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July 7, 2008

Thomas Dowd, Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N5637
Washington, D.C. 20210

**Re: Department of Labor Notice of Proposed Rulemaking [RIN1205-AB54]
Labor Certification Process and Enforcement for Temporary Employment
In Occupations Other Than Agriculture or Registered Nursing in the United
States (H-2B Workers) and Other Technical Changes 20 C.F.R. Parts 655
and 656**

Dear Administrator Dowd:

The following comments are submitted on behalf of the Building and Construction Trades Department, AFL-CIO ("BCTD"), whose thirteen affiliated national and international unions represent more than 2.5 million workers engaged in the building and construction industry in the United States and Canada.

Most of the workers represented by the BCTD and its affiliates in the United States are engaged in or seek employment in an industry that can be short-term and intermittent. These workers, as well as other U.S. workers who perform nonagricultural skilled and unskilled labor are the intended beneficiaries of a labor certification process that is administered by the U.S. Department of Labor ("DOL") and is a prerequisite to obtaining H-2B temporary work visas for alien nonimmigrant workers.

These comments are submitted in response to the Notice of Proposed Rulemaking (NPRM) published on May 22, 2008 by DOL, 72 Fed. Reg. 29942 *et seq.*, which, if promulgated would: (1) replace the current labor certification process used by employers seeking H-2B visas for temporary non-agricultural alien workers with a new process pursuant to which employer applications for H-2B temporary labor certifications would be referred by the Office of Foreign Labor Certification ("OFLC") in DOL's Employment and Training Administration ("ETA") for processing by one of two National Processing Centers ("NPC") located in Atlanta, Georgia and Chicago, Illinois instead of to the State Workforce Agency ("SWA"), which has jurisdiction over the area of intended employment; and (2) require employers to submit a written attestation with their

application for H-2B temporary labor certifications, which states that they have met certain recruitment and labor requirements. In addition, the NPRM proposes adoption of procedures that would permit DOL to issue an H-2B labor certification for a "multiple-year temporary need" (not to exceed three years) pursuant to which employers would nevertheless be required to "retest" the labor market annually.

For the following reasons, the BCTD is unalterably opposed to adoption of the rules proposed by the DOL that would eliminate initial review of employer applications for H-2B temporary labor certifications by the SWA and replace the labor certification process currently applicable to applications for H-2B temporary labor certifications with an attestation-based process. The BCTD is also opposed to expanding the definition of a job opportunity, which requires the labor or services of a foreign worker for more than one year, as "temporary" for H-2B labor certification purposes.

However, the BCTD strongly supports the DOL's proposal to assign all of its investigative and enforcement functions under the H-2B temporary worker program to the Wage and Hour Administrator. This assignment is subject to the anticipated delegation of authority by the Department of Homeland Security ("DHS") to DOL to establish an enforcement process to investigate employer compliance with H-2B requirements and to seek remedies for violations discovered by such investigations. See 73 Fed. Reg. at 29955, 29969-70 (to be codified as 20 C.F.R. §§ 655.50 & 655.60). The BCTD recommends, however, that delegation of this investigation and enforcement authority be accompanied by a commitment of additional resources to the Wage and Hour Division, which has experienced a dramatic reduction in the number of compliance officers available to conduct investigations. Without these additional resources and staffing, the proposed delegation of investigative authority to the Wage and Hour Administrator would actually be detrimental to the need for increased enforcement of employer compliance with H-2B requirements.

The BCTD also supports DOL's proposal to create a mechanism to debar employers, attorneys, and agents from the H-2B program who commit willful violations of its requirements, for a period of up to three (3) calendar years. See 73 Fed. Reg. at 29954-55, 29968 (to be codified as 20 C.F.R. § 655.31).

These proposed changes in investigation and enforcement of compliance with H-2B requirements would be further enhanced if DOL were to adopt final regulations that incorporate additional procedures comparable to those set forth in sections 212(n)(1)(G) and (2) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(n)(1)(G) & (2), which apply to DOL's H-1B specialty occupations program. These procedures create a system pursuant to which employer applications for labor certifications are available for public examination and challenge by aggrieved persons or organizations, including bargaining representatives, pursuant to an administrative complaint process, which can result in administrative remedies, including civil money penalties, denial of approval of future petitions for temporary worker visas, and debarment for willful violations.

These enhanced enforcement tools could significantly improve compliance regardless of whether DOL adopts an attestation-based H-2B process, as proposed in the NPRM and opposed by the BCTD for the reasons set forth below, or retains its current certification-based process with or without modification. Procedures modeled after those set forth in sections 212(n)(1)(G) and (2) of the INA would be especially valuable in the event that DOL presses forward with its proposal to adopt an attestation-based H-2B process because, as discussed below in greater detail, an attestation-based process offers no real assurance that the interests of U.S. workers, who are the intended beneficiaries of the H-2B labor certification requirement, will be protected from unfair competition by foreign temporary labor.

The Proposed Redesign of the H-2B Labor Certification Process is Unnecessary, Bad Public Policy that is Inconsistent with the Statutory Mandate in the Immigration And Nationality Act to Protect the Interests of U.S. Workers Against Unfair Competition for Jobs in the United States from Alien Nonimmigrants, and it Lacks Statutory Authorization.

