided by what will make the program more functional from the standpoint of the end user (the H-2A grower), not the department. While in principal CFB believes electronic filing may prove beneficial, if the department decides to impose specific form submission requirements on H-2A growers, it should ensure that its education and outreach program (addressed in #1 above) provides detailed and constructive guidance to growers on how the new H-2A program will work, registration and other administrative actions required under the program, while providing an ample transition period for such requirements to be rolled out.

3. Wage Protection

In proposing to revise its methodology to compute the AEWR, the department also proposes mandating that employers pay at least $7.25 per hour, regardless of the methodology ultimately chosen. For years, employers who utilize the H-2A program have been required to pay wages that have been far in excess of those paid in the market, ostensibly on the grounds that such a level was necessary to prevent any adverse effect on the wages and working conditions of similarly occupied U.S. workers. As a matter of principle, CFB disagrees with the notion that we should perpetuate a system that effectively penalizes employers, that discourages participation in the H-2A program, or that embeds within the program disincentives that impede the program's success. Such disincentives have an impact in the market, where employers may be forced to

alter or modify planting and marketing decisions. We recognize, however, that it may be necessary for the department to adopt some such 'floor.' Charges already have surfaced from program critics that the new methodology would "slash" workers' wages, although the truth is that the new system would bring H-2A much closer to market reality while still protecting the wages and working conditions of similarly occupied U.S. workers. Recognizing that the groups that perpetuate such charges will seek whatever political or judicial means they can to defeat the department's initiative, we would not oppose a floor of $7.25 per hour as the AEWR. H-2A is a voluntary program; no foreign national is obliged to participate, and if he or she believes the wage is not fair compensation, he or she can decline to participate. It is farcical for anyone to characterize such a change as "slashing" workers wages when in fact more than 9 out of 10 hired farm laborers do not participate in the program and thus do not benefit from the artificially contrived and inflated wage structure that characterizes the existing H-2A program.

4. 50 percent rule.

The department invites comment on the costs and benefits of the 50 percent rule, the merits of retaining or eliminating the rule, as well as possible alternatives that might be effective in protecting U.S. worker access to job opportunities. The actual benefits of the 50 percent rule for domestic workers are, to all practical intent, illusory. CFB strongly supports eliminating the rule entirely. Such an approach would signal a substantial improvement in program operations. The department has a statutory obligation to protect the rights of U.S. workers while implementing the program. By definition, it is necessary to strike a balance between the priority to be given to U.S. workers and the right of an employer, when he has met his legal obligations, to employ H-2A workers. The current 50 percent rule, while seemingly a provision to protect U.S. workers, is more disruptive to farm operations and a disincentive to program participation than it is a true protection for workers. There is no reason to mandate that a grower's obligations to find and recruit eligible US workers should extend past the recruitment period; imposing such an obligation serves only to disrupt operations of the producer and does very little to protect US workers. We will speak later in these comments to the nearly fruitless endeavors of SWAs in referring workers for employment. The fact is, and all available data support this view, relatively few US workers desire employment in agriculture. The work is arduous, episodic, taxing, requires relatively little skill and virtually no education. Within the U.S. economy the pay – while increasing – is relatively low. These jobs provide tremendous economic opportunity for migrant workers but are not perceived as offering the same benefit to US workers. In fact, approximately 10 million individuals in the U.S. economy today choose to work in jobs which pay them *less* than they could earn in agriculture. The 50 percent rule provides virtually no benefit whatsoever to US workers yet its presence has clearly been a disincentive to program participation. It should be abandoned.

5. Payment of Inbound and Outbound and Subsistence Costs

The department in its NPRM notes that it has retained existing requirements that impose on employers the obligation to advance transportation and subsistence costs to H-2A workers but invites comments on "the costs and benefits to employers and workers of continuing to require employers to pay for the inbound and outbound transportation and subsistence costs of H-2A workers." This is a critically important issue to the program. We strongly urge the Department not to require immediate reimbursement of such costs to workers. The history surrounding this matter, exemplified in *Arriaga v. Florida Pacific Farms*, clearly demonstrates that within H-2A there must be a reasoned, valid balance between the benefits that inure to employers and employees.

