



September 15, 2008

**VIA ELECTRONIC SUBMISSION**

The Honorable Michael Chertoff  
Secretary, Department of Homeland Security  
Naval Security Station  
Nebraska and Massachusetts Avenues, NW  
Washington, DC 20528

Ms. Hiroko Witherow  
Department of Homeland Security  
U.S. Citizenship and Immigration Services  
20 Massachusetts Avenue, NW  
Washington, DC 20529  
Electronic Address: <http://www.regulations.gov> (DHS Docket No. USCIS-2008-0058;  
RIN 1615-AB67)

***Re: Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; Notice of Proposed Rulemaking, 73 Fed. Reg. 49109 (August 20, 2008).***

Dear Secretary Chertoff and Ms. Witherow:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) is pleased to submit these comments to the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (DHS) regarding its Notice of Proposed Rulemaking (NPRM) entitled, *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*.<sup>1</sup>

**The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA

<sup>1</sup> *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers; Notice of Proposed Rulemaking, 73 Fed Reg. 49109 (Aug. 20, 2008).*

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (*SBREFA*).

to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

On August 13, 2002, President Bush signed Executive Order 13272,<sup>4</sup> which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

## **Background**

The H-2B program allows employers facing a shortage of available and legal U.S. workers to have access to temporary non-agricultural workers from foreign countries during seasonal or peak times. This program is predominantly used by small businesses in the landscaping, hotel, construction and forestry industries.<sup>5</sup> The H-2B program is overseen by three Federal government agencies: the U.S. Department of Labor (DOL) issues the H-2B temporary labor certifications;<sup>6</sup> DHS reviews and approves the H-2B petitions for employees (paperwork which includes the certification); and if the petitions are approved, the U.S. Department of State (State Department) issues the H-2B visas to workers at consulates overseas.<sup>7</sup>

Employers have cited two major statutory problems with the H-2B program that can only be fixed with Congressional action. First, the number of foreign workers who enter the United States pursuant to the H-2B program is limited to 66,000 for the entire fiscal year, or 33,000 for each six month period of the fiscal year (winter and summer seasons). The demand for new H-2B workers exceeds this limit, and the capacity for each half of the fiscal year has been reached earlier each year.<sup>8</sup> Second, the demand has increased due to the end of the “returning worker exemption.”<sup>9</sup>

For employers seeking to obtain one of these limited H-2B slots, any delay in the processing time by an agency could jeopardize the chances for an employer to have the necessary workers it needs for the season. During summer of 2008, both DOL<sup>10</sup> and DHS released proposed rules to streamline their H-2B processes to minimize any delays and

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<sup>4</sup> *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

<sup>5</sup> 73 *Fed. Reg.* at 49117.

<sup>6</sup> 20 C.F.R. 655.3(a); 8 CFR 214.2(h)(6)(iv)(A)(1). To obtain a temporary labor certification, an employer must test the U.S. market as to the availability of qualified U.S. workers and pay the foreign workers a salary that will not adversely affect the wages and working conditions of similarly employed U.S. workers.

<sup>7</sup> 73 *Fed. Reg.* at 49110.

<sup>8</sup> *Id.*

<sup>9</sup> National Defense Authorization Act, sec. 1074, Public Law No. 109-364 (Oct. 17, 2006). The Immigration and Nationality Act provided that an alien who has already been counted towards the H-2B capacity during fiscal year 2004, 2005, or 2006 was exempted from such a limitation during fiscal year 2007. However, this provision ended on September 30, 2007.

<sup>10</sup> *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; Proposed Rule*, 73 *Fed. Reg.* 29942 (May 22, 2008).

costs for employers. Small business representatives submitted numerous public comments to DOL, stating that most of the rule's changes would not add efficiencies to the labor certification process, and could create additional burdens and costs to employers obtaining H-2B visas.<sup>11</sup>

Small business representatives that contacted Advocacy supported two provisions in DHS' proposed rule that would make the H-2B process more efficient for small entities. The first change would allow employers who apply months in advance to have unnamed workers in its petition, which provides employers with the flexibility to recruit workers that are actually available on the stated date of need.<sup>12</sup> Representatives also supported another change that would reduce the time that an H-2B worker would have to wait outside of the United States prior to filing an extension, change of status or readmission to the United States (from six months to three months).<sup>13</sup>

### **RFA Requirements**

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the agency is required to prepare an Initial Regulatory Flexibility Analysis (IRFA) to assess the economic impact of a proposed action on small entities. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.<sup>14</sup>