The preamble of the NPRM states that DOL “is proposing several significant measures to re-engineer [its] administration of the [H-2B labor certification] program.” 73 Fed. Reg. at 29944. The NPRM explains DOL’s motive for proposing these changes as follows:

The process for obtaining a temporary labor certification has been described to the Department as complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers. In the H-2B Program, and particularly in recent years, the sequential process for filing a temporary labor certification first at the [State Workforce Agency], which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfers the application to the applicable ETA [National Processing Centers], has been criticized for its length, overlap of effort, and resulting delays.

* * * * *

In addition, the Department's increasing workload poses a growing challenge to efficient and timely processing of applications. The H-2B foreign labor certification program continues to increase in popularity among employers. While the annual number of visas available is limited by statute, the number of certifications is not. The number of H-2B labor certification applications has increased 129 percent since FY 2000. In FY 2007, the Department experienced a nearly 30 percent increase in H-2B temporary labor certification application filings over the previous fiscal year. The INA does not authorize the Department to charge a fee to employers for processing H-2B applications. At the same time, appropriated funds have not kept pace with the increased workload at the State or Federal level. This has resulted in disparities in processing rates--

some significant--among SWAs receiving the initial H-2B employer applications. Some observers have noted these disparities among States unfairly advantage one set of employers (those in which the SWAs are able to timely process applications) over others (those in which SWAs experience delays because of backlogs, inadequate staffing or funding, or for other reasons).

Id. (footnotes omitted).

DOL further notes in the NPRM that:

The growth in the number of applications is explained in part by the increasing desire of employers for a legal temporary workforce and by legislation that permitted greater numbers of H-2B workers into the U.S. by exempting from the 66,000 annual cap any H-2B worker who had been counted against the numerical cap in previous years. See, e.g., Save Our Small and Seasonal Businesses Act of 2005 (SOSSBA), Public Law 109-13, Div. B, Title IV, 119 Stat. 318 (May 11, 2005); see also Public Law 108-287 Sec. 14006, 118 Stat 951, 1014 (August 6, 2004) (exempting some fish roe occupations from the cap).

Id. n. 3.

DOL's proposed response to the foregoing phenomenon is three-fold. First, DOL proposes eliminating the role of the State Workforce Agencies ("SWA") in accepting and reviewing H-2B applications, overseeing recruitment of U.S. workers, and forwarding completed applications to the appropriate DOL National Processing Center ("NPC"). Second, DOL proposes that employers will be required to: conduct recruitment for U.S. workers prior to filing an application for an H-2B labor certification (including obtaining prevailing wages from the NPC in advance of recruitment; placement of a job order with the SWA serving the area of intended recruitment; place three advertisements, including one on a Sunday, in the newspaper most appropriate for the occupation and most likely to reach the U.S. workers who would apply and qualify for the job opportunity; and prepare a recruitment report outlining the results of the employer's recruitment effort, which would be submitted with the employer's application. Third, applications for H-2B labor certifications will be required to include a series of attestations described in the proposed regulations in lieu of the SWA-supervised recruitment activity performed under the current H-2B labor certification process. See 73 Fed. Reg. at 29966 (proposed to be codified as 20 C.F.R. § 655.22(a)—(p)).

The preamble in the NPRM assures the public, however, that:

These changes do not alter, in any substantive way, the current obligations and requirements of employers who file an application for H-2B [labor certifications]. Rather, these proposals are designed to improve the

process by which employers obtain labor certification in areas where our program experience has demonstrated that such efficiencies will not impair the integrity of the process or the Department's role in protecting the job opportunities and wages of U.S. workers. These proposals will also provide greater accountability for employers through penalties, up to and including debarment, to further protect against program abuse.

Id. However, the assurances in the NPRM preamble are unconvincing because of three overriding considerations. First, notwithstanding its time-consuming nature, there is no evidence that the current labor certification process discourages employers from using it to obtain alien skilled and unskilled foreign workers. More importantly, as discussed below, the protection of U.S. labor from unfair competition by alien workers for jobs in the United States has been a primary concern of Congress since 1917. Nonetheless, the proposal to eliminate the supervisory oversight role of the SWA in the recruitment of able, willing, qualified, and available U.S. workers together with adoption of an attestation-based process will not adequately advance this longstanding Congressional objective, because it utterly fails to provide more than a scintilla of protection to American workers and, therefore, it is not just bad public policy but also fundamentally contrary to the intent of the INA.

The Statutory and Regulatory Framework of the Current Labor Certification Process Applicable to Petitions for H-2B Visas.