"Worker advocates," whose antipathy for H-2A is well documented, have used creative legal arguments to superimpose on the H-2A program provisions in the Fair Labor Standards Act (FLSA). Thus, while the department's regulations would only require such reimbursement when the worker completes 50 percent of the contract period, reinterpreting that provision through the prism of the FLSA has had the effect of requiring employers to advance those costs at the first pay period. The practical effect of such a practice is to provide a financial incentive to workers who do not wish to complete the contract.

The department needs to strike a reasoned and balanced approach that reflects reality. Utilization of H-2A workers is clearly a benefit to the employer but not to the employer alone or even predominantly. As in any economic relationship, both parties benefit. The department's regulations should reflect that fact. We urge the department not to require employers to advance transportation and subsistence costs to H-2A employees during the employees' first pay period. While there may be some concern that withholding reimbursement to the middle of a contract goes to the other extreme, we believe the department should assure that whatever policy is finally adopted should reflect the mutual benefits that are received by both the employer and the employee.

6. Other parts of agriculture that should be included

In its section advising that it will expand the definition of agriculture to include logging (a change we support), the Department asked "whether there are other businesses that should be similarly included within the definition of agriculture under this program." Listed below are additional segments of the agricultural economy that we strongly recommend be included for participation of the H-2A program.

(a) Dairy cattle and Milk Production [NAICS Code 112120] – The H-2A program is currently foreclosed to a large and vital component of American agriculture – dairy producers. Nationally, this segment of agriculture accounts for over 100,000 workers by some estimates and production equaled $23.4 billion in 2006. It is a vital component of US agriculture and its health affects other segments (including grain production). In Colorado, the dairy industry has grown significantly as operators are finding a more favorable regulatory regime than in other states. At the same time, this growth in Colorado's dairy industry has increased worker demand. Dairy represents a substantial portion of all hired labor in the sector nationally, is a growing portion of hired labor in Colorado and deserves inclusion in the H-2A program. Moreover, permitting dairy to qualify for H-2A would have significant collateral benefits.

(b) Packing & processing [NAICS code 115114] – Farm Bureau wishes to register its strong support for the definition of 'agricultural services' and 'agricultural labor' to include packing and processing in its regulations. We strongly support this change as a recognition of the pivotal role such workers play in agriculture. Many such packaging operations, which are seasonal in nature (particularly given the attributes of the fruit and vegetable season), are integral to many seasonal agricultural operations and are a critical component to assure the profitability and viability of many farming and ranching operations. We strongly urge the department to ensure that such activities may utilize the H-2A program.

Lastly, we want to point out that this rulemaking raises issues that are fundamental not only to the H-2A program but to agriculture as a whole. In its review of comments filed to this docket, the department may well receive suggestions and recommendations that, commendable in themselves, may go beyond a single rulemaking proceeding. Where necessary, a supplemental NPRM should be issued. Just as importantly, we encourage the department, after its review of the H-2A program, to identify those specific changes that require legislative reform

and forward those changes to Congress without delay. While Congress has before it a wide range of immigration issues, it would benefit from the department's analysis and judgment as to ways in which the H-2A program can be improved and broadened to encompass all of U.S. agriculture.

29 CFR 655.102 Required pre-filing recruitment

In its NPRM, the department has proposed that growers retain documents for five years. We question that such a long period of time is necessary to effectuate the needs of the program. We believe a three-year requirement would be more than sufficient to assure accountability by those who utilize the program.

Most importantly, we urge the department to revise its proposal to eliminate the requirement that growers who are not certified for participation are required to maintain documents. The department would mandate a five-year requirement – even for growers not approved for program participation. As employers, growers already must retain other documents for government purposes (for Social Security, IRS, accounting and other reasons). There is no justification – indeed, the department offers none – for a document retention policy that requires growers who have not been certified for participation in the program to maintain records at all (much less for five years). We believe that those not participating in the program should not bear the burden of retaining documentation and urge the department to remove this requirement.