### **DHS' Compliance with the RFA**

DHS completed an IRFA in its proposed rule that was published in the *Federal Register*,<sup>15</sup> and also posted a supplemental "small entity effects" section on regulations.gov.<sup>16</sup> Advocacy is pleased that DHS has reached out to the small business community during the development of an IRFA to understand the impact of this rule on small entities. DHS

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<sup>11</sup> See: Comments from the American Nursery and Landscape Association and the Professional Landcare Network to DOL (Sept. 2, 2008) (*ANLA and Landcare Letter*); the American Hotel and Lodging Association to DOL (July 7, 2008) (*AHLA Letter*); the Associated Builders and Contractors to DOL (July 2008) (*ABC Letter*); the H-2B Workforce Coalition to DOL (July 7, 2008) (*H-2B Coalition Letter*); the Outdoor Amusement Business Association to DOL (July 7, 2008) (*OABA Letter*).

<sup>12</sup> 73 *Fed Reg.* at 49110.

<sup>13</sup> 73 *Fed Reg.* at 49111.

<sup>14</sup> 5 USC § 603.

<sup>15</sup> 73 *Fed. Reg.* at 49117.

<sup>16</sup> *Regulatory Cost Benefit Analysis, Proposed Rule, "Changes to Requirements Affecting H-2B Nonimmigrants,"* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (Aug. 2008) (*DHS Cost Benefit Analysis*).

correctly identified that almost all of employers impacted by this rule are small businesses.<sup>17</sup>

However, Advocacy does not believe that DHS' IRFA identifies all of the costs associated with the proposed changes. DHS only quantifies the cost employers must pay to reimburse H-2B workers' fees, and only discusses alternatives that would minimize costs to small businesses with this provision. Based on its conversations with the small business community, Advocacy recommends that DHS revise the IRFA section to include the additional costs discussed below and develop alternatives that minimize these costs and provide flexibilities to small business.

### **Payment of Fees by Beneficiaries to Obtain H-2B Employment**

Small business representatives are concerned that this rule would require employers to pay potential workers' recruitment or placement fees, resulting in liability and increased costs for small entities.<sup>18</sup> The State Department has received reports in several countries about vulnerable H-2B applicants paying recruiters anywhere from \$2000 to \$20,000 for the opportunity to apply for a visa.<sup>19</sup> In its economic analysis, DHS states that it is "proposing the changes in an attempt to regulate the fees being charged by overseas recruiters." Since DHS "can do little to regulate the activities of recruiters in foreign countries," this rule "regulates recruiters' practices indirectly by imposing obligations on H-2B petitioners [employers] who use such firms."<sup>20</sup> DHS proposes to deny or revoke an H-2B petition if it finds that an employer "knows or reasonably should know that its H-2B employees have been charged a fee by anyone related to their placement."<sup>21</sup> Employers must make "reasonable inquiries" to foreign recruiters, foreign labor contractors and any other party it may work with to obtain foreign workers. Additionally, the employer must reimburse the worker for these costs.<sup>22</sup>

One representative from the National Federation of Independent Business (NFIB) stated that while it is worthwhile to make sure that employees are not exploited due to this program, this rule penalizes small business owners in compliance with the program for the malicious behavior of foreign recruiters.<sup>23</sup> Advocacy had telephone conversations with small business representatives in the landscape industry that were concerned that DHS is creating liability with the higher legal standard of constructive knowledge for employers, who are required "to know or reasonably know" whether or not an employee paid such fees. According to these entities, H-2B employers work indirectly with foreign recruiters and labor contractors and have no way to know about fees that may have been paid throughout the process. Like DHS, small businesses can do little to curb these practices in foreign countries.

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<sup>17</sup> 73 *Fed. Reg.* at 49117. According to DHS' IRFA, approximately 99.9 percent of employers in the construction industry, 95 percent of employers in the forestry and landscaping industry, and 90.8 percent of those in the accommodation and food services industry are small businesses, utilizing the Small Business Administration's size standards.

<sup>18</sup> 73 *Fed. Reg.* at 49112.

<sup>19</sup> *DHS Cost Benefit Analysis*, at 9.

<sup>20</sup> *Id.*

<sup>21</sup> 73 *Fed. Reg.* at 49112.

<sup>22</sup> 73 *Fed. Reg.* at 49113.

<sup>23</sup> Telephone interview with Dan Bosch, NFIB (Sept. 2008) (*NFIB Call*).

DHS' IRFA section estimates that employers can expect to pay a fee of \$500 per employee, and an employer with nine employees will pay \$4,500 under this provision.<sup>24</sup> DHS must disclose how it estimated the cost of \$500 per employee for job placement fees, because the State Department has reported that applicants have paid foreign recruiters from \$2000 to \$20,000.