The INA creates two broad classifications for persons seeking to enter the United States: immigrant and nonimmigrant. Section 101(a)(15) of the INA, 8 U.S.C. § 1101(a)(15) defines an "immigrant as "every alien^{1/} except an alien who is within one of [the] classes of nonimmigrant aliens [described in sections 101(a)(15)(A) through (V), 8 U.S.C. § 1101(a)(15)(A) – (V)]."^{2/}

Under sections 221 and 222 of the INA, respectively, 8 U.S.C. § 1201 & 1202, persons other than citizens or nationals of the United States may apply to United States Consular officials in his or her country for an immigrant or nonimmigrant visa. Specifically, section 221(a)(1)(B) of the INA, 8 U.S.C. § 1201(a)(1)(B), states that

^{1/} Contrary to those who regard the term "alien" as disparaging or offensive, section 101(a)(3) of the INA, 8 U.S.C. § 1101(a)(3), defines an "alien" as "any person not a citizen or national of the United States."

^{2/} "Unlike the lawful immigrant . . . who is admitted to the United States for permanent residence, the nonimmigrant may remain only for the duration of an authorized stay and engage only in those activities that are compatible with the specific nonimmigrant status given on entry." 2 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, Part 4, Chapter 12 § 12.01, at 12-4 (Matthew Bender Rev. Ed. 2008).

consular officers^{3/} may issue a visa to a nonimmigrant who has made proper application therefor, "which shall specify the classification under section 1101(a)(15) of [Title 8, United States Code] of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required." However, section 221(h) of the INA, 8 U.S.C. § 1201(h), states that neither immigrants nor nonimmigrants to whom a visa has been issued are entitled to enter the United States, if, upon arrival at a port of entry in the United States, the immigrant or nonimmigrant is found by the Department of Homeland Security's Bureau of Citizenship and Immigration Services ("USCIS") to be inadmissible under the Act or any other provision of law.

Section 101(a)(15)(ii)(b) of the INA, 8 U.S.C. § 1101(a)(15)(ii)(b), defines a class of nonimmigrants who seek to enter the United States temporarily for the purpose of performing skilled or unskilled labor that U.S. workers are unavailable to perform. This class of nonimmigrants is commonly referred to as H-2B workers. Section 101(a)(15)(ii)(b) provides:

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens --

(H) an alien . . . (ii) (b) 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

8 U.S.C. § 1101(a)(15)(H)(ii)(b) (Supp. 2008).

Section 214(c)(1) of the INA, 8 U.S.C. § 1184(c)(1), further states that "the question of importing any alien as a nonimmigrant under [*inter alia*, section 1101(a)(15)] of [Title 8, United States Code] (excluding nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by DHS USCIS], after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted."

In addition, section 212(a)(5)(A)(i) of the INA, 8 U.S.C. § 1182(a)(5)(A)(i), defines certain classes of persons who cannot be admitted to the United States, either as immigrants or nonimmigrants, unless certain conditions are met. Those classes of persons include aliens who seek to enter the United States to perform skilled or unskilled labor. The statute provides, *inter alia*:

^{3/} Section 101(a)(9) of the INA, 8 U.S.C. § 1101(a)(9), defines a "consular officer" as "any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in [title 8, chapter 12, United States Code], for the purpose of issuing immigrant or nonimmigrant visas"

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(5)(A)(i) Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, **unless** the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that --

(I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A)(i) (emphasis added). Thus, an alien seeking temporary admission to the United States to perform skilled or unskilled labor may be admitted **only** when the Secretary of Labor certifies beforehand that U.S. workers are unavailable to perform such work and that the alien's admission will not adversely affect the wages and working conditions of U.S. workers. Thus, it appears that the DHS USCIS must deny an employer's petition for H-2B visas, which is not accompanied by a DOL labor certification issued in accordance with section 212(a)(5)(A)(i) of the INA.^{4/}

^{4/} Section § 214.2(h)(6)(iii)(A) of the Department of Homeland Security's regulations implementing the INA, 8 C.F.R. § 214.2(h)(6)(iii)(A) (2007), refers to the labor certification provided by DOL as "advice" to the USCIS on whether or not U.S. workers qualified, willing and able to perform the temporary skilled or unskilled labor sought by the employer seeking an H-2B labor certification are available and whether or not employment of an H-2B worker will adversely affect the wages and working conditions of similarly employed U.S. workers. The DHS regulations further state that an employer seeking H-2B visas for foreign workers may submit countervailing evidence to the USCIS if DOL notifies the employer that certification cannot be made. 8 C.F.R. § 214.2(h)(6)(iv) (2007). Presumably, DHS maintains that it has authority to issue an H-2B visa to a petitioning employer notwithstanding DOL's failure or refusal to issue a labor certification, as required by section 212(a)(5)(A)(i) of the INA, if the USCIS independently determines that U.S. workers capable of performing the temporary services or labor are not available and that employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Nonetheless, to the extent that they purport to permit the USCIS to supercede DOL's notice that a section 212(a)(5)(A)(i) certification cannot be issued in support of an employer's petition for an H-2B visa, DHS regulations are arguably contrary to law.