The department further requires growers, during the recruitment process, to contact former employees as part of the effort needed to fulfill their obligation to determine that no U.S. workers are willing and able to accept employment. A question may arise, in such circumstances, about employees for whom a grower might have received a "no-match" letter from the Social Security Administration. The Department of Homeland Security is now seeking to finalize a rule that would institute a "safe harbor" for employers who have received such letters. The rule now proposed by the Department of Labor affords no guidance to growers on efforts to contact former employees about whom they have received a "no-match" letter. We urge the department to harmonize any requirement with the pending proposal by DHS to assure that, if former employees are contacted and agree to be employed, an employer does not thereby take upon himself legal liability at variance with other obligations that may arise under the "no-match" or any similar rule.

The department in its proposal would lengthen the recruitment period for prospective H-2A employers to begin at least 120 days before the DON. Such a period is inordinately long, not reflective of industry practices, or the nature of the work involved. It does not track well with the representative characteristics of the labor pool that is recruited nor is it likely to succeed in accomplishing the department's goals. There is a recognized record of failure in connection with long-term recruitment, particularly with respect to SWA referrals. We acknowledge that a positive recruitment period is an integral component of the obligations that attach to prospective H-2A users but such a requirement should not be arbitrary, should not defeat the purposes of the act and should not impose burdens on growers that are futile and pointless.

That record of labor availability for agriculture over the last several years underscores in no uncertain terms the shortage of U.S. workers. Given this fact, a 120-day recruitment period is simply unworkable; this stems from the fact that the nature of the work is short-term, the jobs being recruited are episodic and it is not characteristic of workers to commit as much as 2 or 3 months in advance for employment that may not last more than a few weeks. Indeed, this fact has been recognized by the Department of Homeland Security in its companion NPRM to the instant proposal by the department. There, DHS, noting exigencies imposed on employers by

naming beneficiaries far in advance of the DON, states that "Since employers often start the temporary labor certification and petitioning processes several months ahead of the actual date of stated need, *naming beneficiaries that far in advance increases the likelihood that those beneficiaries are unavailable to fill the position*."

Beyond these practical considerations, such a requirement takes little account of the vagaries to which agricultural businesses are subject. We strongly oppose lengthening the recruitment period to 120 days and instead support a much shorter requirement (no more than 60 days) as a more appropriate length of time to demonstrate that employers have fulfilled their obligations under the program. For the sector for which H-2A is predominantly applicable – fruits and vegetables – the ability to predict months in advance when labor will be required is simply impossible. Decisions on when to plant, cultivate or harvest crops which by their nature are perishable are subject to weather, precipitation, judgment by the grower and other factors that simply cannot be shoe-horned into an overly prescriptive regulatory scheme that is too rigid to adapt to such variables. This is a critical, fundamental question that the department must answer affirmatively if the program is to succeed.

Similarly, we believe the requirements articulated in subjection (g), mandating placement of advertisements for 3 separate days, one of which is a Sunday, are overly prescriptive and will do little to further the purposes of the program. Instead, it has the contrary effect of requiring growers to undertake expensive, burdensome efforts which many know will be fruitless in producing labor that will work throughout the contract period.

In its proposed revision, the department proposes placing in regulation the requirement, recently enunciated in its Training and Employment Guidance Letter 11-07 (November 14, 2007), that SWAs must determine the employment eligibility of individuals before referring such individuals to H-2A applicants as part of the recruitment process. Fundamental to the purposes of the H-2A program is to ensure that the rights of eligible U.S. workers to employment be protected. That purpose is undermined when government agencies, through lax or negligent attention to their responsibilities, refer individuals who are <u>not</u> eligible for employment in the United States. We support articulation of this policy in the department's regulations.

29 CFR 655.104 Contents of job offers

The department in its proposal has proposed that an "employer may satisfy the requirement to provide housing by furnishing the worker a housing voucher". Colorado Farm Bureau supports this change and believe it reflects a consensus among a wide group of parties that such an approach is a needed component of H-2A. Such an approach is particularly crucial where some growers who have attempted to construct worker housing have been rebuffed by local county planning commissions. A housing voucher in such instances provides a mechanism to further the goals and purposes of H-2A and still provide workers and employers the chance to make the program work.