Small entities have pointed out additional costs from this provision. The regulatory text notes that "the prospective employer would be responsible for the payment of any related indirect fees, attorney's fees, travel agent fees, and fees for assistance to prepare visa application forms."<sup>25</sup> Employers also must pay for "such reasonable transportation expenses to return to their last place of foreign residence."<sup>26</sup> Advocacy believes that all of these costs could result in the payment of thousands of dollars by small entities, and recommends that DHS quantify these costs in the IRFA section. Advocacy also believes that DHS should attribute recordkeeping costs for employers that have to complete "reasonable inquiries" pursuant to these requirements and for the opportunity costs of losing potential employees and scheduled contracts.

Although DHS discussed alternatives for this provision, small business representatives have suggested additional alternatives that minimize the burden on small entities. One business representative who telephoned Advocacy suggested that DHS change the legal standard so that an employer would only be liable for actually "knowing" that a worker paid a recruiter or labor contractor, which may decrease employer confusion and liability. Advocacy also recommends that DHS target the foreign labor contractors and recruiters, who were responsible for the abuses to the H-2B program. A representative from the American Hotel & Lodging Association (AHLA) suggested that the State Department list the "good" foreign recruiters and foreign labor contractors, so small business can certify that they worked only with these law-abiding contacts.<sup>27</sup> The State Department can also create a list of "bad" foreign recruiters and foreign labor contractors that have been prosecuted for their actions towards H-2B workers. DHS should also discuss the procedures that employers should take to enforce this provision or to avoid this dilemma in its Small Business Compliance Guide.<sup>28</sup>

## **Employer Notification Procedures**

Advocacy recommends that DOL and DHS reconcile their conflicting requirements for employers to notify DHS of an H-2B worker no-show, termination, or abscondment (if a worker leaves). The DOL rule would require that H-2B employers notify DHS in writing within 48 hours when a worker is terminated or leaves prior to the end of the specified employment period.<sup>29</sup> The DHS rule requires that employers notify DHS within 48 hours if: 1) an H-2B worker fails to report for work within five days after the employment start date, 2) the services for which H-2B workers were hired is completed more than 30 days early, or 3) an H-2B worker leaves the worksite (for a period of five consecutive work days

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<sup>24</sup> *DHS Cost Benefit Analysis*, at 13.

<sup>25</sup> *73 Fed. Reg.* at 49113.

<sup>26</sup> *Id.*

<sup>27</sup> Telephone interview with Shawn McBurney, American Hotel & Lodging Association (Sept. 2008)(*AHLA Call*).

<sup>28</sup> *SBREFA*, at § 212.

<sup>29</sup> *73 Fed. Reg.* at 29951.

without the consent of the employer) or is terminated prior to the completion of the services for which he or she was hired.<sup>30</sup> The employer must also keep records for one year of this notification. If an employer fails to notify DHS within these timeframes, it risks debarment from the H-2B program for one to five years.

The H-2B Workforce Coalition, whose members include many small business associations, commented to DOL that the 48-hour timeframe to report a worker termination or leaving was burdensome, and is too short a timeframe and may create liability for an employer.<sup>31</sup> AHLA commented that the 48-hour timeframe poses an administrative burden to employers, particularly businesses with multiple worksites that may not immediately be aware of the departure an employee. AHLA recommended a notification timeframe of 30 days when an employee leaves prior to the anticipated end date.<sup>32</sup> The American Nursery and Landscape Association and the Professional Landcare Network also commented that this rule would open up employers to liability if the employee has left to pursue other legal employment. The employer could be sued by a departed employee if the employer incorrectly reports the employee to DHS.<sup>33</sup> Advocacy suggests that DHS consider providing extra notification time for employers or waiving the penalties if the employer can provide a good faith reason for their noncompliance.

DHS' IRFA states that this notification requirement would have some paperwork and recordkeeping requirements, but does not quantify these costs. Advocacy believes that there are other costs such as possible fees and the opportunity costs from employers that are debarred from the H-2B program for a notification failure. Advocacy recommends that DHS add these costs to the IRFA section, and provide further clarification on the employer notification procedures in a Small Business Compliance Guide.<sup>34</sup>

### **Employment Start Date**

Currently, DHS allows employers to file petitions with a start date that is later than what is stated on the approved DOL temporary labor certification.<sup>35</sup> This proposed rule seeks to end this practice, because DHS believes that employers are exploiting this provision to gain an advantage in obtaining H-2B visas from the limited pool of 66,000 visas a year.