DOL characterizes its role in the H-2B labor certification process as merely advisory to the DHS. See 73 Fed. Reg. at 29943 (citing 8 C.F.R. § 214.2(h)(6)(iii)(A)). However, the plain language of section 212(a)(5)(A)(i) of the INA clearly and unequivocally describes DOL certification as a mandatory prerequisite to obtaining a visa for every immigrant and nonimmigrant who seeks to enter the United States for the purpose of performing skilled or unskilled labor.^{5/}

Interestingly, the NPRM states that DHS may propose in a separate H-2B rulemaking to no longer consider any petition for an H-2B visa that is filed without a DOL labor certification. See 73 Fed. Reg. at 29953. Accordingly, the NPRM proposes creating an appeal process whereby employers whose applications for H-2B labor certifications are denied in whole or in part may file a request for review with DOL's Board of Alien Labor Certification Appeals (BALCA). *Id.* This appeal procedure is already available to employers whose applications for permanent labor certifications pursuant to section 212(a)(5)(A)(i) of the INA are denied in whole or in part. See 20 C.F.R. §§ 656.26-.27.

The BCTD supports the NPRM proposal to create an administrative procedure to review decisions to deny in whole or in part employer applications for H-2B labor certifications. See 73 Fed. Reg. at 29969 (to be codified as 20 C.F.R. § 655.33). However, the BCTD urges DOL to expand the availability of the proposed review process to U.S. workers and their labor representatives so that they may challenge any aspect of the labor certification process in the same expeditious manner that the NPRM would make available to employers. This proposed expansion of the right to appeal H-2B labor certification decisions to the BALCA would be particularly crucial in the event that DOL adopts the attestation process described in the NPRM, which as explained below, will substantially eliminate DOL's ability to knowingly certify that there are not sufficient U.S. workers who are able, willing, qualified and available at the time of application for an H-2B visa and admission to the United States and at the place where the H-2B worker(s) are to perform skilled or unskilled labor, and that employment of such H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. In the alternative, the BCTD prefers that DOL include in its final regulations procedures comparable to those set forth in sections 212(n)(1)(G) and (2) of the INA, 8 U.S.C. § 1182(n)(1)(G) & (2), which apply to DOL's H-1B specialty occupation program. See *supra* at 2-3.

^{5/} This does not mean, however, that the BCTD disagrees with DOL's assertion that it lacks enforcement authority or process to ensure that H-2B workers are employed in compliance with the H-2B temporary labor certification requirements after they enter the United States. See 73 Fed. Reg. at 29943 (although the BCTD disagrees with DOL's assertion that Title IV of the REAL ID Act of 2005, Pub. L. 109-13, Div. B, May 11, 2005, 119 Stat. 318, as amended Pub. L. 109-364, Div. A., Title X § 1074(b), Oct. 17, 2006, 120 Stat. 2403, "vested DHS with [enforcement authority or process to ensure that H-2B workers are employed in compliance with the H-2B certification requirements once they enter the United States] in 2005").

Legislative History of the H-2B Temporary Labor Certification Process

An examination of the legislative history of the foregoing statutory provisions confirms that Congress' principal and longstanding statutory purpose was to protect U.S. workers against foreign competition by carefully delineating the circumstances under which nonimmigrant alien workers would be permitted to enter this country for the purpose of performing skilled or unskilled labor.

Beginning as early as 1885, Congress excluded from admission into this country "contract laborers"— that is, skilled or unskilled laborers induced or encouraged to seek entry by an offer of temporary or permanent employment. See Immigration Act of February 26, 1885, 23 Stat. 332. In 1917, Congress carved out a limited exception to this exclusion by permitting the admission of foreign skilled laborers upon a finding that unemployed U.S. workers with the requisite skills were unavailable to perform the contemplated work. See Immigration Act of 1917, Section 3(4), 39 Stat. 874.^{6/}

Moreover, in every subsequent revision of the Immigration Act of 1917, Congress reemphasized this national policy of safeguarding American labor from unfair competition by foreign workers for both temporary and permanent jobs in the United States. See H.R. Rep. No. 1015, 65th Cong., 3d Sess., 8 (1919); H.R. Rep. No. 4, 67th Cong., 1st Sess., 3 (1921), accompanying the Quota Act of 1921 (42 Stat. 5); H.R. Rep. No. 1621, 67th Cong., 4th Sess., 23-27 (1923); H.R. Rep. No. 176, 68th Cong., 1st Sess., 15 -17 (1924); H.R. Rep. No. 350, 68th Cong., 1st Sess., 21-23 (1924), accompanying H.R. 7995, which was enacted as the Immigration Act of 1924 (43 Stat. 153).

The Supreme Court recognized that protection of American labor from unfair foreign competition for jobs in the United States was an overriding objective of the Immigration Act of 1917 in *Karnuth v. United States ex rel. Albero*, 279 U.S. 231, 243-44 (1929), when it stated:

^{6/} This provision (which applied to nonimmigrants as well as immigrants) permitted the entry of skilled and unskilled laborers only upon the Secretary of Labor's finding that "labor of a like kind unemployed cannot be found in this country." See S. Rep. No. 1515, 81st Cong., 2d Sess., 377, 578 (1950). Section 3(4) of the 1917 Act remained in effect until 1952 and is the predecessor of present sections 101(a)(15), 8 U.S.C. § 1101(a)(15), and 214(c), 8 U.S.C. § 1184(c), of the INA (regarding temporary importation of nonimmigrant labor), as well as section 212(a)(5), 8 U.S.C. § 1182(a)(5), the Labor Department certification requirement applicable to alien immigrants and nonimmigrants seeking admission to the United States for employment to perform skilled and unskilled labor. See H.R. Rep. No. 1365, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1697-98.

