H-2B WORKFORCE COALITION

Protecting American Workers Through a Stable and Reliable Seasonal Workforce

www.h2bworkforcecoalition.com

May 17, 2011

Via Electronic Mail

Mr. Michael Jones
Acting Administrator
Office of Policy Development and Research, ETA
U.S. Department of Labor
200 Constitution Avenue, N.W. Room N-5641
Washington DC 20210

RE: RIN 1205-AB58 – Temporary Non-Agricultural Employment of H-2B Aliens in the United States

Dear Mr. Jones:

On behalf of the H-2B Workforce Coalition ("the coalition") we submit the following comments on the Proposed Rule ("rule") cited above. The coalition is a consortium of various industry associations throughout the United States that have joined together to ensure American small and seasonal employers have access to legal short-term temporary workers during peak business periods. The H-2B program provides great benefit to employers who cannot find American workers to fill jobs during peak seasons and to H-2B workers who welcome the seasonal work in the U.S. as an opportunity to provide a higher quality of living for themselves and their loved ones in their native countries. Our comments are broken down into three areas: Policy Concerns; Substantive Concerns, and Procedural Concerns.

POLICY CONCERNS

We commend the Department of Labor ("DOL") for its attempts to ensure protection of U.S. workers and to adequately test the U.S. labor market. However, we do not believe that now is the time to implement the prevailing wage rule on January 1, 2012 and we do not believe that the current proposed regulations are necessary to police the program and ensure compliance with the program. We believe that the proverbial chipping away at the H-2B program is analogous to Chinese water torture that eventually drives the recipient mad - or, in this case, out of business.

The DOL proposed H-2B regulations in 2005 that were never enacted. The DOL then tried again in 2008 and issued a new rule that included, among other things, an attestation-based case processing model. An August 2010 court case invalidated various provisions of the 2008 rule, including the prevailing wage rate for the separately promulgated wage rule. The DOL published a final rule on January 19, 2011 that addresses the calculations used to set wage rates for H-2B workers.

The DOL is now seeking to further refine the H-2B labor certification process to focus on enhancing U.S. worker recruitment and strengthening worker protections. Among other things, the proposed rule includes:

- abolishment of the attestation methods and reverting to the old, time-consuming directed recruitment methods, including recruitment up to 3 days before the date of need
- added administrative procedure of bifurcation of the registration phase that addresses the employer's temporary need and an application phase that addresses the labor market test;
- a requirement to compensate corresponding employees (U.S. workers) in the same manner as H-2B workers;
- three-fourths guarantee of payment of wages;
- a requirement to pay additional transportation cost and daily subsistence;
- new definitions for "full-time, seasonal work"; and
- new liability standards.

While we believe many aspects of this rule will be burdensome for employers and we will discuss in more detail below, the above are our most serious concerns with this proposed policy change. Requiring the recruitment period last until three days before date of need or the date the last H-2B worker departs is chief among our concerns.

The Recruitment Requirement is Onerous and Will Fail to Result in Increased U.S. Worker Employment

The rule requires that H-2B employers accept all qualified U.S. applicants until the third day before the date of need or the date the last H-2B worker travels to the U.S., whichever is later. The DOL says that "[t]his timeframe increases the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer." This requirement is problematic for several reasons. First, employers cannot wait until three days before the date of need to arrange for travel and long-term housing for its foreign workers. This requirement is unworkable for most employers given the investment required when sponsoring H-2B workers and

bringing them to the U.S., including travel arrangements and visa fees. Many employers begin to incur significant costs at least 180 days before the date of need.

Second, this requirement exacerbates the problem of disingenuous applicants and SWA referrals. Given that the employer must accept applicants up till three days before the employment begins, should those last-minute applicants quit, the employer may have to start the H-2B process all over and will be significantly delayed. In addition, this provision does not provide any protection for the H-2B worker.

Because this provision does not preclude the foreign H-2B worker's travel to the U.S., what will likely happen is that the H-2B worker's travel would be delayed until the employer can make a determination whether the U.S. worker can handle the work and whether he/she is likely to stay for the season. If the answer is no, the H-2B worker could then come ahead. If the answer is yes, the U.S. worker will both do the job and stay for the season, the employer will have to decide whether to bring the H-2B worker to the U.S. If the U.S. worker quits or is terminated and the employer then brings the H-2B worker into the U.S., the H-2B worker will have incurred costs (lost income, possible charges for rescheduling transportation). If the U.S. worker is retained and the H-2B worker does not come to the U.S., he will lose the season's income. It's possible that an interpretation might be made if the H-2B worker has been offered employment and obtained a visa, that the H-2B job offer is a contract and that the employer is still liable for all the costs.

Also, that H-2B worker who has been told that he is no longer needed already has a valid U.S. visa in hand. This appears to be a security issue because there is likely not be enough time to alert the appropriate agencies that the H-2B job has been cancelled and to prevent that visa holder from entering.

Also, employers need predictability in terms of the availability of their workforce in order to plan their operations. The employer may or may not be confronted with not one but two workers -- or, none, if the H-2B worker is delayed and the prospective U.S. worker quits. The ability to plan is critical to a business' ability to expand and add more jobs, particularly managerial or supervisory jobs, which are jobs that U.S. workers want. Requiring recruitment to continue until the last H-2B worker travels results in an unpredictable and potentially endless recruitment period, particularly when one factors in H-2B replacement workers and those H-2B workers who are already within the United States.

Indeed, as the attached ImmigrationWorks USA survey demonstrates, 88 percent of employers surveyed are moderately or severely concerned about the consequences of those rule for their bottom line.

Not only will this rule be very difficult for employers to follow, it is not likely to result in many more U.S. workers applying for H-2B jobs. Most applicants who respond to H-2B advertisements do so within the first week of the newspaper advertisement being published or the SWA job order being posted. Ten days is more than adequate to reach the applicant pool. However, if DOL strongly feels it needs to extend the amount of time U.S. workers are referred to H-2B positions, we suggest keeping the job orders open for 30 days. Some states, such as New Jersey,

already require this. At the end of 30 days, the SWA would close the job order and the employer would update and retain a final recruitment report (to be submitted in the event of an audit). A 30-day requirement accomplishes the Department's goal of adding more protections for U.S. workers while balancing the interest of employers to have regulations that they can understand and follow.

The Prevailing Wage Rule and the Proposed Rule Will Prevent Program Use

We urge DOL to keep the current H-2B program (without the new wage determination) until long-term legislative changes can be made. While we welcome efforts to make the H-2B program more usable and more efficient for employers as a means of stimulating and supporting job growth and economic expansion, we believe that this rule will do the opposite by imposing substantial costs and burdens on users of the new system. The coalition is troubled by this rule and urges the DOL to reconsider its promulgation.

It is clear that the burdensome process outlined in this rule is the second part of the DOL's attempt to destroy the H-2B program. With these changes, the DOL is making it more and more difficult for employers to participate in this program. As we discussed in our comments to the prevailing wage rule (attached), the new H-2B prevailing wage rate will cripple employers while many of their domestic competitors, who use undocumented workers, and their foreign competitors, who do not face such labor obstacles, are already operating at a significant advantage. The cumulative effect of the prevailing wage rule and the administrative burden created by the instant rule in terms of additional cost and time will preclude the majority of employers, which are small businesses, from using the program.

DOL claims that the instant rule was brought about because of concerns that the 2008 rule did not sufficiently ensure access to jobs for U.S. workers and that the 2008 rule's attestation-based system resulted in high rates of employer noncompliance. DOL cites to an OFLC audit of "a random sample of cases," which found overall a 55 percent compliance rate. This statistic is misleading given that (1) DOL did not disclose the total number of cases it audited and (2) that DOL appears to have counted all violations with equal weight.

As we noted in our comments to the proposed rule in 2008, we supported the move to an attestation-based system and encouraged DOL to adopt this proposal as it was simpler for employers to use and streamlined processing. We also supported the proposed lengthening of the maximum period of time that can be considered "temporary" to three years. This was a realistic acknowledgement of employers' needs and would have been a useful change to the H-2B program. Reversing this trend and, as proposed in the instant rule, defining a temporary need as nine months or less is overly burdensome and not in keeping with a true seasonal, peakload, and "one-time need" definition.

DOL has not given the 2008 rule and its attestation-based system a chance to be successful. Revamping the existing program and weighing it down with burdensome procedures is a waste of government resources. While we believe the DOL's findings are suspect, we agree that H-2B program violators exist. We encourage the DOL to use its enforcement authority and crack down on bad actors

rather than overhauling the program and instituting burdensome processes.

Several of DOL's Proposals Are *Ultra Vires*

Section 101(a)(15)(H)(ii)(b) defines an H-2B worker as an alien "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country…" Nowhere does this definition require that DOL, as opposed to another agency, make the determination that (1) U.S. workers are unavailable or that (2) employment of an H-2B worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. It is U.S. Citizenship and Immigration Services (USCIS) that has the authority to make H-2B determinations, and it shares that authority by consulting with DOL. Section 214(c)(1) of the Act states that "The question of importing any alien as a nonimmigrant under subparagraph (H) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government…For purposes of this subsection with respect to nonimmigrants described in section *101(a)(15)(H)(ii)(a)*, the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture." While USCIS is required by statute to *consult* with DOL in determining *H-2A* petitions, nowhere is there such a requirement for H-2B petitions. DOL's role in the H-2B process has evolved over the years with Legacy INS and USCIS as those two entities have recognized DOL's expertise and shared their authority with DOL as a result. But DOL has no independent authority over the H-2B program.

In light of this fact, several of the changes proposed by this rule are *ultra vires*. DOL's proposed three-fourths guarantee is one of these changes. Another is DOL's corresponding employment provision.

Three-Fourths Guarantee Provision. DOL cites to its enforcement experiences and provides examples of "unscrupulous employers" as the reason for this requirement; no citation to legal authority is included in the rule. The DOL explains that it is trying to protect H-2B workers by making a guaranteed number of hours enforceable. The DOL cites to district court case law, which holds that job orders cannot be treated as enforceable contracts, but, by requiring a guaranteed offer of employment, the DOL is doing just that. The DOL is enforcing employment-at-will as if it were a contract. With limited exceptions, the rule would require employers to pay three-fourths of the wages of their H-2B employees whether or not they work. DOL lacks the authority to require employers to guarantee payment to H-2B employees once hired.

"Corresponding employment" requirement. In support of this requirement, DOL cites to 8 C.F.R. 214.2(h)(6), which states that the Secretary of Labor will certify that the H-2B's employment will not adversely affect wages and working conditions of similarly employed U.S. workers. The mandate to certify H-2B labor certification applications does not grant DOL the power to require employers to pay their U.S. workers a certain wage. In essence, the rule would require employers to pay all of their employees' transportation and subsistence costs and guarantee

three-fourths of their wages at artificially high levels. DOL appears to be attempting to use the H-2B program as a way to implement a policy goal of mandatory wage levels in certain industries.

A different "corresponding employment" problem is generated by the proposed rule: the loss of professional jobs when H-2B employees are absent because employers are unable to utilize the H-2B program. These supervisory and managerial jobs directly tied to H-2B employment are the kind of jobs U.S. workers want, jobs that include supervisors, managers, superintendents, mechanics, cost estimators, among others.

The Regulatory Flexibility Analysis is Flawed

The Regulatory Flexibility Act (RFA), requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. The DOL's position that the instant rule is not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility Analysis is not required by the RFA is short-sighted and wrong. The DOL's attempt to provide an Initial Regulatory Flexibility Analysis is flawed in its calculations, but even more flawed in its narrow coverage of the true impact of this rule and this rule in conjunction with the prevailing wage rule set to be implemented on January 1, 2012. (RIN-1205-AB61).

