VIA ELECTRONIC SUBMISSION

November 12, 2010

The Honorable Jane Oates
Assistant Secretary
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Thomas Dowd
Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Docket ID ETA-2010-0004; RIN 1205-AB61

Dear Assistant Secretary Oates and Administrator Dowd:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor's (DOL or Department) Employment and Training Administration (ETA), in response to the above-referenced notice of proposed rulemaking (NPRM), published in the Federal Register on October 5, 2010, at 75 Fed. Reg. 61578.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing more than 25,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 77 chapters throughout the United States and Guam. ABC member contractors employ more than 2.5 million construction workers, whose training and experience span all of the twenty-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, nondiscrimination due to labor affiliation, and the award of construction contracts to the lowest responsible bidder through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

Background

The H-2B visa is a temporary, nonimmigrant work visa authorized by the U.S. Department of Homeland Security (DHS) for nonagricultural workers. Under the H-2B program, U.S. employers may hire visa holders to meet peak load, seasonal, intermittent or one-time needs. DHS issues 66,000 H-2B visas annually. During construction worker shortages, ABC members have used the H-2B program to fill their labor needs.

DHS has delegated authority to DOL to establish wage rates for each occupation under the H-2B program. Employers must pay a visa holder, at a minimum, the established wage rate for his or her occupation. Currently, DOL relies on a four-tier skill system, based on the Bureau of Labor Statistics' (BLS) Occupational Employment Statistics (OES), to set wage rates for H-2B visa holders.

Recently, the four-tier system was the subject of a legal challenge. On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania ordered DOL to provide the public with an opportunity to comment on its methodology for calculating wages for the H-2B temporary nonagricultural worker visa program, and to promulgate a rule that meets the requirements of the Administrative Procedure Act in 120 days.

On October 5, 2010, DOL formally published its proposed rule. Rather than issue a notice requesting comment on the current methodology in accordance with the court order, the agency instead opted to propose a completely new wage methodology, which relies heavily on rates set through the Davis-Bacon wage determination process. The NPRM would rescind the current wage methodology, and replace it with a system that will set wage rates as "the highest of the following: Wages established under an agreed-upon collective bargaining agreement (CBA); a wage rate established under the [Davis-Bacon Act] or [Service Contract Act] for that occupation in the area of intended employment; and the arithmetic mean wage rate established by the OES for that occupation in the area of intended employment."[1] The employer would be required to pay the workers "at least the highest" among the "prevailing wage," as outlined above, and the federal, state, and local minimum wages.

ABC's Comments in Response to DOL's Proposed Rule

ABC has a number of concerns with DOL's rule as proposed, each of which are addressed below. Primarily, we object to the proposed rule, and believe that it would be detrimental both to the long-standing success of the H-2B program and to its participants—particularly small businesses. ABC recommends that DOL preserve the current H-2B wage methodology, and withdraw its proposal to revise this crucial component of the program.

[1] 75 Fed. Reg., at 61579.

I. The Davis-Bacon Act

unions and union contractors, which in 2009 comprised only 14.5 percent of the private sector construction industry.[4]

As a result of WHD's failed methodology, Davis-Bacon rates are outdated, inaccurate and inflated. In fact, a 2008 study by the Beacon Hill Institute at Suffolk University found that the current Davis-Bacon wage determination process grossly inflated wages. The study compared the methods used by the BLS and WHD to determine the prevailing wage for workers employed on federally funded construction projects. Researchers examined nine occupational categories in 80 metropolitan areas and concluded that the current unscientific WHD method artificially raised wages by 22 percent over the more scientifically sound BLS method.[5]

As stated in the 2008 Beacon Hill Study, "the practice of basing the prevailing wage on a small minority of workers who have, on average, weekly earnings that are almost 30 percent higher than other workers, guarantees that the reported wage is anything but the prevailing wage." The impact of using Davis-Bacon rates is evidenced in DOL's own cost projections for the NPRM, which state that the hourly wage rate for H-2B workers in the construction industry will be increased by an average of $10.61 per hour.[6]

B. WHD's Failure to Provide Information on Job Duties for Each Davis-Bacon Wage Rate Will Unnecessarily Complicate Visa Wage Determinations

Under Davis-Bacon, the job duties that apply to a particular job classification are determined by local practice. For example, a carpenter may hang sheet rock in one area, whereas that work may only be performed by sheetrock hangers in another jurisdiction. Where DOL determines that the prevailing wage rate for a classification is based on a union collective bargaining agreement, the job duties for that classification will also most likely be governed by the union's work rules in that collective bargaining agreement. Generally, union work rules require that only a certain job classification may perform certain work. For example, the work rules may require that only an electrician is permitted to install alarm systems, even though such work is performed by technicians in other jurisdictions.

While each DOL wage determination will list several different classifications of workers (painters, carpenters, laborers, etc.), little information is available on the actual job duties or union work rules that apply to the classifications. Although the published wage determinations may identify the relevant local union for each of the listed job classifications, where the rate is based on the union's collective bargaining agreement, DOL does not provide detailed information as to whether there are any work rule restrictions attached to those wage rates and, if so, what those work rule restrictions are.

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[4] U.S. Department of Labor, Bureau of Labor Statistics, Union Membership (Annual) News Release (Jan. 2010): http://www.bls.gov/news.release/union2.htm

[5] The Beacon Hill Institute at Suffolk University, The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages (Feb. 2008): http://www.beaconhill.org/bhistudies/prevwage08/davisbaconprevwage080207final.pdf

[6] 75 Fed. Reg. at 61586.

DOL's failure to provide such information makes it difficult to determine the appropriate wage rate for many construction related jobs. Moreover, because the methodology used by WHD is biased in favor of unionized contractors, in many instances union wage rates and work rules are deemed "prevailing," even though that is clearly not the case. Again, if WHD's methodology truly captured prevailing rates, union rates would prevail in very few regions, as only 14.5 percent of the private sector construction industry is represented by unions[7]. Importing these problems into the foreign labor certification process essentially renders visas unusable by the vast majority of contractors, particularly smaller contractors.

implications of DOL's proposed rule will certainly have a negative impact on this already cash-tight industry.

Construction companies have been hit especially hard by the current state of the economy. Industry firms are already confronting unprecedented strains on their cash flows, and it is an unfortunate reality that many small businesses have failed due to inadequate capitalization. The challenges faced in the current economic environment by construction industry small businesses that rely on the H-2B program will be significantly compounded by DOL's proposed rule. It is entirely possible that more small businesses will be forced to close their doors as a result.

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For the reasons outlined above, ABC opposes the NPRM, and urges DOL to reconsider its proposed changes to its H-2B wage calculation policy. In addition, ABC strongly recommends that DOL maintain the current four-tier wage system, which utilizes scientific wage data from the BLS OES. ABC believes that DOL should comply with the previously-mentioned court order and provide affected stakeholders the opportunity to comment on the current H-2B wage calculation