The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. In the report of the House Committee to accompany the bill which became the Quota Act of May 19, 1921 (H. of R. Report 4, 67th Congress, 1st Session), it was stated (p. 3) that one of the causes which called for the immediate passage of an act to restrict immigration was: "2. Large unemployment in the United States, making it impracticable for the United States to accept a heavy immigration." And further (p. 7): "In the opinion of a majority of the members of this committee the economic aspects of immigration alone call for the passage of this restrictive legislation, if there were no other reasons." In the Senate report upon the same bill (S. Report 17, 67th Congress, 1st Session, p. 4) one of the evils pointed out was that a large part of the new immigration had been of a migratory character, immigrants coming to the United States not so much for the purpose of permanent residence as to seek temporary profitable employment. The report of the House Committee to accompany the bill which afterwards became the Act of 1924, now under consideration, (H. of R. Report 350, 68th Congress, 1st Session) likewise makes clear that protection of American labor was one of the controlling reasons for further restriction of immigration. The committee, after pointing out that various suggested plans for admitting laborers and farmers had been rejected, said (p. 22): "As has been so often said with reference to the demand for the admission of laborers, the present gain is not worth the future cost."

This concern for protecting American labor from unfair foreign competition for jobs in the United States was carried forward when Congress overhauled the immigration system in 1952 by replacing the Immigration Act of 1917 and its progeny with the Immigration and Nationality Act. Congress included Section 212(a)(14) in the INA in order to "provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." H.R. Rep. No. 1365, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Admin. News at 1705. See Immigration and Nationality Act, Act of June 27, 1952, ch. 477, § 212(a)(14), 66 Stat. 183.

Pursuant to section 212(a)(14) of the original INA, aliens, which includes both immigrants and nonimmigrants, were subject to exclusion only when DOL certified that **either**: (1) there were sufficient workers in the United States who were willing, available, and qualified at the alien's destination to perform the skilled or unskilled labor, **or** (2) that the employment of the alien would not adversely affect the wage structure and working conditions of U.S. workers. Accordingly, pursuant to the mandate of section 214(a)(14) of the original INA, DOL only issued labor certifications to aliens, or persons acting in behalf of such alien, seeking to enter the United States to perform skilled or

unskilled labor in those categories of employment and in the geographic areas described in a "Schedule A" published annually in DOL's regulations, which DOL determined lacked sufficient numbers of workers who were able, willing, qualified, and available for employment in such categories, or the employment of aliens in such categories and in such areas would not adversely affect the wage structure and working conditions of U.S. workers similarly employed. See e.g. 29 C.F.R. § 60.2(a)(1) (1966). Otherwise, DOL's regulations stated that the determination and certification required by section 212(a)(14) could not be made with regard to aliens seeking employment in the categories of employment described in "Schedule B" of the regulations. See e.g. 29 C.F.R. § 60.2(a)(2) (1966).

This provision had the effect of excluding any intending alien within the scope of the DOL certification; nonetheless it proved ineffective because an alien could only be excluded if DOL affirmatively determined in advance that admission of aliens seeking employment in a particular category of employment in the geographic area of intended employment would have an adverse effect on U.S. workers. However, DOL had no way of knowing in advance the prospective occupation, residence, or employer of each alien seeking to enter the U.S. for employment. Accordingly, Congress reversed the labor certification procedure by amending section 212(a)(14) of the INA in 1965 thereby placing the primary responsibility for proving no adverse effect on the applying alien, or person acting in his or her behalf, instead of on DOL. The stated purpose of this amendment was to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market." Immigration and Nationality Act - Amendments, Pub. L. No. 89-236, § 10, 79 Stat. 917 Oct. 3, 1965. *Bustos v. Mitchell*, 481 F.2d 479, 482 (D.C. Cir., 1973) (citing H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965)).

This restructure of section 212(a)(14) of the INA reversed the prior presumption favoring admission of aliens seeking employment to perform skilled and unskilled labor to strengthen the protection of the American labor market and to reduce the burden on DOL in implementing this protection. S. Rep. No. 748, 89th Cong., 1st Sess. 15, *reprinted in* 1965 U.S. Code Cong. & Ad. News, 3328, 3333-34. As a result, the presumption against admission of aliens for the purpose of performing skilled or unskilled labor can be overcome *only* if the Secretary of Labor determines that **both** conditions set forth in parts (A) and (B) of the Section 212(a)(14) are met.¹⁷ *Pesikoff v. The Secretary of Labor*, 501 F.2d 757, 761-62 (D.C. Cir. 1974); *cf. Silva v. Secretary of Labor*, 518 F.2d 301, 309-10 (1st Cir. 1975) ("the burden of proof is on the alien or his prospective employer to prove that it is not possible for the employer to find a qualified American worker").