Before addressing our concerns with DOL's analysis, we would like to point out DOL's contradictory reasoning. On the one hand, DOL cites to the adverse effect of the employment of H-2B workers on U.S workers as a main policy reason for the rule, while, on the other hand, DOL explains that employment in the H-2B program "represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program" (15167). It is curious how such a small fraction of the employment of the U.S. economy can pose such a threat to U.S. workers.

In fact, the H-2B visa program does not depress wages of U.S. workers in similar occupations nor do H-2B workers take jobs from their U.S. counterparts. Attached please find a report issued by the U.S. Chamber of Commerce and ImmigrationWorks USA which uses original economic analyses to come to these conclusions.

The DOL's analysis is flawed for a number of other reasons. The DOL fails to take into account how the inability to access and use the program caused by the substantive and procedural changes proposed by this rule will render the program virtually unusable by the H-2B community. The majority of the H-2B Workforce Coalition Members agree that, should this NPRM be finalized as proposed, their employers could not afford to utilize it. The DOL should review the economic impact of the elimination of the program on a substantial number of small entities. Additionally, the changes proposed in the rule together with the changes finalized in the prevailing wage rule render the program absolutely unusable by many current program participants.

According to the DOL the proposed rule is not expected to have a significant economic impact on a hypothetical small entity that applied for enough workers to fill 50 percent of its workforce. To evaluate this impact, the Department calculates the total cost burden as a percent of revenue for each of the top five industries. The analysis is flawed because, as stated above, of the failure to address the overarching unworkability of the proposed program revisions. In addition, DOL based its analysis on a comparison with the 2008 rule and did not include the new prevailing wage rule in its analysis. Failing to take into account the new prevailing wage methodology, which will exacerbate the effect of the instant rule's corresponding employment and three-fourths guarantee provisions, renders this analysis misleading and inaccurate.

In fact, the DOL does not include an analysis of more significant rule changes in its RFA. For example, the DOL fails to analyze the burden of the corresponding employment requirement because the DOL lacks the data to calculate the impact and does not mention the three-fourths guarantee requirement in its RFA. The DOL's analysis regarding the requirement to recruit up to three days before the date of need or the date the last foreign worker departs suggests that the only additional cost of the extended recruitment is the cost of determining and then reporting the date to the DOL. The DOL ignores the effect of this requirement in terms of the significant investments employers make when bringing in foreign workers, including travel and housing costs.

The DOL also fails to take into consideration the loss of managerial and support positions - jobs that are currently held by U.S. workers - that will occur when this rule goes into effect and employers are no longer able to hire H-2B workers. As the attached ImmigrationWorks survey demonstrates, 59 percent of employers said they would downsize of close their businesses if they were unable to hire any H-2B workers.

SUBSTANTIVE CONCERNS

Three-Fourths Guarantee of Payment of Wages is Unfair and Unrealistic

The DOL proposes to require a guaranteed offer of employment for a total number of work hours equal to at least three-fourths of the workdays of each four-week period. The rule states that a Certifying Officer can terminate an employer's obligations under the in the event of fire, weather, or another Act of God that makes fulfillment of the job order impossible. This implies that if an employer does not timely inform the CO, the employer is liable for payment. An employer should not have to pay an employee if the employee does not or cannot work. The attached ImmigrationWorks USA survey indicates that 60 percent of employers are moderately or severely concerned about the consequences of this rule on their bottom line.

At the very least, DOL should include man-made disasters (such as oil spills and controlled flooding) to the list of exceptions to the guarantee. In addition, the three-fourths guarantee, if implemented, should only cover the length of the contract, similar to the H-2A program, rather than the four-week period.

The Application of 'Corresponding Employment' is Burdensome

The rule requires that employers provide to workers engaged in corresponding employment at least the same protections and benefits as those provided to H-2B workers. The DOL defines corresponding employment as the employment of non-H-2B workers in any work included in the H-2B job order or any work performed by the H-2B workers during the validity period of the job order. This definition will significantly affect small businesses where many employers have positions that combine duties. The corresponding employment requirement, when combined with the prevailing wage rule and the three-fourths guarantee (discussed above), will result in mandatory payment of artificially high wages to the majority if not all of an employer's workforce. This requirement takes away an employer's flexibility regarding its workforce. To avoid this draconian result, an employer will be forced to monitor its employees and ensure they remain within the confines of their job description. As explained above, we also believe that this requirement is *ultra vires*.

The Suggested Elimination of the Use of Agents is Problematic

In its preamble, the DOL states that it is concerned about agents' involvement in and contributions to what it sees as a lack of compliance in the H-2B program. Again, as explained above, we believe the DOL's finding that the majority of H-2B users are non-compliant is baseless and erroneous. We acknowledge bad actors exist in the H-2B program and, again, we encourage the DOL to enforce the existing regulations to root out fraud.

We agree with the DOL's proposal that relationships between employers and agents should be verified and support the requirement that agents submit copies of their agreements with employers. We do not want agents using employer information to file fraudulent applications. However, bona fide agents are essential to the success of the H-2B program. DOL's own statistics show that in FY2010, only 14% of employers filed H-2B applications without using an agent and, of these cases, 38% were denied. The H-2B program is very complicated and agents help guide employers through the process. We encourage the DOL to crack down on fraud using its enforcement authority rather than rather than prohibiting agents from preparing and filing H-2B applications on behalf of employers.

Defining a Temporary Need as Nine Months or Less is Overly Burdensome

Defining a temporary need as less than nine months is burdensome because some employers will no longer be able to participate in the H-2B program. A temporary need should not be quantified in the regulations because it is industry-specific. For example, seasons at the national parks can last up to 11 months. In addition, as part of the proposed bifurcated registration process, the DOL is adjudicating H-2B applications to determine temporariness. Each employer should be able to argue that its need is temporary and consistent with the definition of seasonal or peak load. The attached ImmigrationWorks USA survey reports that 64 percent of H-2B employers are moderately or severely concerned about how this rule will affect their business.

The Requirement that the Employer Pay Transportation and Daily Subsistence is Onerous

We oppose the requirement that employers pay daily subsistence and transportation to and from work as overly burdensome, especially given the corresponding employment requirement. Payment of transportation and subsistence costs should be at the discretion of the employer as it is industry-specific and depends on the conditions of the job. This requirement is especially problematic in terms of the problem of disingenuous U.S. worker applicants. Employers should not have to pay transportation and subsistence costs of an employee who quits after only a few days of work. In the alternative, we suggest that the DOL require a certain amount of employment before employers are required to reimburse employees for these costs.

The Strike, Lockout and Layoff Provisions are Too Broad

The proposed strike definition is broader than the current definition and includes any concerted work stoppage as a result of a labor dispute and covers the entire worksite instead of just the position. The rule would require a certification that there is currently no "**strike, lockout, or work stoppage** … at the same place of employment." H-2B workers are not used as strikebreakers, which is what this is probably intended to address. However, even assuming this is the goal, this language is too broad. The language should say "strike or lockout in the course of a labor dispute...for the positions sought to be filled." A stoppage of work as a result of a labor dispute can refer to very minor disagreements and would effectively mean no employer in the country could use the program.

Requiring Additional Recruitment in an Area of Substantial Unemployment is Unnecessary

We believe that requiring additional recruitment in an Area of Substantial Unemployment ("ASU") is burdensome and unnecessary. The standard required recruitment is sufficient to reach U.S. workers. Also, the ASU should be defined consistent with the period of need rather than with the recruiting period.

Changing the Definition of Full-Time Work is Burdensome

The proposed change in the definition of full-time work from 30 hours to 35 or even 40 hours a week is burdensome when considered along with the new prevailing wage rule, corresponding employment and the three-fourths guarantee, increasing the work-week from 30 hours to 35 hours poses a significant burden for employers. The definition of full-time work should remain as it is.

The Change in the Standard for Debarment is Unfair

The new standard for debarment of substantial failure rather than willful failure is unfair because employers may be barred from using the program for negligent rather than knowing failures. This is a slippery slope and can only lead to debarment actions that do not include "intent." In addition, an employer could be debarred for mere technical violations. An employer should not be penalized with

debarment for procedural failures.

PROCEDURAL CONCERNS

The Requirement to Accept All Qualified U.S. Applicants Referred for Employment by the SWA Until the Third Day Preceding the Date of Need or the Date the Last Foreign Worker Departs for the Employment, Whichever is Later, is Burdensome, Too Short of a Timeframe, and May Create Liability for the Employer

Please see our comments above regarding this rule.

Bifurcating the Process is Burdensome and Time Consuming

The imposition of a bifurcated application process is burdensome because the addition of a registration step in an already complicated and onerous process. We also question whether the DOL will be able to complete its adjudication in time to allow employers to subsequently apply with DHS and then the H-2B employee to apply with the Department of State to allow for timely arrival of employees. We maintain that the attestation process is better for employers because it is more streamlined. Again, we encourage DOL to exercise its enforcement authority rather than instituting a new and burdensome application process.

In addition, please clarify at what point during the application process will an H-2B number be allocated.

Factual Data From Employers on Damage Proposed Rule Would Cause To Small and Seasonal Businesses

As part of these comments, the H-2B Workforce Coalition is including a survey of H-2B employers conducted by ImmigrationWorks USA. From a sample of 501 respondents, the overwhelming majority of H-2B employers view the proposed rule as a direct threat to their businesses which will cause them to downsize or close their businesses.

Quick Statement on the Cap

Finally, while we realize that this is not a regulatory matter, we would be remiss if we did not point out that the H-2B cap of 66,000 is very low, and simply not reflective of workforce needs. H-2B employers urgently need this issue to be remedied. In that light, we would like to suggest that after the annual cap has been met that DOL consider "replacement" labor certifications for H-2B workers who are issued a visa but either do not report for work or leave before the validity period of the labor certification has expired. This would allow employers to fully utilize the H-2B "slot" that they have invested in when a worker leaves while still respecting the annual cap.

Thank you for your consideration of these comments.

Respectfully submitted,

Alabama Hospitality Association

Alabama Restaurant Association

American Horse Council

American Hotel & Lodging Association

American Moving & Storage Association

American Nursery & Landscape Association

American Rental Association

American Sugar Cane League

American Trucking Associations

Asian American Hotel Owners Association

Associated Builders and Contractors

Associated General Contractors of America

Associated Landscape Contractors of Colorado

California Hotel & Lodging Association

Colorado Hotel and Lodging Association

Connecticut Nursery and Landscape Association

Crawfish Processors Alliance (LA)

Essential Worker Immigration Coalition

Federation of Employers and Workers of America (FEWA)

Florida Nursery, Growers & Landscape Association

Forest Resources Association

Golf Course Superintendents Association of America

Illinois Landscape Contractors Association

ImmigrationWorks USA

Indiana Hotel & Lodging Association

Interlocking Concrete Pavement Institute

International Association of Amusement Parks and Attractions

International Association of Fairs and Expositions

International Franchise Association

Louisiana Irrigation Association

Louisiana Nursery and Landscape Association

Louisiana Seafood Promotion & Marketing Board

Maine Innkeepers Association

MASLabor

Massachusetts Lodging Association

Minnesota Nursery & Landscape Association

National Association of Realtors

National Club Association

National Council of Agricultural Employers

National Fisheries Institute

National Hispanic Landscape Alliance

National Restaurant Association

National Roofing Contractors Association

National Ski Areas Association

National Thoroughbred Racing Association

Oregon Association of Nurseries

Oregon Restaurant & Lodging Association

Outdoor Amusement Business Association

Pennsylvania Landscape and Nursery Association

Professional Landcare Network (PLANET)

South Carolina Hospitality Association

Tennessee Hospitality Association

Tennessee Nursery & Landscape Association, Inc.