One other matter in this section raises serious issues and must be clarified by the department in its final rule.

Based on our reading, we believe the department intends, in 29 CFR 655.104(l) relating to rates of pay, to assure that that piece rates or productivity standards are determined by local, prevailing market conditions. We agree with this approach, particularly given the fact that piece rates can vary a great deal given market conditions, the crop in question, the locality or the business decisions of the grower. With the AEWR derived from OES data, the grower will determine the appropriate wage and skill level for his employees. Piece rates and productivity

standards are not and should not be determined by the CO. More importantly, it is critical that the CO or the SWA not mandate that piece rates and productivity standards be included in the job order.

Existing department regulations do not require publication of piece rates or productivity standards, yet "worker advocates" are attempting to use them in court as a mechanism to challenge employers through lawsuits and to frustrate the purposes of the act. Once the correct AEWR for the position has been established and approved and the grower attests that he will pay the highest of the Federal or state minimum, the prevailing wage, or the AEWR, the program's provisions have been met. The department should state in explicit terms in its rule that a certifying officer (CO) or an SWA cannot require that piece rates and productivity standards be included in the job order.

29 CFR 655.108 Offered Wage Rate

In the proposed rule, the department proposes changing how it calculates the AEWR. This effort should strengthen the ability of the H-2A program to support US agriculture while assisting farmers in filling jobs for which there are no American workers available. Additionally, the proposed methodology holds the prospect of utilizing wages that rule out any negative impact on American wages linked to local labor market fundamentals. The existing process for calculating the AEWR has moved further and further from advancing these core goals since its adoption in the late 1980's due to dramatic changes in the composition of the agricultural workforce.

The existing process for calculating the AEWR is based on a compromise that has outlived its usefulness. The current process depends on an annual survey of farmers conducted by the United State Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS); from this survey is derived an average wage paid to all farm workers across a few broad geographical areas (15) for a few composite occupational categories (2). This emphasis on a broad-gauge measure was deliberate. The last revision in the AEWR calculation in 1987 recognized that agricultural wage surveys could include wages paid to a small number of H-2A workers and illegal workers that were concentrated in a few specific areas and job categories. Hence, the survey reflected, at least in theory, some adverse wage effect. The NASS survey was initially designed to mute the impact of small pockets of H-2A workers and undocumented workers, and it was thought to provide a reasonable estimate of wages for American workers, thus positing for H-2A workers a wage (albeit artificially derived) that would avoid any depression. While there were no definitive measures, the combined H-2A and illegal workforce was commonly thought to be less than 10 percent of all individuals employed in the sector. Hence, agriculture was viewed as being operated with an overwhelmingly American work force and the broad-gauge survey was thought to produce a reasonably unbiased measure of American wages.

Whether the estimate (10 percent) of the H-2A and illegal workforce in the late-l980's was accurate is open to debate. There is a growing body of information, however, that shows that undocumented workers now account for 50 to 75 percent of the hired farm workforce and H-2A workers account for another 5 percent. As a result, NASS's geographic and occupational aggregates no longer offer the remedy they were once thought to provide: minimizing, if not eliminating, the impact of non-American workers. As a consequence, the NASS methodology no longer provides a reliable estimate of the level at which H-2A wages would have to be set to protect an increasingly small (and diminishing) pool of American workers. Moreover, the geographic and occupation aggregates that made sense 20 years ago have become increasingly

counter-productive by moving the AEWR away from the particulars of the local labor markets where H-2A hiring actually takes place.

The proposed shift to using the Department of Labor's Occupational Employment Survey (OES) rather than the NASS survey addresses 3 key issues —

1. How to arrive at a better estimate of what the reference wage should be, recognizing that a large part of the work force is no longer composed of US workers that are legally authorized to be employed;
2. How to provide a survey framework flexible enough over time to adjust to a dramatic drop in the number of undocumented workers in the agricultural workforce as a result of immigration reform; and
3. How to link the AEWR more closely to market conditions where H-2A hiring will take place.