The courts have frequently recognized that the purpose of § 212(a)(14) (now §

¹⁷ Section 212(a)(14) was subsequently amended and renumbered as section 212(a)(5)(A)(i) of the INA, 8 U.S.C. § 1182(a)(5)(A)(i), by § 601(a) of the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 5072, Nov. 29, 1990.

212(a)(5)(A)(i) is to deny admission of aliens competing for jobs in the United States with U.S. workers and to protect the U.S. labor force from an influx of foreign skilled and unskilled labor. See *Wang v. Immigration and Naturalization Service*, 602 F.2d 211, 213 (9th Cir. 1979).

Elimination of the Role of State Workforce Agencies in the H-2B Labor Certification Process Together with Employer Attestation of Compliance with Many of the H-2B Labor Certification Requirements Render Such Labor Certifications Non-Compliant with the Statutory Mandate in Section 212(a)(5)(A)(i) of the INA.

Prior to mid-2005, the SWA had initial responsibility for processing applications for H-2B labor certifications, as well as applications for H-2A and E-3 labor certifications, under the guidance of ETA Regional Administrator Certifying Officers located in nine different regional offices. At that time, DOL began redirecting submission of applications for H-2B labor certifications from the ETA Regional Administrators to newly established National Processing Centers in Atlanta, Georgia and Chicago, Illinois. Under both the prior procedure and the current procedure, applications for H-2B labor certifications were and still are reviewed by a SWA to insure that each job offer for which an employer-applicant is seeking an H-2B labor certification contains a wage that is not below the applicable prevailing wage, based on the provisions of 20 C.F.R. § 656.40 and more recently, the ETA's "Prevailing Wage Determination Policy Guidance, Non-Agricultural Immigration Programs, Revised May 9, 2005." The SWA is responsible for advising employers to correct deficiencies in their applications for H-2B labor certifications whenever it is incomplete or the job opportunity is for less than full-time work, offers to pay a wage below the prevailing wage, contains unduly restrictive job requirements or a combination of duties not normal to the occupation in which the job opportunity exists, or has terms and conditions of employment that otherwise inhibit the effective recruitment and consideration of U.S. workers for the job opportunity, or is otherwise unacceptable because it does not comply with DOL policies. The SWA is currently responsible for expeditiously informing the employer that its application for an H-2B labor certification is deficient and facilitating correction of the deficiencies so that the application can be processed and action taken on its merits.

In addition, the SWA is responsible for preparing a job order, using the information provided by the employer's application for an H-2B labor certification, and placing it in the SWA's job bank system for ten (10) days, during which time the SWA is supposed to refer qualified U.S. applicants to the employer for consideration instead of hiring H-2B foreign workers. The SWA is also responsible for coordinating with other SWA whenever an application for an H-2B labor certification indicates that the requested H-2B workers will perform their job in multiple locations within a Metropolitan Statistical Area and one or more locations are outside the jurisdiction of the SWA in order to insure that a job order is placed for at least ten (10) days with each of the other SWA where the work will be performed and accept for referral qualified U.S. applicants from the other state(s).

The SWA is also responsible to overseeing and supervising advertisement by the employer of the job opportunity in a newspaper of general circulation or in a readily-available professional, trade or ethnic publication for the prescribed period of time, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from qualified U.S. workers. SWA oversight and supervision also includes making sure that the job advertisement includes: (1) necessary information such as directions to applicants that they should report or send their resumes to the SWA for referral to the employer by disclosing the SWA contact information and job order number; (2) a description of the job opportunity that includes specific details such as the duties to be performed, work hours and days, rate of pay, and duration of the employment opportunity; (3) the employer's minimum job requirements; (4) an offer of wages, terms, and other conditions of employment that are not less favorable than those offered to the H-2B workers and are consistent with the nature of the occupation, activity, and industry; and (5) a statement that the job opportunity is "temporary" and includes the number of job openings that the employer intends to fill. The SWA is also responsible for assuring that the employer seeking an H-2B labor certification has contacted union and other recruitment sources appropriate for the occupation and customary in the industry and that these sources were unable to refer qualified U.S. workers or were non-responsive to the employer's request, and reviewing the detailed written recruitment report that each employer is required to prepared and submit.

The SWA is then responsible for submitting the employer's application for an H-2B labor certification together with the results of the employer's supervised recruitment activity, prevailing wage findings, and all other supporting documentation to the appropriate NPC Certifying Officer for review and determination whether to grant or deny the application for an H-2B certification.