Texas Hotel & Lodging Association

Texas Nursery and Landscape Association

Tree Care Industry Association

U.S. Apple Association

U.S. Chamber of Commerce

Wisconsin Green Industry Federation

Wyoming Lodging & Restaurant Association

RIN 1205-AB58 –
THE LIKELY ECONOMIC IMPACT

At the request of the National Restaurant Association and the H-2B Workforce Coalition, ImmigrationWorks USA has investigated the practical and economic effects of the Department of Labor's proposed rule concerning temporary non-agricultural employment of H-2B workers in the United States. Our report is based on three lines of inquiry. We reviewed the existing literature concerning the economic impact of the H-2B program. We conducted a survey of business owners from an array of sectors that rely on H-2B workers: 501 employers from across the U.S. answered five questions about the likely impact of the proposed rule. And we examined four case studies: four business owners in three states who use either the H-2B or H-2A temporary visa programs and whose experience sheds light on the likely consequences of the new rule.

On the basis of this analysis, we conclude that the proposed rule would have significant adverse consequences for a broad swath of American businesses that rely on the H-2B program. Restaurants, hotels, nurseries, landscapers, lawn care companies, forestry businesses, seafood processors, fisheries, golf courses, ski resorts, amusement parks and a variety of construction firms, among others, would find their businesses hamstrung by the new regulations, and their cost of doing business would increase, in many cases dramatically.

If the proposed rule is implemented, many companies will stop using the H-2B program. A significant number might go out of business. The consequences for U.S. workers will be exactly the opposite of what the Department of Labor intends: rather than opening jobs for Americans and improving their working conditions, the new rule will force many H-2B employers to downsize or close, shedding U.S. jobs and generating less economic activity up- and downstream in the local economy. As H-2B employers without an adequate labor force turn away business and cut back hours, so too of necessity will their suppliers and clients. And these companies too will shed jobs now filled by U.S. workers – a domino effect that would be particularly severe in close-knit local economies, such as the fishing ports on Maryland's Eastern Shore or ski resorts in Colorado, where virtually every local business depends to some degree on a seasonal industry that relies on H-2B workers. The H-2B program accounts for only a tiny fraction of total U.S. employment, no more than 0.05 percent of nonfarm jobs. But the economic impact of the proposed rule would reach well beyond employers enrolled in the program.

AN ANATOMY OF THE PROPOSED RULE

The proposed rule is far-reaching and multifaceted, with provisions affecting virtually every aspect of employers' hiring practices and labor management, as well as their participation in the H-2B program. The many, varied changes the proposed rule would mandate can be grouped in two broad categories.

The first is comprised of changes to the H-2B application process: modifications that range from minor tweaks to a structural overhaul that would add an entirely new stage to the application process. Likely to be most burdensome, according to the H-2B employers who responded to the ImmigrationWorks survey: the requirement that business owners continue

to recruit American workers up to three days before their H-2B employees are scheduled to start work or until the last date H-2B employees arrive at the worksite.

The second broad category of provisions would require changes in the workplace. These too range from minor to major, and they can be further subdivided into three groups.

Some proposed worksite changes, such as requirements for providing tools and equipment necessary to perform the job and retaining documents in case the company is audited, are relatively small in and of themselves. And although their collective effect could be burdensome and expensive, they seem unlikely to cause major problems for employers enrolled in the program.

Other proposed worksite requirements are likely to be more significant. These include changes in the length of the season that would be covered by the program, the proposed new definition of a full-time work week and the requirement that workers be guaranteed employment for three-quarters of the hours in every four-week period of their contracts, regardless of weather and other conditions. While perhaps reasonable-sounding, these proposals could severely limit employers' flexibility and increase their costs. All three provisions ignore the real-life circumstances of the many, varied industries that rely on H-2B workers and the conditions under which they operate. Taken together – and combined with prevailing wage requirements finalized by the Department of Labor in January 2011 – this second subgroup of worksite changes could have a significant cumulative effect on employers, dramatically curtailing their ability to run their businesses profitably and keep workers, both Americans and H-2B visa holders, employed.

Finally, and likely to be most problematic for employers, the third subgroup of worksite changes are the proposed requirements for "corresponding employees" – defined as U.S. and other workers, hired during the H-2B recruitment process or already in the company's employ, whose job descriptions overlap in any way with that of an H-2B worker or who perform any of the same tasks performed by H-2B workers. These provisions are likely to necessitate dramatic changes in employers' hiring practices and management techniques and transform the way many companies enrolled in the program do business. Of most concern, both for employers and for the U.S. economy, are likely consequences for productivity, as companies struggle to differentiate differently skilled workers and impose rigid new work rules about what different categories of employees can and cannot do. These provisions promise to be particularly onerous for small businesses, where job descriptions are often close to meaningless and most or all employees are occasionally called upon to do virtually every task required for the operation of the company.

A roadmap of IW's analysis

ImmigrationWorks' analysis of the proposed rule proceeds from the general to the particular.

The first section of this comment reviews the existing literature on the economic impact of H-2B workers, underlining the benefits to enrolled employers and the U.S. economy likely to be lost if significant numbers of businesses are driven out of the program.

A second section looks at possible cumulative effects of proposed changes in H-2B processing. Of particular concern here is the possibility that the expanded, intensified and significantly more opened-ended review process proposed in the new H-2B rule would have consequences similar to those that have resulted from new regulations imposed in 2010 on the H-2A agricultural temporary worker program. By all accounts from a wide range of employers and other observers, the new H-2A regulations have resulted in a dramatic

increase in arbitrary and capricious processing that hinders employers' ability to hire needed workers, both foreign and domestic, and contribute to the economy.

The final section of the analysis looks in more detail at the five proposed requirements ImmigrationWorks believes are likely to be most onerous for H-2B employers: the shortening of the maximum work period from ten to nine months; the combination of the 35-hour work week and the three-quarters rule, which together would require that employers guarantee H-2B employees at least 105 hours of work each month, regardless of weather and other conditions; the requirement that employers continue to recruit U.S workers up to three days before H-2B employees start work or until the last date H-2B employees arrive at the worksite; and the new requirements for corresponding employees.

WHAT THE LITERATURE SAYS

Although the H-2B program has been in operation for nearly 25 years, since it was mandated in 1986 by the Immigration Reform and Control Act, it has rarely been studied by economists or evaluated by the government. In the absence of objective assessment, subjective opinions have run wild – largely favorable evaluations by employers who rely on the program to keep their businesses open and growing and sweeping criticisms by labor unions and others who object in principle to temporary worker programs. Until last year, what objective assessments existed were based largely on anecdotes, case studies or flawed research designs that blamed the H-2B program for consequences, such as stagnant real wage growth for low-skilled workers, seen in recent decades across all sectors of the U.S. economy.

In 2010, the Department of Labor proposed a new methodology for determining the prevailing wage that employers should be required to pay H-2B workers – a reform the department insisted was necessary to ensure that the H-2B program did not adversely affect U.S. workers' wages and working conditions. But the department produced no evidence – and indeed none exists – to suggest that the program has any such effect. And if anything, a study produced last year by a renowned labor economist working with ImmigrationWorks and the U.S. Chamber of Commerce showed exactly the opposite.

That report, *The Economic Impact of H-2B Workers*, disproved two widespread allegations about the program – that H-2B workers depress the wages of U.S. workers in similar occupations and that employers hire H-2B workers because they are cheaper.

An original economic analysis conducted for the report compared wages in sectors that rely heavily on H-2B workers with wages in other industries that hire few or no temporary visa holders. This comparison showed that the number of H-2B workers in a given field has no negative effect on U.S. workers' employment or earnings. On the contrary. When the proportion of H-2B workers in an occupation increases, in the next year wages and employment in that occupation increase faster than they otherwise would have.

A second original economic analysis conducted for the ImmigrationWorks-Chamber report refuted the claim that U.S. employers hire H-2B workers because they are cheaper. On the contrary, according to the study, the number of H-2B workers in a state increases when local labor markets tighten. And far from taking jobs from Americans, H-2B visa use correlates with *higher* U.S. employment rates. The analysis compared state-by-state data on H-2B admissions with state unemployment rates and employment growth during the period from 2006 to 2009. The comparison showed that the number of H-2B workers admitted to a state increases as unemployment rates fall and employment growth accelerates. In other words, employers hire H-2B workers because U.S. labor is in short supply and they need additional hands – not, as critics claim, because H-2B workers are inherently cheaper to hire than Americans.

In addition to refuting false claims about the H-2B program, the ImmigrationWorks-Chamber study also investigated the program's benefits to U.S. workers and the U.S economy. The report assessed these benefits by asking H-2B employers. Business owners who use the program are in the best position to assess how it works. The vast majority are repeat users who fully comply with the law and with DOL requirements. And they have been turning to the program in increasing numbers in the years since it was created, despite considerable costs and bureaucratic obstacles. (Enrollment grew by a factor of more than twelve between 1989 and the onset of the recession in 2007.)

ImmigrationWorks assessed employers' opinions in a short survey of five open-ended questions distributed in July 2010. More than 365 employers responded, highlighting four principal benefits of the H-2B program.

- ***The program offers employers a legal way to hire foreign workers when U.S. labor markets are tight.*** This is especially important for seasonal businesses, which have particular difficulty attracting U.S. workers because of the temporary and physically demanding nature of the jobs they offer and the often remote locations in which they operate.

- ***The program reduces companies' turnover and training costs.*** In contrast to U.S. workers, whose turnover in physically demanding seasonal jobs is often high, most H-2B workers stay for the duration of their visas, providing employers with a stable, reliable workforce. Also unlike U.S. workers, many H-2B workers are willing to return year after year to the same company, helping the employer hold down training costs.

- ***Far from undermining U.S. workers, the program creates jobs for Americans.*** Hiring H-2B workers allows employers to expand the volume of business they do, and this in turn enables them to hire more U.S. workers, often for higher-skilled supervisory, clerical and sales positions – jobs that pay well above the minimum wage and offer an opportunity for year-round work.

- ***By sustaining otherwise unsustainable industries for which few U.S. workers are available, the program bolsters related U.S. businesses and supports additional jobs for Americans.*** The classic example is the seafood processing plants on the Eastern Shore of Maryland. For generations, local African-American women staffed the Eastern Shore plants, picking Chesapeake crabmeat out of its unyielding shell. But the region has changed in recent decades, and few locals are now available or interested in this tedious, painstaking work. The crabbers began using H-2B workers in 1991, and today the $25 to $30 million Eastern Shore seafood processing industry would not survive without 400 to 500 H-2B visa holders – mostly Mexican women – who return to the plants summer after summer. This workforce sustains the processors, supporting jobs for U.S.-born managers, packagers, accountants and other white-collar workers. And the seafood plants sustain the rest of the Eastern Shore economy: from the financial institutions that lend the plants money to the restaurants that serve their product to visiting tourists – not to mention the grocery stores and other businesses where foreign workers shop.

Several in-depth local studies of the economic impact of H-2B workers have confirmed these ImmigrationWorks-Chamber findings about the domino effect of the program on other U.S. businesses up and down the economic food chain.

