



National Association of State Departments of Agriculture

4350 North Fairfax Drive

Suite 910

Arlington, VA 22203

Tel: 202-296-9680 | Fax: 703-880-0509

www.nasda.org

March 13, 2015

The Honorable Thomas Perez
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Secretary Perez and Secretary Johnson:

As the Commissioners, Secretaries, and Directors of the state departments of agriculture in all 50 states and four U.S. territories we are extremely concerned about the Department of Labor's (DOL) decision to no longer accept or process requests for H-2B prevailing wage determinations or labor certifications in light of a March 4 decision in *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). We urge DOL and the Department of Homeland Security (DHS) to immediately resume processing H-2B applications.

In *Perez v. Perez*, the United States District Court for the Northern District of Florida vacated and permanently enjoined DOL's 2008 H-2B regulations. The same court previously invalidated DOL's 2012 H-2B regulations. These decisions were based on the premise that DOL possesses no express authority under the Immigration and Nationality Act (INA) to promulgate regulations pertaining to this temporary non-agricultural worker program.

In response to the decision, DOL announced on March 4, 2015 it can no longer accept or process requests for prevailing wage determinations or applications for labor certification in the H-2B program. The following day, U.S. Citizenship and Immigration Services (USCIS) announced it was temporarily suspending adjudication of Form I-129 H-2B petitions.

As a result, the H-2B program has been effectively shut down, and businesses, which rely on the H-2B program as an important source of labor due to their seasonal nature or demanding travel requirements, face a very real possibility of having to shut down their operations as well. Many of these impacted industries include forestry, seafood harvesting and processing, state fairs, horse training, and other businesses closely related to or supportive of agricultural operations.

The program is important not only for those employers, but also for local and rural economies because these businesses generate increased revenue for their local communities. Without the H-2B program many businesses would be forced to close or, at the very least, scale back, which could have a devastating effect on local and rural economies. Importantly, businesses that rely on the H-2B program for foreign temporary workers also employ many American workers, both temporary and permanent, while supporting many upstream and downstream agricultural-related jobs.

Since the H-2B program is vital to so many American businesses, workers, and local economies throughout the country, we urge the Department of Homeland Security (DHS) to immediately take necessary action to resume adjudication of H-2B petitions. Although the district court's decisions find that DOL lacks the express statutory authority to promulgate rules governing the H-2B program, the

RECEIVED

RECEIVED BY DHS EXEC SEC

2015 MAR 16 AM 10:35

2015 MAR 16 PM 4:00


decisions do not affect DHS' H-2B rulemaking authority. As such, DHS can issue regulations to provide a reasonable mechanism through which H-2B petitions can be adjudicated without violating the District Court injunctions. Because of the exigent circumstances, DHS, with the assistance of the Office of Management and Budget (OMB), could swiftly issue an interim final rule that would go into effect immediately upon publication.

At the very least, DHS should develop a policy that will resolve the suspension of pending cases that already have labor certifications approved by DOL. These businesses have already invested substantial time and money recruiting, paying for immigration and travel costs, and preparing for incoming workers, and they stand to lose the most due to a disruption in the H-2B program. It is unfair to employers who followed the applicable rules, obtained temporary labor certifications, and timely filed petitions with USCIS—often in conjunction with fees to ensure premium processing—to now reject their petitions and refund their fees without taking all available measures to mitigate undue harm.

We are mindful that DHS may not have the technical expertise in certain areas related to the H-2B program which have historically been within the expertise of DOL. That being said, DHS still has authority under INA 214(c)(1) to consult with DOL regarding H-2B petitions for assistance over these technical areas. DHS should work with DOL to develop and implement a process where DHS is able to consult with DOL for such technical expertise.

The time-sensitive nature of the program requires DOL and DHS to immediately resume adjudication of H-2B petitions to avoid further complications and unnecessary challenges to critical operations in forestry, seafood harvesting and processing, state fairs, and other agricultural and rural businesses. We stand ready to assist your agencies in bringing a swift and workable solution forward.

Sincerely,

A handwritten signature in cursive script, reading "Barbara P. Glenn".

Barbara P. Glenn, Ph.D.
Chief Executive Officer
NASDA



Employment
and
Training
Administration



U.S. Citizenship
and Immigration
Services

MAR 31 2015

Barbara P. Glenn, Ph.D.
Chief Executive Officer
National Association of State
Departments of Agriculture
4350 North Fairfax Drive, Suite 910
Arlington, VA 22203

Dear Dr. Glenn:

Thank you for your correspondence to Secretary of Labor Thomas Perez and Secretary of Homeland Security Jeh Charles Johnson regarding the continued operation of the H-2B temporary nonagricultural worker program. As you are aware, on March 4, 2015, the U.S. District Court for the Northern District of Florida, in the case of *Perez v. Perez*, No. 3:14-cv-682, vacated U.S. Department of Labor (DOL) regulations from 2008 governing the H-2B program. The court vacated those regulations on the ground that DOL lacks authority under the Immigration and Nationality Act to engage in unilateral legislative rulemaking concerning the H-2B program. The court further vacated and enjoined DOL from enforcing the rule, and DOL was forced to immediately discontinue processing applications for temporary labor certifications in the program. The U.S. Department of Homeland Security (DHS) suspended H-2B adjudications while it reviewed and assessed the district court's decision.

DOL and DHS share your interest in the continued operation of the H-2B program and have taken prompt actions to address the problem. On March 16, 2015, DOL filed an unopposed motion to stay the district court's order until April 15, 2015. The court granted that motion on March 18, 2015. As a result, DOL immediately resumed issuing labor certifications and prevailing wage determinations under the 2008 H-2B rule. The court has since taken further action that has stayed its order while it reviews pleadings recently submitted concerning this litigation. DOL has published frequently asked questions on its website at www.foreignlaborcert.doleta.gov in order to assist employers and other stakeholders in understanding the scope and effects of the court's order.

In addition, in conjunction with the filing of DOL's motion on March 17, 2015, DHS resumed adjudications of H-2B petitions based on temporary labor certifications previously issued by DOL. Given the volume of cases received during the current suspension of H-2B adjudications, DHS has suspended premium processing of H-2B petitions until further notice. Once DHS has completed data entry of the pending petitions and reassessed its ability to deliver

appropriate levels of service to premium and non-premium filings, DHS will determine when to accept new premium processing requests.

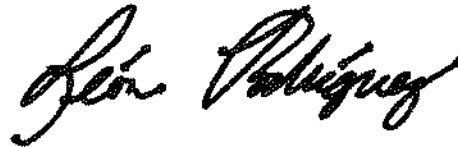
DOL and DHS are also moving expeditiously to fill the regulatory gap resulting from the district court's order. The Departments intend to promulgate a joint interim final rule by the end of April.

Thank you again for your letter. DOL and DHS will continue to keep the affected public informed of developments with respect to the H-2B program.

Respectfully,



Portia Wu
Assistant Secretary
Employment and Training Administration
U.S. Department of Labor



León Rodríguez
Director
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security