The labor certification function formerly performed by nine ETA Regional Administrators' Certifying Officers was consolidated in the Certifying Officers in the two NPCs in order to bring greater uniformity to the certification process. However, the proposal described in the NPRM to eliminate SWA responsibility for overseeing and supervising employer recruitment activity, including advertisement of the job opening in appropriate publications, and replacing it with a series of employer attestations that would be submitted to the NPC subject to a combination of measures, which include post-adjudication audit, supervised recruitment and/or debarment from future participation in the H-2B labor certification process is fundamentally flawed. ***These measures are flawed because they are designed to detect fraud and abuse of the attestation process after the fact rather than to deny labor certifications that will adversely affect the interests of U.S. workers similarly employed in the same locality.***

Noticeably missing from DOL's proposed post-adjudication audit process is a means by which the underlying attestations are contemporaneously tested for their reliability, as opposed to their truthfulness. That is, there is no means available in the

proposed attestation-based process pursuant to which an employer's otherwise good-faith determinations that it has made an adequate effort to ascertain whether able, qualified, and willing U.S. workers are available to fill the job opportunity that the applicant-employer intends to fill with H-2B workers, including the appropriate prevailing wage that was offered to both prospective U.S. employees during the recruitment phase of the process and the alien nonimmigrant who is ultimately hired to fill the job opportunity. Consequently, these enforcement mechanisms would not provide the kind of information that DOL must have in its possession in order to certify,^{8/} as required by law, that there are not sufficient U.S. workers who are able, willing, qualified and available at the time of application for a visa and admission of H-2B workers to the United States, and that employment of such H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

Aside from the provision in the NPRM, 73 Fed. Reg. at 29967 (to be codified as 20 C.F.R. § 655.23(c)), which states that an NPC Certifying Officer can issue a Request for Information ("RFI") to an applicant-employer within 14 days of receipt of an application for an H-2B labor certification that seeks supplemental information and documentation concerning apparent deficiencies in the employer's application, none of the proposed measures intended to police employer attestations provides direct assurance to able, willing, qualified, and available U.S. workers that they will be given a real opportunity to be considered for the job opportunities that employers seek to fill with H-2B workers. It is simply too late to provide the statutorily-required labor certification mandated by section 212(a)(5)(A)(i) after DOL conducts a post-adjudication audit, if such audit is ever conducted.^{9/}

As such, the proposed attestation-based process would fail to implement adequately the predicate that "unemployed persons capable of performing such service or labor cannot be found in the United States." This predicate is of paramount importance under the H-2B labor certification process, and cannot be eviscerated by an attestation-based process that merely gives it lip service. Yet, that is exactly what the proposed attestation-based process described in the NPRM would do if adopted.

^{8/} Webster's New World College Dictionary (3rd ed. 1997) defines "certify" as: "(1) to declare (a thing) true, accurate, certain, etc. by formal statement, often in writing; verify, attest." Similarly, Black's Law Dictionary (7th ed. 1999) as: "1. To authenticate or verify in writing. 2. To attest as being true or as meeting certain criteria."

^{9/} The NPRM states:

(a) The Department **may, in its discretion**, conduct audits of temporary labor certification applications, regardless of whether the Department has issued a certification, denial or non-determination on the application.

Notwithstanding these comments, the BCTD does not intend a ringing endorsement of the current labor certification process used by DOL to carry out its statutory mandate under section 212(a)(5)(A)(i) of the INA. That process, like the proposed H-2B attestation-based process, lacks any meaningful access for affected U.S. workers and/or their labor representatives to challenge an employer's application for an H-2B labor certification with respect to recruitment or wages. U.S. workers must depend totally on DOL's determination that an adequate search of the domestic market has been made. There is little uniformity of administrative procedures among the SWA; recruitment efforts are not standardized as much as they could be due to lack of definitions; and prevailing wage determinations are often made on an *ad hoc* basis.

The NPRM acknowledges the latter situation. See 73 Fed. Reg. t 29946-47. However, DOL's solution would require employers to obtain directly from the Chicago NPC, instead of the SWA, the requisite prevailing wage rate(s), which must be offered to U.S. workers during the mandatory recruitment period as well as the H-2B worker hired in the event the effort to recruit able, willing, qualified, and available U.S. workers is unsuccessful. This proposal is not objectionable in and of itself. However, determination of the "prevailing wage" in the proposed regulations is virtually identical with 20 C.F.R. § 656.40(b) & (d) (2007), which DOL has been applying since 2005 to prevailing wage determinations for occupations under its permanent and temporary non-agricultural foreign labor certification programs. 73 Fed. Reg. at 29946; 73 Fed. Reg. at 29962 (to be codified as 20 C.F.R. § 655.10(b) & (c)).

These regulations, which became effective on March 28, 2005, *inter alia*, eliminated the heretofore mandatory use of prevailing wage rates determined by the Secretary of Labor pursuant to the Davis-Bacon Act, 40 U.S.C. § 3141 *et seq.*, and the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. § 351 *et seq.*, in the labor certification process applicable to both permanent and temporary employment of skilled and unskilled labor. The obligation to use Davis-Bacon and SCA wage rates applied regardless of whether the employer seeking a permanent or temporary H-2B labor certification had a government contract otherwise covered by either statutory requirement. Instead, the post March 2005 regulations, like the proposed regulation in the NPRM, permit employers to rely on Davis-Bacon and SCA prevailing wage rates if they choose to do so, but reliance on such rates where otherwise available is no longer required. *Compare* 20 C.F.R. § 656.40(b)(4) (2007) with 73 Fed. Reg. at 29963 (to be codified as 20 C.F.R. § 655.10(b)(5))

Additionally, DOL's current procedure for determining the "prevailing wage" states that if the job opportunity is not covered by a collective bargaining agreement:

the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided [if the employer provides a survey acceptable under another provision of the regulations], of the wages of workers similarly employed in the area of intended employment, The wage component of the Occupational Employment Statistics Survey shall be

used to determine the arithmetic mean, unless the employer provides an acceptable survey [under another provision of the regulations].