A study conducted in 2008 by the University of Maryland's Sea Grant Extension Program quantified the benefits of the H-2B program to the economy on Maryland's Eastern Shore. This study drew on a quantitative survey of the crab processing industry conducted each

year by the Maryland Department of Health. Based on responses to the Health Department's questionnaire, University of Maryland researchers concluded that H-2B workers were responsible for 45 percent of the crab production on the Eastern Shore and that if there were no foreign workers available, 50 percent of the industry's U.S. workers would lose their jobs.

The second stage of the study involved calculating what these cumulative job losses – H-2B workers and Americans – would mean for other Maryland businesses. Researchers stipulated that the impact would be twofold. Businesses that supplied the seafood plants would experience a drop in demand for their products. And unemployed workers would consume fewer goods and services produced and sold by local merchants, while workers who had returned to Mexico would consume none. The study used Maryland state data to quantify this multiplier effect and concluded that every H-2B worker employed in an Eastern Shore processing plant supported 2.5 additional jobs in the local economy, some in the crabbing sector, others much further afield.

A dire warning

Another 2008 study, commissioned by a group of employers in Louisiana, quantified the impact of H-2B workers on that state's economy. Like Maryland, Louisiana employs H-2B workers to sustain a wide array of industries: seafood processing (in Louisiana, it's not just crab, but also crawfish, shrimp, oysters, catfish and alligator), meat processing (chicken but also deer), sugarcane production, rice milling, food service, hospitality, landscaping and construction, among other sectors.

The Louisiana study surveyed 49 of the state's biggest users of the H-2B program, asking about their annual sales, the percentage of their production that would be affected if no H-2B workers were available and the number of Louisiana farmers they did business with. Based on this evidence, the research team concluded that every H-2B worker in the state supported three additional jobs in the surrounding community, and the study used this multiplier, along with the 49 companies' annual sales, to calculate how much the state economy would shrink if the firms were unable to hire H-2B workers.

The total loss: $948 million for the 49 companies and $2.4 billion for the state. According to the researchers, without H-2B workers, the entire Louisiana sugar industry would shut down. The labor shortage in forestry – the state's largest agricultural sector – would be so severe that many companies planning for years ahead would start planting in other states. And several seafood processors who participated in the survey predicted they would go out of business.

Taken together, these three studies add up to a dire warning. While the proposed rule may be intended to enhance the H-2B program, many companies that now rely on an H-2B workforce – small business owners in particular – made clear in their responses to a new survey conducted for this report that the rule could well drive them out of the program.

Combine the changes mandated in the proposed rule with the new prevailing wage rates mandated by the DOL final rule scheduled to go into effect in January 2012, and it's not far-fetched to imagine scores if not hundreds of employers simply giving up and abandoning their use of the H-2B program. The 2010 ImmigrationWorks-Chamber report and the 2008 studies from Maryland and Louisiana paint a vivid picture of what this would mean – in dollars and cents and U.S. jobs lost, not just to H-2B employers but also to the surrounding community. It's a deeply disturbing picture and one that ought to give pause to anyone concerned about the state of the economy in the many communities across the country – from the Louisiana seacoast to Michigan summer resorts – that depend on seasonal industries.

PROPOSED PROCESSING CHANGES – A CUMULATIVE NIGHTMARE

The proposed rule would change the H-2B application process in many ways – a nip here, a tuck there, an additional layer of review, an additional or more open-ended criteria somewhere else. Some of these proposals may be reasonable. A few would require additional effort by employers but would ultimately, we believe, be manageable for the majority of businesses enrolled in the program. What's of concern to employers who use the program: the unrelenting, anti-business thrust of these changes and the cumulative effect they are likely to have.

Our fear: that the expanded, intensified and significantly more opened-ended review process proposed in the new rule would have consequences similar to those that resulted from new regulations imposed in 2010 on the H-2A agricultural temporary worker program – changes that have not produced any demonstrated benefits for workers or employers, but have led to a dramatic increase in arbitrary and capricious processing decisions by the department.

The proposed H-2B rule would add at least four significant new stages and layers of review to the H-2B application process. An entirely new first step would require employers to prove the seasonal nature of the jobs they seek to fill. Business owners would then be required to file their job orders with the State Workforce Agency – a completely new layer of review. Third, before a SWA could accept or post a job order, it would be required to consult with the National Processing Center on the terms and conditions of employment. And the NPC's scope to review applications and attachments would also be significantly expanded.

Together, by some estimates, these four new stages and layers of review could triple DOL's workload and the time required to process H-2B applications. And because of the loose and open-ended way many of these additional steps are designed, without clearly articulated standards and with few deadlines, we believe the expanded processing would invite arbitrary and capricious decisions by officials.

Among the provisions of the proposed rule we find most troubling in this regard:

- The absence of any definition or criteria for determining what job requirements are bona fide and consistent with normal and accepted seasonal job qualifications and requirements.

- The unlimited discretion given certifying officers to request that employers substantiate the appropriateness of job qualifications.

- The discretion given to certifying officers to request that employers modify job orders – requests that can be made *at any time* in the H-2B application process.

- The discretion given certifying officers to request additional employer-conducted recruitment for virtually any reason – a few acceptable reasons are mentioned in the rule, but it specifies no limiting criteria and no limits to the additional activity that can be requested.

- The lack of deadlines or time frames within which DOL would be permitted to make these and other requests.

The bottom line: the new rule would not only add new steps and duplicative processes, it would create numerous new opportunities for second-guessing, fishing expeditions and arbitrary decision-making by the department. Employers seeking a reliable, predictable

employment process that allows them to plan their peak seasons and grow their businesses could instead find themselves mired in bureaucratic quicksand – an inexplicable, inexhaustible series of government requests and review with no definitive endpoint.

In fact, this is exactly what has happened in recent years to many employers seeking approval to hire H-2A workers. In the year since DOL issued new regulations for the H-2A program, agricultural employers report receiving multiple, repetitive, even baseless or trivial requests for additional information. Applications just like those routinely approved in past years have been denied. Denial rates have skyrocketed. And employers struggling to keep ahead of duplicative reviews and arbitrary requests are frequently prevented from meeting crucial deadlines and are unable to hire H-2A workers. True, higher denial rates could conceivably be good news – they could mean the government was detecting and blocking erroneous or invalid applications. But the fact is a significant number of the past year's H-2A denials – by all accounts, a majority – have been overturned on appeal.

Will the proposed H-2B rule open seasonal employers to nitpicking and flyspecking of the kind that now bedevils H-2A employers? And what, over the short and long run, is that likely to cost H-2B employers? In the absence of evidence from the H-2B program – the proposed H-2B rule has yet to go into effect – consider two brief case studies illustrating the kind of arbitrary and capricious adjudication now routine in the H-2A program.

H-2A case study Number One: Lynn-Ette and Roberts Circle R farms

Lynn Roberts and his wife Annette own two farms in Kent, New York, in the northwest corner of the state, some 40 miles east of Niagara Falls. The 7,000-acre Lynn-Ette & Sons farm grows cabbage, cucumbers, beans, squash, corn and wheat. The 500-acre Roberts Circle R Fruit Farm produces apples, pears, peaches and nectarines. Together, the two operations generate $14 million a year in revenue, and they employ 39 year-round workers. During the growing season, the Roberts hire five or six additional local residents, but they rely primarily on H-2A workers – in recent years, 150 Jamaican men. The farms' busiest months are July through November, but the Roberts need a first H-2A crew in late March to start pruning fruit trees and trimming last year's cabbage, stored through the winter, in preparation for taking it to market.

Office manager and H-2A coordinator Laurie Gregori has been preparing the two farms' H-2A paperwork for a decade, and until this year, she says, she never experienced processing problems or delays. This year, DOL identified eleven deficiencies in her first order – for 22 men the two farms needed to start work on March 25. And when Gregori was one day late in answering the eleven questions, the farms were denied workers.

More than half of the complaints from the certifying officer at DOL's national processing center had to do with the way Gregori had filled out the paperwork. Some of the requirements of the 22 jobs were listed on one part of a form but not in another. In one instance, Gregori used an outdated version of an application rather than the current one. She also misstated a few small things: she mistook the amount the workers would be reimbursed for expenses during their travel to and from New York – by 74 cents per day. She called the jobs "seasonal" when they should have been called "full-time." (In truth, they are both seasonal and full-time.) One of the certifying officer's eleven questions sought clarification of something clearly and correctly stated on the application – that the farms had not used an agent to help them navigate the application process.

In other instances, DOL ventured to second-guess the Roberts' labor needs. Although the farms said they needed workers on March 25, the department said the start date should be April 4. The Roberts asked for workers with six months' experience: they say the farms function best when employees know how to do the work and have experience of the adverse

weather conditions common in upstate New York in early spring. The department disagreed, insisting that no prior agricultural experience or training was necessary. The Roberts differed with the certifying officer about how many days of failing to show up for work should be grounds for terminating an employee – one or five. But in the interest of getting workers, the farms were willing to cede the point. And there was no evidence of any kind in any of the Roberts' paperwork to suggest they intended to exploit their H-2A workers or use these employees' presence to undermine American workers.

Gregori's big mistake – the mistake that cost the farms their first crew this year – was timing. The government gave her twelve calendar days to correct the eleven deficiencies it identified. The letter stating that deadline was dated February 25 but didn't arrive at the farm until February 28. Gregori telephoned the processing center to ask on which day the twelve-day countdown had begun. When she got no answer, she assumed the deadline was March 11, and she sent the amended application on March 10 via FedEx overnight delivery. According to DOL, she was late.

The department denied the Roberts' request for workers. The farms appealed the decision and lost. They advertised locally for workers to fill their 22 vacancies. Five local residents applied for and got jobs but then failed to show up regularly. "They would come in one day, and then not come in the next," Gregori explained.

The bottom line for the Roberts' farms: because they couldn't get an answer from DOL and missed an arbitrary deadline by one day, Lynn-Ette lost $200,000 in cabbage sales, and many of the Roberts' fruit trees, which were not pruned when they should have been, are now bearing apples more suited for making apple juice and applesauce than being sold as table fruit – which reduces their value by a third.

H-2A case study Number Two: Turkey Knob Apples

Turkey Knob Apples grows fruit and runs a packing house and processing facility on 2,200 acres in Mount Clifton, Virginia, in the history-rich Shenandoah Valley. Turkey Knob president Jaime Williams isn't comfortable disclosing his annual revenue but uses the term "multi-million" to describe the operation, and Walmart is a major client – the quality of the farm's apples is that high. The farm employs 50 full-time year-round workers, hires another 40 local residents for seasonal labor and brings in roughly 200 workers from Mexico each year on H-2A visas.

Last year, according the Williams, Turkey Knob lost hundreds of thousands of dollars when the farm was denied 45 of its H-2A workers.

The order for the workers was denied three times – twice by the state labor agency and once by DOL. Among the reasons the application was deemed deficient: Turkey Knob asked for a minimum of one month's agricultural work experience, it wanted to drug test prospective workers before they were hired, the farm failed to provide proof that it had purchased workers' compensation insurance for the temporary employees and Williams failed to sign a required recruitment report.

Like the Roberts in New York state, Williams and the certifying officer who reviewed his case differed over how many days of failing to show up for work should be grounds for terminating a employee. But in this case too, the grower was willing to change the standard he had used for many years – and that had once been acceptable to authorities – in order to get the H-2A workers he needed.

Still, despite these changes, Williams' work order was denied. Turkey Knob had to make do with workers DOL had referred to the farm, many of them from outside the immediate area,

including 25 workers from Puerto Rico. According to Williams, the Puerto Ricans weren't accustomed to farm work, and they chafed at the long hours, six-day work weeks and cool rainy weather normal in Virginia in early summer. He also says they were significantly less productive than the H-2A workers he has hired in years past.