First, the OES's agricultural wage information is based on data collected from farm labor suppliers — individuals who specialize in finding, pricing, and placing agricultural workers with local farm employers. Consequently, the people being surveyed are more aware and knowledgeable of the market for agricultural wages and the supply-and-demand factors, including characteristics of the labor force, that shape the market. The NASS survey focuses on estimating a particular farmer's total labor bill and dividing it by the total number of hours worked on the enterprise to arrive at an average wage. This NASS approach essentially ensures that H-2A and undocumented workers are not filtered out and includes hired workers of any type to arrive at an estimate of the American wages that the AEWR is supposed to protect. While the OES is not perfect in factoring out H-2A and undocumented workers, it is more effective than the NASS survey. If necessary, the guidelines for completing the OES survey for agricultural categories can be strengthened to reinforce reporting for legal American workers only.

Second, the OES has the capacity to evolve over time as reform of the immigration system leads to a greater proportion of the agricultural workforce achieving legal status. Due to the larger sample size of the OES and the labor market knowledge base of those individuals completing the survey, the new wage mechanism will be better suited to adapt to the expansion in the use of the H-2A program envisioned by the department and fill the gap in the agriculture workforce with properly documented workers.

Third, the shift to the OES can address the need to assure that wages of the agricultural work force are pegged as close to market wages as possible, a factor which is critical to assure a healthy agricultural sector. Moreover, this is consistent with ensuring that the H-2A wage does not depress the wages of American workers. However, once this goal of protecting American workers is realized, the challenge becomes one of pricing labor on the most localized and job-specific basis as possible. For example, with the NASS survey based on 15 broad regions, AEWR wages tend to be "lumpy." One set of wages can prevail for multiple states in which the labor supply and demand fundamentals in the local markets differ dramatically. This broad geographic aggregation also means that there can be "fault lines" where defined regions meet and wages differ dramatically over the short span of a few miles, although they essentially depend upon the same labor market.

This same problem is at work across occupations. The NASS system reports one composite occupation based on averaging wages for crop and livestock workers. The end result is that crop workers, who would normally tend to earn less than more specialized livestock workers, must be paid more because of the AEWR specification. Alternatively, the livestock worker, who would normally be paid more, is paid less. The OES can be used to identify 4-6 major categories out of

the 16 categories for which data are collected, allowing a farmer to tailor his H-2A hiring to his specific needs.

OES Implementation

While it is clear that shifting from NASS to OES is a conceptual improvement, the practical details are no less important. The proposed rule does not specifically describe how the OES data will be utilized. Hence, these comments include recommendations on how the OES data should be used to arrive at AEWR's.

Colorado Farm Bureau believes that the underlying principle shaping implementation should be keeping the AEWR tied as closely as possible to market fundamentals. This entails:

1. Taking full advantage of the geographic detail in the OES survey. DOL should specify AEWR's for all the geographic areas surveyed (over 500) consistent with accepted statistical quality controls and the confidentiality rights of the individuals surveyed;
2. Drawing on survey detail to expand the number of farm occupations to possibly six categories (compared to the one category currently utilized by NASS).
3. Drawing directly on the actual survey data to break wages and designate skill levels by geographic area and by occupation using quartiles, with the first quartile including the bottom 1-25 percent workers, the 2nd quartile including workers in the 26 to 50 percent range, the third quartile including workers in the 51 to 75 percent range; and the 4th including workers in the 76 to 100 percentage range. While other DOL activities specify different quartiles, the process suggested here is the simplest and most transparent. The need for experience, special skills, or training stated in each H-2A application would determine where an H-2A worker fell among the quartiles. Jobs would be classified according to the skill and experience required, not on the qualifications of the individual who eventually filled the job. Farmers would be responsible for identifying the type of work in question and in which quartile the worker would fall. DOL's National Processing Center would be responsible for checking to ensure that each applicant has selected the quartile consistent with the job description;
4. Basing the AEWR on the most reliable application of OES data to reflect current market conditions. Based on our reading of the department's current OES data and existing methodology, it would appear that the 2009 AEWR would be based on OES data collected for 2005, 2006, and 2007 through the end of calendar 2007, processed and released in 2008 and used in mid- and late-2008 by farmers making 2009 H2A hiring decisions. Such a methodology would account for the fact that agricultural labor markets can be volatile due to year-to-year swings in production and demand for labor. A 3-year average compensates for this variability. If any adjustment is made to update the data to current market conditions, it should be transparent, consistent with existing OES methodology, be statistically reliable and assure an outcome that comes as close as possible to market conditions.
5. DOL must develop a user-friendly, transparent AEWR website that translates the complex OES regional and occupational information into a simple H-2A wage and skill level format using the quartile distribution. This is imperative for farmers to make informed decisions and allow the H-2A program to function as efficiently as possible.

