



October 20, 2009

Mr. Thomas Dowd, Administrator
Office of Policy Development and Research
U.S. Department of Labor
Room N5641
200 Constitution Avenue NW
Washington, DC 20210

**Re: RIN 1205-AB55 (also known as ETA 2009-0004)
Temporary Agricultural Employment of H-2A Aliens in the United States;
Notice of Proposed Rulemaking (NPRM)**

Dear Mr. Dowd:

The U.S. Apple Association (USApple) is the national trade association representing all segments of the apple industry. Members include 36 state apple associations representing 7,500 apple growers throughout the country, as well as over 300 individual firms involved in the apple business.

Historically, our industry's highest participation rate in the H-2A program has been in New England and the Champlain Valley of New York as their shorter harvesting season has been a more natural fit with the program. Many apple growers there and elsewhere who used the program in years past stopped doing so due to increased costs, threat of lawsuits and general inefficiencies of the program. The housing requirement has also been a significant impediment for many of our members. Small and large operators have reported that when they were in the program they could not count on the workers arriving on time (due to delay at the consulate or with DHS/DOL).

Participation in the H-2A program has grown significantly over the past three years since many apple growers have faced worker shortages and uncertainty as the result of increased border security and enforcement. We expect the number of H-2A users in our industry will continue to increase over the coming years.

The current H-2A regulatory proposal is the latest episode in a series of regulatory actions that began when the Bush Administration finalized rules that represented a major reform of the H-2A program on December 18, 2008. Because there will be many references to current and past H-2A regulations, in addition to the latest proposal, we will refer to them in these comments by the year they were finalized and proposed. Thus, the Bush rules are hereafter referred to as the 2008 rules. The 2008 H-2A rules revised the prior rules finalized in 1987 that implemented the

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statutory H-2A changes enacted in the Immigration Reform and Control Act of 1986 (hereafter referred to as the 1987 rules). The proposed 2009 rules will replace the 2008 rules if finalized.

The regulatory chaos that has ensued during the past year has made it exceedingly difficult for current and potential H-2A users to understand and comply with the rules of the program. Rather than providing a reliable, affordable, and legal labor force for U.S. agriculture, as intended by Congress, the current regulatory environment discourages use of the H-2A program by employers who might otherwise do so. This is particularly problematic for small growers who do not have the resources to hire and maintain a more permanent work-force nor do they have the resources to hire a staff to navigate the H-2A bureaucracy. In New England, for example, the vast majority of apple growers utilizing the H-2A program need fewer than fifteen workers per season.

We welcome the opportunity to provide comments on behalf of the U.S. apple industry. We are also in full support of the comments submitted by the National Council of Agricultural Employers (NCAE), an Association to which we and many of our members belong.

1. Definition of Agriculture

The 2008 rules expanded the definition of agriculture to include many packing and processing jobs. Many apple growers own packing operations where they pack their own fruit and that of other growers. Prior to the 2008 rule, these packing operations only qualified for the H-2B program, which is very difficult to get into given the current caps. The proposed definition not only eliminates this expansion but further limits the use of H-2A workers beyond the 1987 rule.

Small operations with various crops and multiple methods of sales are common in many apple-growing states including New England, Pennsylvania, Virginia, New York and the midwest. These businesses represent the fastest growing segment of U.S. agriculture and are routinely highlighted and praised by the Obama Administration in “buy local” and “know your farmer initiatives.” Workers on these small operations with retail outlets may, for a short duration, perform tasks such as unloading or loading trucks, refreshing displays or directing cars. The elimination of the wording “typically performed on a farm” limits the use of H-2A workers in cases where something is incidental but not prevailing. This will put smaller operations at an even greater disadvantage. Therefore, we urge retention of the expanded definition of agriculture included in the 2008 rule.

2. Application and Recruitment Process

USApple strongly opposes the extension of recruitment dates from the 1987 rule. Both the 2008 and 2009 rules require employers to advertise for jobs not later than 75 days prior to the date of need; the practical affect of this is to advance the minimum start date of the H-2A process to more than 80 days. This is so far in advance that many growers have not yet made crop decisions for the year. For apple growers, it is very difficult to predict the number of workers needed as well as the start and stop dates accurately that far in advance. Weather conditions throughout the year play a major role in the size of the crop as well as the start and stop dates for pruning, pest management, harvest and other activities.

In addition, recruitment of seasonal domestic workers that far in advance is very unlikely to result in commitments by prospective workers and those that do commit are likely to have changed their minds by the time the start date rolls around. The 2008 rule reduced the 50% rule to 30 days after the date of need. The reinstatement of the full 50% rule coupled with the extended recruitment will make the program virtually impossible to use.

3. Wage Provisions

USApple does not believe that there is a rational basis for retaining an Adverse Effect Wage Rate (AEWR) standard separate and distinct from the prevailing wage for the H-2A program. When the AEWR was first established under the predecessor H-2A provisions of the Immigration and Naturalization Act (INA), there was not a federal minimum wage applicable to agricultural employment. For more than thirty years now, minimum wage requirements have been applied equally to agricultural and non-agricultural employers. Today, the majority of agricultural workers are foreign born and most of them are not work authorized. Even with the overwhelming presence of aliens, including unauthorized alien workers in the U.S. agricultural industry, hourly wages for U.S. farm workers have increased more rapidly than hourly wages of non-farm workers.

The H-2B and H-1B visa programs follow a prevailing wage system and so should the H-2A program. It has been argued that the H-2A program is unique because it is not subject to the caps of the H-2B and H-1B programs and yet for the past several years the H-2B program has actually brought in more workers than the H-2A program. The use of a prevailing wage standard in the H-2A program will not cause wage depression.

The proposed requirement that an employer increase the prevailing wage or piece rate it pays if DOL publishes an increase during the contract period is not applicable to the H-2B and H-1B programs which are subject to the same statutory criterion. DOL has failed to provide any justification for the proposed change. Nor has DOL examined the economic impact of such a change on H-2A employers generally, and particularly small entities. The application in mid season of any such increase would be extremely detrimental to employers, who have budgeted and entered into contracts based upon wages in effect at time of recruitment. This provision should be deleted from a final rule.

The DOL should eliminate the AEWR and adopt a prevailing wage requirement that is consistent with DOL's current prevailing wage determination procedures. USApple encourages DOL to further study the question of an appropriate wage standard for H-2A certified occupations, including consultation with experts, stakeholders and the U.S. Department of Agriculture. It should consider ways in which the USDA farm wage survey may better provide wage data to meet DOL's stated goal of appropriately reflecting farm labor market realities and labor costs.

In closing, USApple firmly believes that a long-term legislative solution is needed to ensure a legal, reliable and stable workforce for the U.S. apple industry. We have long been an active member of the Agriculture Coalition for Immigration Reform (ACIR), a broad based coalition of

groups representing labor intensive agriculture working in support of the AgJOBS legislation. Without such reforms we could see specialty crop production, including apples, shifted offshore, where the workers are available.

If you or your staff should have questions or need additional information, please feel free to contact me at 703-442-8850.

Sincerely,

A handwritten signature in cursive script that reads "Diane C Kurrle". The signature is written in black ink and is positioned above the typed name.

Diane C. Kurrle
Vice President, Public Affairs
U.S. Apple Association