Turkey Knob appealed the denial of the work order, and an administrative law judge found in the farm's favor. But by the time the requested 45 H-2A workers showed up in Virginia, in late August, Turkey Knob had lost a significant part of its harvest. Because of the inadequate workforce, apples hadn't been picked on time. Overripe fruit fell from the trees and rotted on the ground. According to Williams, he lost 100,000 bushels this way, and at $6 per bushel, he was out $600,000.

This year, Williams is considering opting out of the H-2A program. The only problem: he has no workable alternative.

Both the Roberts family in New York and Jaime Williams in Virginia paid directly for the arbitrary and capricious processing that is increasingly the norm in the H-2A program. But they are not the only ones who are paying a price. When their operations suffer, their U.S. employees suffer too – they lose their jobs – and so do other businesses and U.S. workers up- and downstream in the local economy. Most damaging for employers and others in the community, when business owners are unable to predict market conditions, it becomes extremely difficult to plan for growth – and all but impossible to pull it off with an inadequate and unreliable labor force. H-2A employers are finding this out the hard way. Must H-2B employers be next?

A NEW SURVEY OF H-2B EMPLOYERS

In order to assess the likely impact of the proposed rule on H-2B employers, ImmigrationWorks conducted a new survey of business owners who use the program. A questionnaire composed of five multiple-choice and open-ended questions was circulated in late April 2011 by H-2B agents and business associations with members likely to hire seasonal workers. Respondents could reply by fax, email or the internet. Over three weeks, 501 H-2B employers responded.

The survey probed employers' opinions of three provisions of the proposed rule. How would the shortening of the maximum work period from ten to nine months affect their bottom line? What about the combination of the 35-hour work week and the three-quarters rule, which together would require that employers guarantee H-2B employees at least 105 hours of work each month, regardless of weather and other conditions? And what about the requirement that employers continue to recruit U.S workers up to three days before H-2B employees start work or until the last date H-2B employees arrive at the worksite?

There is no reason to believe that employers' concerns about the proposed rule are limited to these three provisions – on the contrary. But ImmigrationWorks felt it was important to keep the survey short – not to require too much time of busy small business owners. On each question, employers were asked for one of three responses: *severely*, *moderately* or *not at all* – and they were given space to explain their answers.

Two final questions explored employers' attitudes toward additional issues likely to shed light on how the proposed rule would affect them and their businesses. A first question asked about their experience hiring U.S. workers for temporary seasonal work: how frequently did American workers apply for such positions, and if hired, how long did they remain on the job? A second question inquired about what employers would do if their companies were unable to hire H-2B workers. Both of these questions were open-ended. (The survey and a chart depicting the results are attached at the end of the report.)

A shorter season

Of the 501 employers who responded to the survey, 32 percent said that capping the temporary work period at nine rather than ten months would severely affect their bottom line. Another 32 percent said the proposed provision would affect them moderately – for a total of 64 percent reporting that the change would have negative consequences for their businesses. The remaining 36 percent said it would not affect them.

The employers' explanations shed further light on their concerns. Location was a critical variable, but even more important was the type of business the respondent owned. And what was most striking about the explanations was the intensity of the responses from the 32 percent of respondents who said the proposed provision would affect them severely. Capping the length of the season may not matter to all employers, but to those for whom it is important, it matters a great deal.

Among the industries most concerned about a curtailed season: landscaping, seafood processing, ski resorts, summer resorts, forestry. Worried landscapers were not exclusively from the South, as might have been expected – in other regions too the season often begins in early spring and extends into the fall. (Employers from Connecticut, Massachusetts, Minnesota and Oregon, among other Northern states, mentioned the leaf season, as did many landscapers from Texas, Missouri and North Carolina.) Summer resort owners talked about their need for help preparing the property before guests arrive and closing it up at the end of the season. Trees have to be planted when the ground is ready. Oysters must be processed when they are harvested. Snow removal waits for no man. And employers simply could not understand how a bureaucrat 500 or 1000 or 3000 miles away could imagine that he or she understood their business and its cycles better than they, the employer, did.

About the costs of cutting short the season, employers across sectors voiced a common litany of concerns. Clients would be dissatisfied. Companies would lose business. Businesses would be unable to bid on as many contracts as they have in the past. Training and quality control would suffer. In many businesses, U.S. workers – full-time year-round U.S. workers – would eventually lose their jobs as employers could not bid on contracts and revenues dropped. A number of business owners said they would consider leaving the H-2B program.

A sampling of employers' comments:

Our season is ten months long, not nine months. What do we do for the other month? We will lose work and lose money. It is tough enough to run a small business without this added financial strain.

Our season starts in February and ends in November – ten months. Our clients expect service throughout this time period. We would lose revenue for one full month.

We would reduce the number of clients we could service because of a shortage of manpower.

We will have to use the manpower we have to do more in a shorter time. Therefore, we will have to pull crews off existing contracts. We will lose contracts.

My peak-time requirements vary every year, depending on weather and customer expectations. If more than nine months are required to satisfy contracts and I do not perform, I will lose customers and profits, and that could mean closing my business. If I close my business, at least 25 American jobs will be lost. Plus it will have a negative impact

on my suppliers, who depend on income from doing business with my company. The closing of one small business will impact the lives of many American families.

Guaranteed time

A second question asked employers about the combination of the 35-hour work week and the three-quarters rule, which together would require that businesses guarantee their H-2B employees at least 105 hours of work each month, regardless of weather and other conditions. Of the 501 employers who responded to the ImmigrationWorks survey, 34 percent said this requirement would severely affect their bottom line. Another 26 percent said it would have a moderate impact – for a total of 60 percent reporting that the proposed change would have negative consequences for their businesses. The remaining 40 percent said it would not affect them.

In this case too, it was clear from respondents' explanations of their answers that although the proposed change would not matter to all employers, to those for whom it is important, it would matter a great deal.

Taken as a whole, the 501 survey responses did not suggest that most H-2B employers have trouble keeping their foreign workers busy through the season. On the contrary. For many employers, the 105-hour guarantee was of little or no concern. A plurality of respondents reported that their H-2B employees consistently work 40, 45 and even more hours per week. Even among those who said the guarantee would be burdensome, many said it would be no problem during the busiest months of the season. For four months out of nine, many explained, or five months out of ten, their employees work full time and more. And indeed, on this question and elsewhere in the survey, employers made a point of the long hours their H-2B employees are willing to put in when an increased workload demands it – this is one of the qualities that makes H-2B employees most valuable to small business owners.

The problem for many employers who answered that the 105-hour guarantee would be a burden: the first and last months of the season. For many different kinds of H-2B businesses, the season starts slowly. Crews are preparing the grounds, ramping up, cleaning up after idle winter or summer months or just getting ready – and very often this entails less work than what is required during the rest of the season. So too as the season winds down: the nature of the job often changes, and the pace slows – but not to the point that no seasonal workers are needed.

Also a problem for many employers: the vicissitudes of weather and natural disasters. Heat, cold, snow, lack of snow, rain, drought, hurricanes, tornadoes: business owners can't control them, and when they strike, workers often cannot work. If the water is too cold, crabs are harder to catch. If the water in the ground is frozen, you can't plant trees. And sometimes, in some businesses, demand just drops – for no obvious reason. Employers cannot predict these conditions months in advance when they apply to participate in the H-2B program. But nor can most afford to pay employees who are not working – they cannot incur expenses when the business is not making money.

On this question too, a broad range of industries said the proposed provision would severely affect their bottom line: landscapers, seafood processors, ski resorts, summer resorts and forestry, among others. Their common refrain: we do the best we can to predict our workload, but we aren't always right, and we can't afford to guarantee employees a fixed workload every month. Many respondents were prepared to guarantee a minimum workload over the season, but not month to month. And if they had to commit to a monthly guarantee, many reported, they would lose money – so much so that a significant percentage said they would have to drop out of the program.

A sampling of employers' comments:

If there is no work, the owner does not make any money. How can he afford to pay workers who are not working? Maybe there are some employers out there who are prosperous enough to do this, but it's just not realistic for most small businesses.

We can't control the weather and we can only pay for hours worked. We struggle to hit a 5 percent profit margin as it is.

What if it rains or we have a natural disaster?

Our industry is feast or famine. We can't control it. But no employer can afford to pay employees who haven't worked.

We would be paying wages with absolutely no return on the expense.

My product costs would increase so much, I'd have to close!

Why even consider a rule like this? How can a company pay employees if they are not generating income? Most small businesses operate on thin profit margins to stay competitive. My business would not survive.

How can DOL be so out of touch? Seasonal work is just that, seasonal. If the grass isn't growing because of drought, if the crabs aren't coming in because of an oil spill, if the apples aren't as plentiful because of a freeze – then there's no work to be done, or not as much. How can you expect business owners to compensate workers during times like these?

If this passes, I will apply for a job as a landscape laborer because I don't know of another job that will pay me to stay home when it rains.

Impossible to plan the season

Of the three proposed provisions tested by the survey, by far the most objectionable to H-2B employers was the requirement that they continue to recruit U.S workers up to three days before H-2B employees start work or until the last date H-2B employees arrive at the worksite. Of the 501 employers who returned the questionnaire, 74 percent said this provision would severely affect their bottom line. Another 14 percent said it would have a moderate impact, for a total of 88 percent saying the change would have negative consequences for their businesses. Only 12 percent said it would not affect them.

Not only did far more employers think this provision would be onerous, but the quality of their concern was noticeably different. The written answers to this question were longer than responses to many other queries. They were more impassioned. The phrase that came up again and again was "not realistic." And many employers were plainly frightened by this requirement. It was clear to many that it would make the H-2B program unusable, and they were at a loss for what they would do instead.

Employers' virtually unanimous complaint: that the requirement would make it impossible to plan – impossible to plan the season, impossible to commit to contracts, impossible to plan even weeks ahead, impossible to plan for growth. Many employers noted that they spent months preparing for their peak seasons. Other said it took them the whole year: that as soon as one year's workers leave, they sit down and beginning planning for the next season.

The H-2B application process alone can start as long as 210 days from the first day workers are needed on the job. Employers file paperwork with four different government agencies. They spend thousands of dollars recruiting, interviewing and processing each H-2B employee. They spend hundreds if not thousands more advertising for American workers. And if they cannot find U.S. workers, they commit to H-2B employees – arranging at that point to pay for the workers' transportation costs and often rent housing for them. As long as a month before the season starts, employers start to arrange for H-2B workers to cross into the United States. They sign binding contracts for housing. They bid for contracts with clients. They plan work crews. They assign American managers. They gird up for the season that in many if not most cases will generate the revenue that sustains the business through the lean remainder of the year.

Many respondents to the survey tried to imagine what would happen if at this point – three days before the season starts – an American worker showed up to claim an H-2B worker's slot. None of the alternatives are appealing. You could pay two workers to do one job. You could send the H-2B worker back to his country of origin and forfeit all that you have poured into recruiting and hiring him. Worst of all – and the most likely outcome, according to many employers – you would hire the American *and* send the H-2B worker home, only to find that the U.S. worker soon quit and you were left with no one to do the job.

None of these scenarios are financially sustainable for small business owners. Whatever way the story ends, according to survey respondents, the employer will be out thousands of dollars for each employee. He will start the season deep in the hole and, worse still, if the shuffling and turnover has left him in the lurch with no worker, will find himself unable to keep his commitments to customers. The quality of service he has promised will suffer, or his product will, and with it, soon, his reputation – and his chances of securing business in the future. Many respondents were also concerned about the unfairness to their H-2B employees, who would arrive counting on a season of work – in their case, too, a season that often sustains their families through the rest of the year – only to be sent home empty-handed. And in the end, employer after employer came back to the same grim bottom line: the likelihood that the cost of the proposed provision would drive them out of the H-2B program.