29 CFR 655.109 Labor Certification Determinations

The proposal states that: "The CO may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an

audit, or otherwise." We wish to bring to the department's attention one particular matter related to certifications that must be addressed before promulgation to assure proper functioning of the program.

Under existing practice, a grower applying for H-2A workers can have the number of his workers reduced or even eliminated based on decisions made by the SWAs or other entities in ways that can cripple his business operations. For instance, it is a common practice for SWAs to refer to employers individuals who have indicated a willingness to accept H-2A employment. The reality is that such a process rarely produces any significant component of a grower's labor needs, much less the complete set of workers the grower requested. In this case, growers can see the number of worker certifications reduced by the number of referrals; in instances in which referrals outnumber requested certifications, an employer can see his entire application denied. When the grower seeks in fact to interview, assess and hire the referrals, however, it is all too often the case that the referrals either fail to show up, do not accept employment or, after accepting it, abandon employment after a brief period.

It is important that the Department build into the H-2A program a mechanism employers may use when faced with such circumstances so that they will have the flexibility to obtain the legal labor they need.

There must be a recognition that the referral system suffers to a large degree from the same symptoms as the agricultural labor sector as a whole: domestic labor is in critically short supply and virtually unobtainable. We urge the department in the strongest terms to explore such an approach in its final rule so that the program can accomplish what it is designed to do.

Another matter that is critical for the department to correct before it publishes its final rule is the associated fee structure. In the rule as proposed, the department has adopted a set of fees that represents an enormous increase in the costs of the program to H-2A users; this increase will be crippling for some growers and an enormous burden for others. It must be significantly modified.

We recognize that the existing fee structure for the H-2A program has been left unchanged for years; we also acknowledge that the program has grown substantially in the recent past, and given the current state of enforcement of immigration law it holds the prospects for significant future growth provided it offers a viable alternative to growers. Thus, it seems reasonable that the department can propose and expect an appropriate increase in overall program revenues. The proposal by the department, however, is far from reasonable or justifiable.

For small fruit and vegetable growers who might utilize workers for only a short, three-week period, such a fee structure is prohibitive. Currently available data indicate that 10 H-2A workers would cost over $10,000 in application fees alone. On top of such fees, there will be border crossing fees, transportation and per diem fees, housing fees and other costs. The cost for a small grower could rise to almost $20,000 dollars before any revenue is gained through harvest of the crop. Such costs rise exponentially for larger growers, who may see their fee costs rise well into six figures before they achieve any profit from the investment.

We recommend that the department in the final rule approve a reasonable increase in fees per worker and per application. We believe it is reasonable to double these fees (viz., $200 per application as opposed to the current $100 per application; and $20 per worker as opposed to the current $10 per worker). Moreover, such a revised fee structure must also retain a cap as the existing fee structure does. We would recommend doubling the existing cap of $1000 to $2000.

We believe such an approach accomplishes the goals of the department in increasing revenues to more closely reflect the costs incurred by the department without critically injuring growers who desperately need a workable guest worker program.

29 CFR 655.118 Debarment

Colorado Farm Bureau has several concerns that relate to the department's proposed expansion of grounds for debarment and accompanying procedures. The department seeks to expand ETA's grounds for debarment and procedures in proposed §655.118 while granting the Wage and Hour Division (WHD) new authority and procedures at proposed 20 CFR §501.20.