Small business representatives in the landscape industry who contacted Advocacy stated that they legitimately list the date of need in their temporary labor certifications to DOL, but need the flexibility to write a different start date in their DHS H-2B petition when unforeseen circumstances occur. For example, landscape businesses face the reality being denied for the winter season due to the H-2B capacity and need to re-apply for the summer season. Employees can also arrive late due to delays at a foreign consulate or an illness. The elimination of this provision restarts the H-2B process again for employers, adding the cost of obtaining a new DOL temporary labor certification when reapplying for a petition

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<sup>30</sup> 73 *Fed. Reg.* at 49114.

<sup>31</sup> *H-2B Coalition Letter*, at 3.

<sup>32</sup> *AHLA Letter*, at 3.

<sup>33</sup> *ANLA and Landcare Letter*, at 3.

<sup>34</sup> *SBREFA*, at § 212. DHS needs to clarify procedures such as how an employer submits this notification (what methods can employers submit this notification?) and how the timing of the notification would work (is it from the date of receipt or mailing?). DHS should also note the fees for non-compliance of this section.

<sup>35</sup> 73 *Fed. Reg.* at 49111.

with DHS. DOL estimates that employers will likely pay in the range of \$500 to \$1850 to meet the advertising and recruitment costs from obtaining a temporary labor certification.<sup>36</sup> Small business representatives note that they must also pay an additional premium processing fee of \$1000 for their application to be considered in time.<sup>37</sup> Advocacy recommends that DHS quantify these additional costs in the IRFA section.

DHS states that there will be an exception for this prohibition, for the “unavailability of the originally requested number of workers.”<sup>38</sup> Advocacy recommends that DHS clarify the vague and confusing term “unavailable worker” in a Small Business Compliance Guide. If DHS denies the petition of a landscape business for the winter season due to the statutory cap, does that mean that this business can take advantage of this “unavailable worker” exception when reapplying for the summer season? Can an employer take advantage of this exception when there is a bureaucratic delay or an employee illness? Advocacy recommends that DHS delete this provision entirely or clarify when unforeseen circumstances meet this exception.

### **Temporary Need**

The proposed rule expands when an employer’s need is considered “temporary,” allowing terms longer than a year if it is a one-time occurrence that does not exceed three years. Currently, the program only allows terms of longer than a year in “extraordinary circumstances.”<sup>39</sup> Advocacy believes that this definition provides flexibility for small entities that may need temporary workers for specific projects that may take more than one year to complete.<sup>40</sup>

DHS will require an employer to retest the labor market for prevailing wages and obtain a temporary labor certification from DOL annually to petition for a multi-year term.<sup>41</sup> As noted in the previous section, an employer typically pays \$500 to \$1850 for advertising and recruitments costs to obtain a temporary labor certification annually, along with a \$1000 premium processing fee. Advocacy recommends that DHS add these costs to the rule’s IRFA section. The H-2B Worker Coalition recommends that this requirement be limited to situations where there is a significant time period.<sup>42</sup> For example, if an employer has a one-time need of 18 months, it should not be required to obtain another temporary labor certification. Advocacy recommends that DHS allow employers the alternative of attesting that they will pay the prevailing wage rates annually in a multi-year H-2B petition, instead of requiring these employers to obtain a temporary labor certification every year.

### **Small Business Compliance Guides**

Advocacy is willing to assist DHS in preparing the Small Business Compliance Guides that are required to accompany a final rule. SBREFA requires DHS to prepare one or more

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<sup>36</sup> 73 *Fed. Reg.* at 29957.

<sup>37</sup> *AHLA Call.*

<sup>38</sup> 73 *Fed. Reg.* at 49112.

<sup>39</sup> 73 *Fed. Reg.* at 49115.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *H-2B Coalition Letter*, at 4 (July 7, 2008).

compliance guides to assist small entities in complying with this rule,<sup>43</sup> and to set up a response system to answer inquiries from small entities about the rule.<sup>44</sup> The information gained through this proposal's comment period and this comment letter will aid the DHS in drafting the compliance guide.

## **Conclusion**

Small businesses utilizing the H-2B program are seeking a legal means to hire foreign workers, and Advocacy commends DHS for proposing changes that streamline the H-2B process. Advocacy is pleased that DHS reached out to the small business community to prepare an IRFA for this rule, but recommends that DHS revise the IRFA section to include additional costs suggested by the small business community. Our office looks forward to working with DHS to develop alternatives that minimize these costs and provide additional flexibilities for small business. Please contact me or Janis Reyes at (202) 205-6533 ([Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov)) if you have any questions or would like additional information.

Sincerely,

//signed//  
Thomas M. Sullivan  
Chief Counsel for Advocacy

//signed//  
Janis C. Reyes  
Assistant Chief Counsel

cc: The Honorable Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs

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<sup>43</sup> *SBREFA* at § 212.

<sup>44</sup> *Id.*