Some excerpts from employers' comments:

Who thought of this?! This just isn't realistic.

The H-2B application process is extremely time-consuming. It takes approximately four months from the time we begin our recruiting efforts locally until we determine how many H-2B visa workers we will need to apply for on our application, then submit our application, and wait for an approval. Once we get approved, it takes two to four weeks just to get an appointment with the consulate. It is completely unrealistic to put all this time and money – including attorney fees, DOL application and processing fees and appointment fees – into an H-2B worker only to have the position taken by someone else at the last minute.

The Americans who apply for the job rarely accept the job. If they do accept the job, they rarely show up for the first day of work. If they do show up, most work only a few days to a couple of weeks and then quit. For each American worker we hire, we get one less visa worker. If an American takes the job and then quits, we will be left short-handed.

What about our foreign workers? These folks need a few weeks to tie up loose ends before they come to the U.S. Many have jobs in their home counties that they must quit before they come to the U.S. This would be very cruel to the foreign worker. Imagine telling him at the last minute that he does not have a job in the U.S. anymore.

We begin our process of crossing 30 days in advance. If we have U.S. workers showing up to work up until three days before our last group of H-2B workers arrive, we will be forced to break H-2B contracts and/or provide less work for all – risking breaching the proposed three-quarters rule or the 105-hour monthly guarantee.

This is not feasible. Several thousands of dollars in fees have already been paid to get the H-2B workers, and most are on their way to the U.S. within three days. Housing has been arranged, rented or leased. We cannot run a business on the speculation that someone will show up. What if we hired [an American worker] and sent the H-2B worker home, but then the U.S. employee didn't make it through the 30-day trial period? We would have no one!

This would be a planning, operational and financial nightmare for my business. Planning for peak season is a year-round process. The uncertainty of how few/many Americans might apply and how committed they would be to the labor-intensive outdoor work I need would be a constant unknown. Operationally, we would lose years of training that has been invested in the H-2B workforce that returns to us year after year.

You're asking us to pay all the recruiting and visa fees and consulting fees, which can add up to thousands of dollars, only to have to cancel at the last minute? This would be extremely financially draining at a time we are already financially stressed.

We will have to pay for every worker who is recruited even if we tell him to stay in Mexico because an American worker has shown up to work. The H-2B process takes months to complete – it makes no sense to take several months of planning, fees and paperwork and throw it all away at the last minute. This would affect our bottom line severely. It's just not realistic.

If you pay to bring an H-2B employee here and then hire someone else right before they get here, you have two workers for the same job. This makes no sense!

Trying to hire U.S. workers

The fourth question on the survey asked H-2B employers about their experience trying to recruit U.S. workers for temporary, seasonal jobs. Of the 501 employers who returned the questionnaire, 22 percent said no U.S. workers applied for advertised openings or that the Americans they hired did not show up for the first day of work. Of those who hired U.S. workers, 71 percent said the employees quit within the first month. Only 6 percent of those who hired locally reported that the workers stayed through the season.

Every employer has his own explanation for why Americans so rarely apply for temporary seasonal work and why, when hired, they often don't last long on the job. Many respondents speculated about motives, others offered anecdotes. But in the end, on this question, the only answers that matter are the numbers – and they speak, clearly and dramatically, for themselves.

To repeat: 71 percent of H-2B employers who hired U.S. workers said the employees quit within the first month. Only 6 percent reported American workers staying for the entire season.

What does require some discussion is the significance of these striking figures. What do they tell us about the H-2B program and the workability of the proposed rule?

- These facts explain, bluntly and starkly, why employers turn to H-2B workers in the first place. They do so out of need. When lesser skilled U.S. workers aren't available, employers who want to comply with the law turn to H-2B workers, who generally

work alongside a relatively more skilled U.S. workforce to keep the business afloat and contributing to the economy.

- These facts underline, once again bluntly and starkly, just why the proposed three-day rule will not work. Employers' skepticism and incredulity about this provision is rooted in experience. They know first-hand why it would be risky to hire a late-arriving American referral and send an H-2B worker home. And in light of their own experience, they are deeply frightened of being forced into a corner where they would have no choice but to do exactly that.

- These facts also highlight why it would be preposterous, as proposed in the pending rule, to require employers to treat out-of-state U.S. job applicants the same way they treat H-2B employees. Given their past experience with U.S. workers, employers cannot imagine paying for U.S. job applicants' transportation to the workplace, reimbursing them for their subsistence costs while on the road, often providing them with housing when they arrive at the worksite – when the odds are so strongly against their remaining on the job for more than a few days or weeks.

A sampling of employers' comments:

I have interviewed countless American workers over the years. Most tell me they do not want temporary work. In the past two years, we hired two temporary American workers, and neither showed up in the spring.

Very few even apply, and during the 13 seasons I have been here, not one worker hired stayed more than a few weeks.

Of the dozen of U.S. workers offered positions, only one has lasted an entire season. Most (over 75 percent) do not report for work the first day.

In the past eight years, not one of the U.S. workers who applied for work during our winter recruitment stayed for the entire season. Of the approximately 25 U.S. workers who were hired and agreed to come to work, only four reported for work on March 15 and only two stayed more than one week.

Most never showed up – period. If they did, it was for a week or two. The longest – one month.

In the five years we have been using the H-2B program, we have had only one U.S. worker report to work and he lasted less than two weeks.

A majority of American workers do not show up for the first day of work, and another large percentage show up for only a day or two and then quit. On occasion, we have hired an American employee who has remained with us for the entire season, but these are few and far between.

This is the heart of the problem. We have tracked the issue for a long time and found that U.S. employees hired as laborers last an average 2.5 days before they quit. Our average H-2B laborer has been with us 9+ years.

So far, in ten to 15 years, not one has stayed more than two days.

I hired 53 American workers in 2009. Not one lasted more than two months – most quit within a week.

Our experience is that U. S. workers are very short-term – a matter of weeks or days.

Our experience over the last 12 years is that the great majority (90 percent) of local workers will not last even a few weeks. Two years ago, when our H-2B employees were a month late in arriving, we used three different employment agencies and hired 72 seasonal workers. Two of the 72 stayed with us the entire season.

Less than 20 percent of them show up for the interview. Less than 25 percent of those who are hired show up for work at the beginning of the season. Half of those last less than a week, with none lasting more than two weeks.

We do find local people who want to work, or more correctly they find us, and we hire them. But in the past eight years, advertising for between 60 and 80 workers per year, we have hired only one local worker who lasted more than one season. We advertise for 60 workers. This year, with double-digit unemployment rates, we got a total of eleven responses. Nine showed up for the interview. Six showed up for the first day of work. Four did not last the first week. And the last two were gone after three weeks. In the past seven years, there were four years when we advertised for 80 workers without one response.

Virtually no U.S. workers have remained on the job for a full season or even half a season. Most U.S. workers didn't last more than two days. This past year, during the H-2B recruitment process, we received 57 applications from U.S. applicants interested in the positions. Only seven showed up for interviews. We hired three – the rest couldn't perform the physical requirements of the job, did not have valid driver licenses or failed the drug test. Of the three U.S. workers hired, none showed up on the first day of work.

Our retention rate for U.S. workers "hired" is about 2 percent. Of these who actually show up for work, less than 10 percent stay the season.

I have participated in the H-2B program for nine years. During that period I have hired many U.S. workers during the recruitment process. Only one remained for the entire season. Most never show up the first day of work. Of the few who do show up the first day, most leave within a couple of weeks. Why? Americans want year-round employment. And landscape work is hard – like agricultural work. It involves hard physical labor and exposure to environmental extremes. Few in our urban workforce understand the physical requirements of a landscape job.

If there were no H-2B workers

The final question in the survey asked employers what they would do if their companies were unable to hire H-2B workers. Of the 501 employers who returned the questionnaire, 34 percent said they would go out of business. One in four said they would downsize, restructure or lay off U.S. workers. Another 23 percent said they make do with an inadequate workforce and poorer quality product. Four percent admitted they would hire unauthorized workers, and 14 percent said they would be at a loss for what to do.

Taken together, 59 percent said they would downsize or close their businesses.

On this question too, the numbers speak for themselves and need little explanation. The responses underline the value of the H-2B program and the unspeakable loss that would result if the department presses ahead with burdensome regulations and arbitrary, unpredictable processing likely to drive large numbers of employers out of the program.

Employers who use the H-2B program are employers determined to play by the rules, resisting the temptations that draw many of their competitors to hire unauthorized workers.

They are willing to pay extra, they are willing to let the government into their businesses. They comply with burdensome requirements and accept unappealable decisions by officials even when those decisions have severe adverse consequences for their companies.

But at some point, these employers say, there is a limit. If H-2B requirements become too onerous, they will drop out of the program – and when they do, they will have no choice but to close their businesses or shrink them, no alternative but to aim lower or come through with less for their customers.

Employers' answers to this fifth question make for painful reading – there's no other word for it. It's a story of loss for these small business owners, loss for their local communities and loss for the U.S. workers up- and downstream in the economy who will be dragged under as H-2B employers downsize and close.

A sampling of employers' comments:

I will have to decide whether or not to remain in business. I don't think I can without the H-2B program.

We will be forced to downsize significantly – and we'd be able to service only our best customers.

We would most likely be forced to downsize. Our quality would go down and we would be forced to turn away all but the most profitable jobs. I would have to let several key managers and foremen go – without workers, there would be no reasons to keep them and I couldn't afford them at their current wages. We would face some very difficult decisions about which employees and customers to keep. We would certainly not be able to grow our business or hire anyone for the foreseeable future.

Cut our operation in half. Lay off American workers.

We may have to turn away work or use temp agencies, which would dramatically increase our costs.

Our company would eventually be cut in half or fold. We would lose a lot of customers because we wouldn't have the manpower to serve them. This would cause some of our American supervisors to be laid off.

Most likely go out of business. Certainly have to downsize, cutting vital full-time American jobs – and mind you, these are jobs with benefits, not so easily replaced in this economy.

Perhaps go out of business. We would lay off most staff and managers.

We wouldn't be able to do any of our jobs. We would go out of business

If we are unable to hire H-2B workers, our entire business would collapse. We employ an American management and office staff of 18 people who would all lose their jobs if we could not hire H-2B workers.

If we did not have H-2B workers, we would not be able to fulfill our customer demands – and would risk losing customers altogether. If we lose any one of our larger customers (i.e. Walmart), that could mean the end of our business – putting 125 full-time employees out of work.

Eliminating the H-2B program or making it impossible to use only increases the chances that many companies will hire illegal workers. If Americans will not do these jobs, and H-2B workers are not available, undocumented workers are the labor pool of last resort. The only alternative for companies is to cease operations, which means American workers will lose their jobs. We currently employ more than 125 American workers in supervisory, management, support and skilled labor positions – but we will not need any of them if we cannot hire field laborers.

We depend on the H-2B program for our survival. If the program continues to become more onerous and costly, we will have to close our doors after 28 years. This will mean putting twelve reliable, hard-working Americans out of work.

If we were unable to hire H-2B workers, my company would not be able to service its customers, and American jobs would be lost. Please don't make American employers who have chosen to play by the rules suffer. The H-2B option is indispensable for a labor-intensive business like mine.

CORRESPONDING EMPLOYMENT – AN UNWORKABLE IDEA

Of all the changes proposed in the pending rule, among the most problematic for employers are the proposed requirements for "corresponding employees" – defined as U.S. and other workers, hired during the H-2B recruitment process or already in the company's employ, whose job descriptions overlap in any way with that of an H-2B worker or who perform any of the same tasks performed by H-2B workers.