The department bases the expansion of grounds for debarment on what it believes has been under-enforcement of the program with the hopes that increased debarment penalties will deter bad actors. Colorado Farm Bureau strongly believes that the new expansion, rather than deterring bad actors, will in fact deter good actors from using the program in the first place. The department has created a debarment scheme that allows a summary Notice of Debarment without notice and opportunity to be heard, nor does it require (with one specific exception) willful conduct or a pattern or practice of unlawful behavior. The debarment procedures bear no resemblance to the due process afforded growers under the certification revocation procedures. Indeed, as written, the department has offered little more than a tautology. Grounds for debarment need not even be "substantial" – the definition of substantial violations is defined as the grounds for debarment themselves. Based upon the proposed regulatory language, a grower can be summarily debarred for one singular action or omission reflecting an activity listed as grounds for debarment. This is an extreme form of punishment that appears intended to eliminate any incentive to use the program. We strongly encourage the department to harmonize its due process procedures with other DOL debarment proceedings.

The preamble also seems to confound the administrative review procedures at proposed §655.115 (relating to revocation of a certification) with debarment. By its nature, debarment is a more serious penalty than suspension or revocation of a labor certification and would traditionally be imposed upon contractors and employers after conviction of a civil offense or crime or upon completion of an investigation showing willful intent and/or a pattern or practice to violate the law along with aggravated circumstances. Debarment may also result in ineligibility to apply for other federal programs. Under virtually any legal proceeding, it is standard for charges first to be alleged to which someone may respond; an action is not taken prior to adjudication of such charges.

The proposal outlines in two sections the conditions upon which the Administrator may debar an employer for "substantial violations" of a material term or condition of his temporary labor certification. First, proposed 655.118 provides grounds upon which an employer may face debarment. Debarment, however, is explicitly "not limited to" the "substantial violations" listed. The existing regulations on which the preamble claims these new proposals are based do contain the "not limited to language." 20 CFR 655.10(g)(i)(A). For the department to reserve to itself unspecified grounds on which it may debar program participants without notifying employers of those grounds removes any semblance of adequate notice or due process and weaves into the fabric of the program a fundamental disincentive to its use. At a time the department is working to broaden acceptance of the program, it must assure that program participants are afforded due and appropriate notice of those standards that must be met and which, when not met, could then and only then lead to debarment. This fundamental defect in the program must be remedied.

Later in the same section, the rule provides for debarment if the employer commits one or more acts which have the effects listed in subsections (i)-(v). We agree with the principle that

substantial program violations ought to meet with stiff penalties. Debarment, however, ought to be a penalty of last resort. We believe it is more appropriate for the regulation to provide that one act or omission is in itself not grounds for debarment; rather, such liability (viz., debarment) should be based upon a pattern or practice of unlawful actions. Moreover, the grounds for debarment in subsections (i)-(iii) and (v)-(vi) are based upon employer actions or omissions that "reflect" unlawful activity, not that the actions themselves are unlawful.

Proposed 29 CFR 655.118(b)(1)(i) allows for debarment if the employer acts in a manner that is "significantly injurious …" There is no explanation within the rule as to what is "significantly injurious" or in what context such a judgment could be reached other than the list of activities. Is a 10% reduction in wages significant? Is it 1%? How will injury to working conditions be measured? How is this undefined measurement isolated from other unrelated factors that may have a negative impact upon the workers' wages, benefits and working conditions? What if the employer takes actions that have a negative impact on wages etc., but are otherwise lawful activities? What if the employer's actions are not willful? With respect to the newly added grounds for debarment (viz., impacts upon similarly employed workers), we believe the department has an obligation to spell out how an employer would have knowledge that his actions may impact workers employed by other H2A employers. The language provided in the proposed rule does not provide the employer with sufficient notice of what activities will result in debarment, and it is fundamentally unfair to impose a penalty on a regulated party when the party is not given fair and adequate notice as to what standard applies, violation of which would invoke the penalty in question. We agree with the principle that workers' rights must be protected, and we do not countenance flagrant violations by 'bad actors.' We believe, however, that fundamental due process requires that the standards expected of program users be clear, precise and known beforehand before they can be applied.