Under the proposed rule, corresponding employees would be entitled to the same wages the employer offers H-2B workers, the same protections and benefits, the same transportation and subsistence payments. Any processing requirements that apply to H-2B workers – for example, the requirement that employers notify the government when the employee quits or is fired – would also apply to corresponding employees. And Wage and Hour Division enforcement would be expanded to include workers in corresponding employment.

All of this would be burdensome enough if corresponding employees were defined as U.S. workers who were truly analogous to H-2B workers and similarly situated. But that is not the definition in the proposed rule. On the contrary, the definition is phrased so broadly that in many businesses, every employee will be a corresponding employee – described in the rule as anyone engaged "in any work included in the job order, or any work performed by the H-2B workers during the . . . period of the job order." The critical word here is *any*, used not once but twice. It would expand the definition of corresponding employment to the point that it is virtually meaningless – encompassing, in many cases, the entire workforce of the company. And if implemented as written, this provision will have severe adverse consequences for employers enrolled in the H-2B program.

In order to explore the likely consequences, ImmigrationWorks looked closely at two Colorado businesses that hire H-2B workers, the Broadmoor resort, a five-star hotel in Colorado Springs, and Keesen Enterprises, a commercial landscaping and irrigation company on the outskirts of Denver.

'Everyone picks up trash'

Built in the early 20th century for a wealthy clientele seeking the kind of resort experience it knew from the grand hotels of Europe, the Broadmoor has more than 700 rooms, 18 restaurants, three championship golf courses and a luxury spa. Visitors come to marvel at the Rockies, enjoy outdoor activities and experience the world-class service for which the

hotel is famous. Most of the staff of 1600 – 2000 in the summer – are U.S. workers, but during the hotel's busiest months, it also employs 185 H-2B workers.

How many of the Broadmoor's 2000 full-time summer staff would fall under the definition of corresponding employees? According the resort's human resources department, virtually all of them.

In some cases, the hotel's U.S. and foreign workers are fairly similar, and it makes sense that their pay and benefits would be similar. In other cases, H-2B employees who have returned to the hotel for many years make more than inexperienced U.S. workers doing the same or similar work. Yet under DOL's unworkable definition of corresponding employment, the resort would be required to pay these two dissimilar groups of employees – one inexperienced, one very experienced – exactly the same wage.

Still other workers at the Broadmoor occasionally take on tasks outside their primary duties that overlap with work performed by H-2B and U.S. employees. Housekeepers, for example, are sometimes assigned to inspect rooms already cleaned by other housekeepers, and the inspectors make several dollars an hour more. But because inspectors occasionally do some of the same tasks performed by housekeepers – folding a towel, repositioning a pillow – under the proposed rule, all Broadmoor housekeepers would be entitled to the higher wage paid to inspectors. This is clearly unreasonable and would be an undue burden on the hotel.

Nor is this the end of what the rule would define as corresponding employment at the Broadmoor – far from it. One of the primary responsibilities of the resort's H-2B workers is to clean rooms and make beds. But on busy days, under the pressure of high-volume guest turnover, many other hotel employees – including senior management – also make beds. According to the Broadmoor's HR department, it's not unusual for the resident manager, the director of food and beverage, even the finance manager to help out cleaning rooms on a busy day. So too in the resort's restaurants. H-2B workers' primary responsibility in the restaurants is to clear tables. But restaurant managers also routinely pick up dishes and remove dirty glasses – that's part of the hotel's culture of service.

The same is true on the golf courses and elsewhere on the resort's 3000-acre grounds. All employees pick up trash when they see it. Supervisors frequently cut grass alongside H-2B workers. Senior staff routinely hold doors open for guests, and managers pick up luggage when there's no one else around to do it. Under DOL's overly broad definition of corresponding employment, all of these employees would be deemed corresponding. If they are all entitled to the same wages and benefits, what does that mean H-2B workers should be paid? And will all Broadmoor employees be entitled to the three-quarters guarantee and subject to all DOL requirements for H-2B workers?

DOL admits in the proposed rule that it has not "identified a reliable source of data to estimate the number of workers in corresponding employment at worksites on which H-2B workers are requested." But nor apparently has it given much thought to how employers are likely to respond to the rule's overbroad definition of corresponding employment and the requirements that come with it.

If the rule is implemented as written, businesses like the Broadmoor will be forced to do everything in their power to differentiate differently-skilled workers and avoid situations in which they perform similar tasks or their job descriptions overlap in any way. The resort would be required to make rigid new rules about what different categories of employees can and cannot do. H-2B workers and others would be pigeonholed by narrowly written job descriptions with strictly demarcated responsibilities from which they could never depart, no matter what happened in the workplace. Productivity would suffer. The quality of service at the Broadmoor would plummet dramatically. Workers, foreign-born and American alike,

would be discouraged from learning new skills and would find it much harder to rise within the company.

The company, its customers and employees alike would all be losers – no one would gain. And while a relatively large enterprise like the Broadmoor could perhaps adjust to this kind of compartmentalized hiring and rigid management, albeit at an extremely high cost, most small businesses could not – the vast majority simply could not operate under these conditions.

The cumulative effect

Keesen Enterprises designs and maintains landscaping for commercial clients in the Denver area – apartment complexes, office parks, shopping centers and the like. In business for nearly 40 years, the company employs more than 200 workers in the summer months – some salaried, some hourly – and brings in between $10 to $12 million a year in revenue. In past years, the firm has hired up to 200 H-2B workers. This year, the total is 85. H-2B employees are the backbone of the company's 40 two- to five-man maintenance crews, with some serving as crew foremen and a few in more skilled jobs like irrigation tech. Though they are outnumbered by the enterprise's 124 U.S. employees, some of whom are salaried and considerably more skilled – clerical staff, managers, supervisors – H-2B employees account for the lion's share of Keesen's summer payroll, largely because of the overtime pay they receive.

What would the new corresponding-employment rule mean for Keesen Enterprises? At Keesen too, as at the Broadmoor, job descriptions are fluid, and everyone does a little of everything necessary to keep the operation running. Skilled irrigation techs occasionally dig ditches, salaried account managers pick up trash and pull weeds. Foremen are working members of the maintenance crews and do many of the same chores done by ordinary crew members. Should all of these workers be paid the same wage? It's a ridiculous suggestion. If the proposed rule is implemented as written, Keesen would struggle to make dramatic changes in its hiring practices and management norms, transforming the way the company does business. But in all likelihood, according to director of operations, Steven Steele, it won't come to that – the financial ramifications of the new regulations will have devastated the company first.

The problem for Keesen, as for many H-2B employers, would be the cumulative effect of several different provisions introduced in recent months by DOL. Start with the new prevailing wage requirements finalized in January 2011 and scheduled to go into effect on January 1, 2012. Add the proposed new rule's definition of a full-time work week and the requirement that workers be guaranteed employment for three-quarters of the hours in every four-week period of their contracts, regardless of weather and other conditions. Then, the *coup de grace*, apply the new definition of corresponding employment, and for Keesen it's all over – and Steele explains, the new "requirements would make the H-2B program cost-prohibitive" for the company.

Keesen currently pays its H-2B workers a minimum of $9.19 an hour – well above the federal minimum wage of $7.25. Some of the company's H-2B employees are more skilled than others, and on average the H-2B workforce makes $9.79 an hour, typically for a 42-hour week over a nine-month contract.

DOL's new wage requirement will significantly raise this payment floor. According to the finalized rule, employers must pay H-2B workers whichever is higher – the federal, state or local minimum wage, a wage determined by a collective bargaining agreement, a Davis-Bacon Act or Service Contract Act wage or the arithmetic mean of wages paid to all employees in the occupation in question in the geographic area.

In Keesen's case, this will mean one of two things. The arithmetic mean of wages currently paid to Denver landscaping and groundskeeping workers, skilled and unskilled, would be $11.76 an hour – a 28 percent increase over what Keesen is paying now. The Service Contract wage for grounds maintenance employees in the Denver area is $14.67 an hour – a 60 percent increase. Keesen doesn't yet know which new wage the department will insist upon, but either way, according to Steele, it will become the new minimum wage for the company's entire workforce, with compensation rising commensurately across the board.

Hours worked will also be an issue for Keesen. The company's H-2B contracts run from March through November. From June through September, maintenance crews work flat out. There's lots of overtime, and even with the occasional rainy day, all workers, U.S. and foreign-born, put in more than 40 hours a week. Spring and fall – March, April and May and October and November – are different. The weather is capricious. The amount of work available can be irregular – not all contracts are in full gear or they are tapering off. Not all H-2B workers put in a full 35-hour weeks in those months, or 105 hours each month, and paying them as if they had could raise Keesen's H-2B labor costs by as much as 40 percent – another 40 percent on top of the 28 percent or 60 percent rise already mandated by the prevailing wage rule. And meanwhile, as wages rise, so will the cost of workers' compensation insurance, payroll taxes and a number of other incidental but by no means trivial payroll costs.

The cumulative totals are staggering – either scenario would be devastating for Keesen Enterprises.

Today, with the H-2B prevailing wage at $9.19, Keesen's H-2B payroll comes in at $173,351 every month – that's 85 workers making an average of $9.79 an hour for 42 hours a week. If the prevailing wage rises to $11.76, Steele calculates that the company's monthly H-2B payroll will rise to nearly $210,000. Under the corresponding-employment provision of the proposed rule, the company's U.S. maintenance workers would also have to get a 28 percent raise. And calculated on an annual basis, the company's payroll for hourly employees will rise by more than a million dollars.

But even this doesn't capture what the real increase would be, because Keesen's more skilled, salaried workers would also have to be paid more – the compensation paid to foremen, managers and supervisors would have to go up in tandem with or even more steeply than hourly employees' wages rose. And unlike hourly workers, salaried workers would receive a year-round increase.

Bottom line, according to Steele, assuming the best-case scenario next year, Keesen's total annual payroll will come in at $7.5 million – 23 percent, or $1.4 million, more than the company's current labor costs. If economic conditions are anything like they are this year, Keesen will be unable to pass any of this cost onto customers – in the down economy, landscaping prices are not exactly going up. And that means the company will have to absorb the additional labor costs – at the expense of investments in new equipment, merit-based pay raises and other employee benefits.

The second scenario is more daunting still – much more daunting. If the prevailing wage for Keesen's H-2B employees rises to the Service Contract wage of $14.67 an hour, the company's H-2B payroll would jump from $173,351 each month to more than $275,000 – a 60 percent increase. The payroll for non-H-2B hourly workers would rise at the same rate. Add in skilled, salaried workers and calculate the increase over the entire year, and Keesen's annual labor costs will go up by $2.9 million – to a total of just over $9 million. The company's annual revenue is only $10 to $12 million.

Asked to calculate the extras – DOL requirements that employers pay H-2B workers' travel costs, reimburse them for expenses on the road, guarantee 105 hours of employment each month and the rest – Steven Steele threw up his hands. "It wouldn't matter," he wrote in an email, "because we'd be out of business anyway."

Conclusion

Is the Department of Labor thinking about these consequences? Has it calculated what the proposed rule, or the combination of the proposed rule and the recently finalized wage rule, will mean for H-2B employers across the country? Has it thought through the implications of corresponding employment? Has it anticipated what a new norm of arbitrary and capricious adjudications will do to burden companies and slow their recovery at a time when all America is looking to small businesses to move nimbly to take advantage of opportunities and create jobs? Nothing in the text of the proposed rule suggests that the department has adequately considered any of these issues.

The employers who responded to ImmigrationWorks' survey returned again and again to a common theme. "Why on earth," one asked, "do these bureaucrats in Washington think they know more about how to run my business than I do? What do they understand about the reality of my season, my labor needs, the conditions in which we have to work, the quality of service my customers expect?" Multiply this knowledge gap by the many different sectors that rely on H-2B workers and the myriad different conditions, geographical and other, under which H-2B employers operate – and it isn't hard to understand why the business owners who responded to the ImmigrationWorks survey are so deeply concerned about the proposed rule.

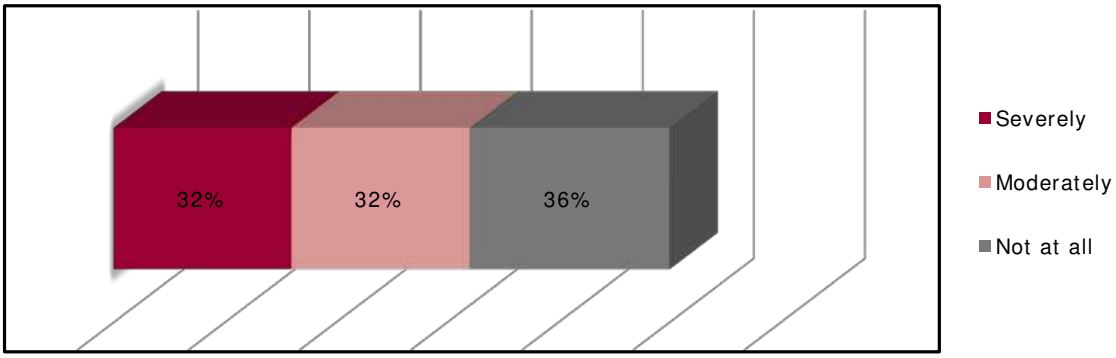
The H-2B program is small, but the stakes are high. Not just the businesses, small and large, enrolled in the program will suffer. Not just their employees, foreign-born and American. And not just other companies that buy and sell from H-2B employers – suppliers and customers up and down the economic food chain. The most devastating cost will be to U.S. workers in these other local companies and to the communities in which they live and work. Far from reducing adverse effects on U.S. workers, the proposed rule will greatly exacerbate and add to them. True enough, all of these employers and employees together are a small part of the U.S. economy. But that is hardly an excuse for the destruction the proposed H-2B rule would wreak.

ImmigrationWorks USA

RESPONSES TO IW H-2B SURVEY

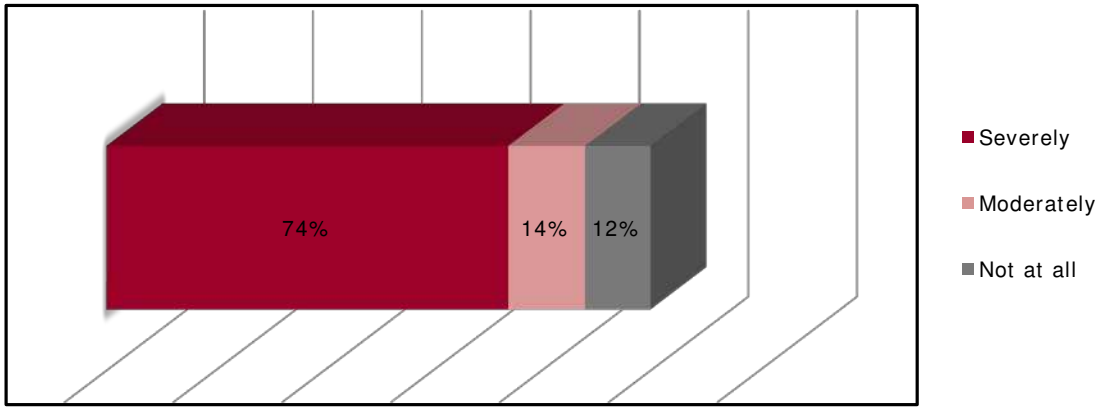
APRIL - MAY 2011

QUESTION ONE How long is the season or peak time for which you hire H-2B workers? Will reducing the visa period from ten months to nine months make a difference for your business? How will it affect your bottom line?



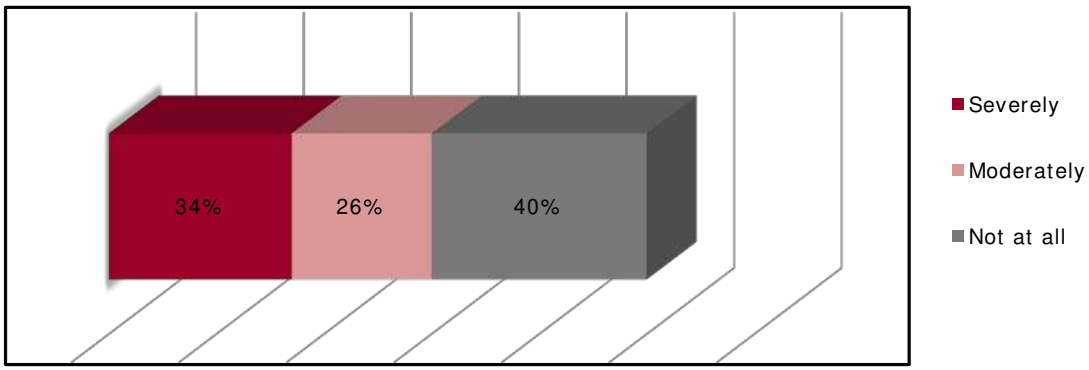
TAKEAWAY 64 percent of employers are moderately or severely concerned about the consequences for their bottom line

QUESTION TWO The new rule requires employers to continue recruiting for the job opening – and to hire any American worker who applies – up to three days before the company's last H-2B worker arrives. Is this realistic? How will it affect your bottom line?



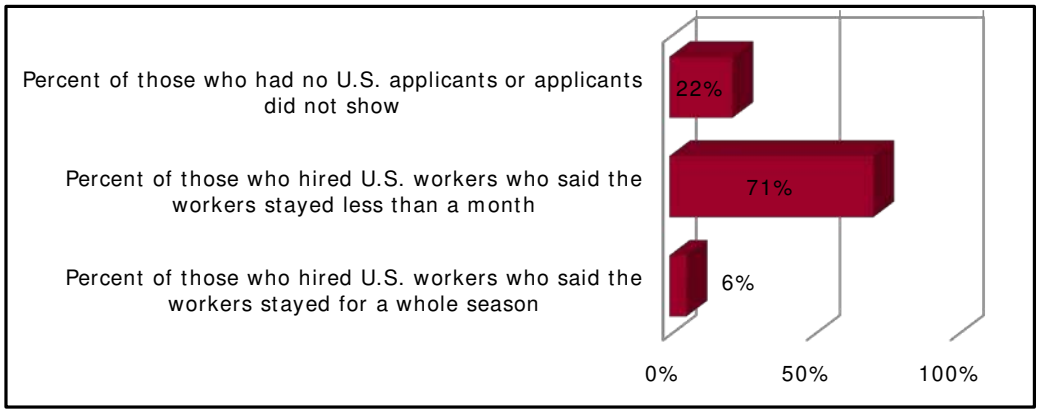
TAKEAWAY 88 percent of employers are moderately or severely concerned about the consequences for their bottom line

QUESTION THREE The new rule requires employers to offer H-2B workers at least 105 hours of work each month regardless of weather and other conditions – and to pay them for that many hours even if they do not work that long. Is this realistic? How will it affect your bottom line?



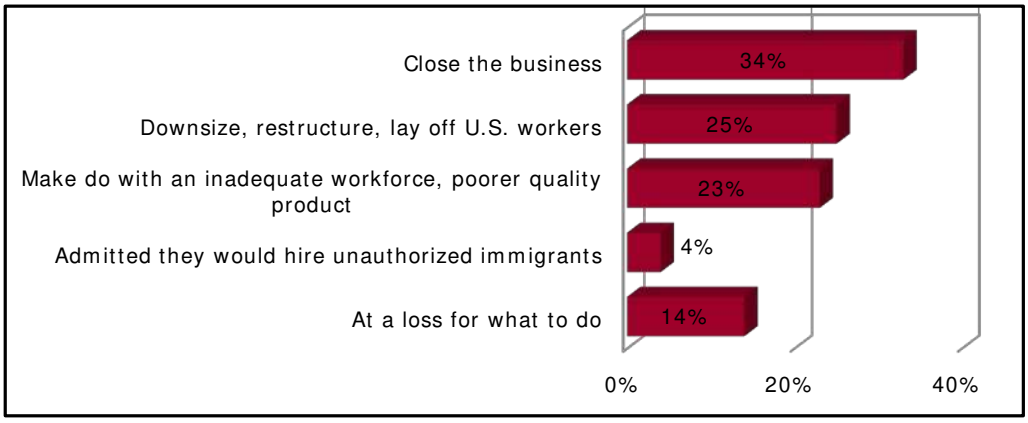
TAKEAWAY 60 percent of employers are moderately or severely concerned about the consequences for their bottom line

QUESTION FOUR One of the primary goals of the new rule, according to DOL, is to make sure H-2B employers offer ample opportunities to U.S. workers. In the past, when U.S. workers have applied for and accepted jobs advertised as part of the H-2B process, how long did those U.S. workers remain employed by your company? Did they usually remain through the season? Half the season? A matter of weeks or days?



TAKEAWAY 71 percent of U.S. workers hired for seasonal work quit within a month

QUESTION FIVE What would your company do if you were unable to hire any H-2B workers?



TAKEAWAY 59 percent of employers said they would downsize or close their businesses

Results based on 501 responses

H2B SURVEY

The Department of Labor has proposed extensive changes to the H2B program. ImmigrationWorks is preparing a comment on the practical problems these changes are likely to create for employers.

We can't do it without you – we need your input! Please take a moment to answer five questions.

Tell us where you live and what kind of business you run if you're comfortable providing that information. Or answer anonymously if you prefer.

Please take as much space as you need. And thank you for your time!

How long is the season or peak time for which you hire H2B workers? Will reducing the visa period from ten months to nine months make a difference for your business? How will it affect your bottom line?

__ *Severely* __ *Moderately* __ *Not at all* *Please explain*

The new rule requires employers to continue recruiting for the job opening – and to hire any American worker who applies – up to three days before the company's last H2B worker arrives. Is this realistic? How will it affect your bottom line?

__ *Severely* __ *Moderately* __ *Not at all* *Please explain*

The new rule requires employers to offer H2B workers at least 105 hours of work each month regardless of weather and other conditions – and to pay them for that many hours even if they do not work that long. Is this realistic? How will it affect your bottom line?

__ *Severely* __ *Moderately* __ *Not at all* *Please explain*

One of the primary goals of the new rule, according to DOL, is to make sure H2B employers offer ample opportunities to U.S. workers. In the past, when U.S. workers have applied for and accepted jobs advertised as part of the H2B process, how long did those U.S. workers remain employed by your company? Did they usually remain through the season? Half the season? A matter of weeks or days? Please explain fully.

What would your company do if you were unable to hire any H2B workers?

Please email your responses to Margaret Edmunds at medmunds@immigrationworksusa.org or fax them to 202 595-8962.
You can also enter them online here.

ImmigrationWorks USA *is a national federation of small business owners advocating immigration reform. The organization links 25 state-based, pro-immigration business coalitions: employers and trade associations from Florida to Oregon and from every sector of the economy that relies on immigrant workers. IW coordinates and supports these groups as they fight for better immigration law in Washington and in the states.*