In a similar fashion, the proposed 29 CFR 655.118(b)(1)(ii) uses "significantly" to define the level of violation required. Is an employer subject to debarment if one U.S. worker is not hired for other than job-related reasons? What if the failure to hire is not willful? How is this standard different from the standard used to revoke a labor certification? In order to justify debarment, the department needs to explain why these activities, without willfulness or a pattern and practice are additional grounds for debarment.

Further, proposed 29 CFR 655.118(b)(1)(vi) allows for debarment for employment outside the area of intended employment. While such activity is unlawful, the regulation allows for debarment for what could be an otherwise *de minimis* action without evidence of a pattern or practice of unlawful conduct. What if the employee agrees to do the work during the course of his authorized work period? What if the work is only for 30 minutes? Some minimal standard must be established for using these factors as grounds for debarment. Debarment for a single action in this category will deter many growers who will fear that an unintended mistake will result in debarment.

We are similarly concerned about the employer's lack of opportunity to rebut allegations of improper conduct before the Notice of Debarment is issued. The Notice is a final action subject to appeal. In its preamble relating to §501.20, the department refers to procedures found in part 655. Assuming the department is referring to §655.110, the substantial violations in that section do not mention debarment. While we understand the Department's desire to streamline the debarment process and provide consistency, this desire does not outweigh an employer's due process rights to a hearing before draconian debarment orders are issued. As the department is well aware, the H-2A program is rife with litigation, allegations, and in some instances outright intimidation by representatives of "worker advocates." The process, as provided in the proposed regulation, would allow parties opposed to the H-2A program to spark investigations not aimed

at improving working conditions but at shutting down an employer's ability to hire H-2A workers when qualified U.S. workers are unavailable.

Finally, the proposed regulation allows for debarment not only of the employer, but of any successor of interest. We do not understand why the department would ban a successor in interest, rather than simply those entities with a substantial interest. A three year debarment in areas without an adequate U.S. labor supply can result in the dissolution of the employer's business. Debarring a successor in interest would place roadblocks on the sale of assets and the business to others who are not complicit in the cause of debarment.

Similarly, the preamble states that the debarment procedures outlined in proposed §501.20 are identical to debarment procedures found in 20 CFR §655. We do not believe they are identical: in fact the proposed language is broader, provides new grounds for debarment, and lack any due process prior to issuance of a Notice of Debarment. Such deficiencies in the procedure proposed by the department raise fundamental Constitutional questions of due process for employers and must be remedied before final promulgation of the rule.

Moreover, the list of grounds for debarment at §501.20(b)(i)-(iii) are broader than those listed in existing 20 CFR §655. Existing regulations require conjunctive activity - that the significantly injurious action, and failure to comply with penalties or a court decision/pattern or practice of actions result in grounds for debarment (see 20 CFR (g)(i)(A)(1) and (2). The proposed grounds for debarment make each activity independent grounds for debarment. Moreover, existing regulations do not list proposed 20 CFR (b)(iii) as grounds for debarment. The grounds for debarment under this section do not require any willfulness, pattern or practice of unlawful activity.

We strongly encourage the department to (1) remove language providing for unlimited grounds for debarment, (2) clarify in the final regulation and its preamble what actions by an employer or their agent are subject to debarment versus other penalties provided in the regulation, (3) require that an employer willfully act and/or engage in a pattern or practice of unlawful conduct before commencing debarment proceedings, (4) allow employers the opportunity to be heard before issuing a Notice of Debarment. The Department's desire to "increase" enforcement, along with the greatly increased fines, will discourage new growers from participating in the H-2A program.

We appreciate this opportunity to submit comments for this important proceeding. If you have questions, please contact Landon Gates at 3033.749.7516 or Lgates@colofb.com.

Sincerely,

Troy Bredenkamp
Executive Vice-President

/lwg