20 C.F.R. § 656.40(b)(2) (2007). Compare with 73 Fed. Reg. at 29962-63 (to be codified as 20 C.F.R. § 655.10(b)(2)). In fact, the only substantive variation between these two provisions is the last sentence in the proposed regulation that states “[t]he wage shall be determined in accordance with section 212(t) of the INA,” which directs DOL to provide at least four (4) levels of wages commensurate with experience, education, and the level of supervision. See 8 U.S.C. § 1182(t)(1)(A)(i)(II) (to which 8 U.S.C. § 1182(p)(4) applies).

Adoption of this method of determining the “prevailing wage” for H-2B labor certification purposes represents the culmination of a relentless process pursued by DOL during the last eight (8) years, which reversed a nearly 40 year practice adopted by DOL after section 212(a)(14) of the INA was amended in 1965 of requiring employers seeking H-2B labor certifications to offer U.S. workers and H-2B workers prevailing wages equivalent to Davis-Bacon or SCA prevailing wage rates whenever available and applicable to the job opportunity. DOL’s reversal of this longstanding practice is intended and has had the effect of depressing the prevailing wages that employers must offer to U.S. workers during the mandatory recruitment period thereby making it less likely that able, willing, qualified, and available U.S. workers will accept the employer’s offer of temporary employment and simultaneously increasing the likelihood that the employer’s application for H-2B labor certifications will be granted.

The Proposed H-2B Attestation-Based Process Lacks Any Statutory Authorization.

DOL currently operates attestation-based H-1B, H-1B1 and E-3 specialty occupation nonimmigrant programs. Unlike the attestation-based process proposed in the NPRM that would be applicable to the H-2B labor certification program, the attestation-based H-1B, H-1B1 and E-3 specialty occupation nonimmigrant programs were created by statute, not regulation. Specifically, section 101(a)(15)(H)(i)(b) of the INA, which authorizes both the H-1B and H-1B1 specialty occupation nonimmigrant programs, states:

(H) an alien (i) . . .(b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed

with the Secretary an application under section 1182(n)(1) of this title,^{10/} or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title.^{11/}

8 U.S.C. § 1101(a)(15)(H)(i)(b) (emphasis added). Similarly, section 101(a)(15)(E)(iii) of the INA, which authorizes the E-3 specialty occupation nonimmigrant program, states:

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him . . . (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and **with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title.**

8 U.S.C. § 1101(a)(15)(E)(iii) (emphasis added).

In addition to the absence of statutory authorization to implement an attestation-based H-2B labor certification program modeled after DOL's attestation-based H-1B, H-1B1 and E-3 specialty occupation nonimmigrant programs, DOL's authority to adopt such a program is further undermined by section 212(a)(5)(A)(i) of the INA, 8 U.S.C. § 1182(a)(5)(A)(i), which expressly precludes admission of aliens, both

^{10/} Section 212(n)(1) of the INA, 8 U.S.C. § 1182(n)(1), which is referenced in section 101(a)(15)(H)(i)(b) of the INA, states that "[n]o alien may be admitted or provided status as an H-1B nonimmigrant unless the employer has filed with the Secretary of Labor an application [which states that the employer has complied with each of the requirements set forth in section 212(n)(1)(A)-(G), 8 U.S.C. § 1182(n)(1)(A)-(G)]."

^{11/} Section 212(t)(1) of the INA, 8 U.S.C. § 1182(t)(1), which is referenced in both section 101(a)(15)(H)(i)(b1) and section 101(a)(E)(iii) of the INA, states that no alien may be admitted or provided status as a nonimmigrant under either of the aforementioned specialty occupation programs "unless the employer has filed with the Secretary of Labor an **attestation** stating [that the employer has complied with each of the requirements set forth in section 212(t)(1)(A)-(D), 8 U.S.C. § 1182(t)(1)(A)-(D)]." (Emphasis added).

immigrant and nonimmigrant, seeking to enter the United States for the purpose of performing skilled or unskilled labor ***unless DOL certifies that there are not sufficient domestic workers, and that the employment of such immigrants or nonimmigrants would not adversely affect the wages and working conditions of U.S. workers similarly employed.***

DOL can not simply disregard the affirmative responsibility expressly conferred on the Secretary of Labor by Congress in section 212(a)(5)(A)(i) of the INA to certify the Attorney General and the Secretary of State and substitute an attestation-based process, which flies in the face of clear and unequivocal statutory language. Congress has unquestionably delegated to DOL the responsibility for issuing labor certifications to aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, including those nonimmigrants seeking H-2B visas. DOL cannot simply disregard this Congressional mandate.

It is submitted, therefore, that the regulatory changes proposed by DOL in its May 22, 2008 NPRM are inconsistent with the unambiguously expressed intent of Congress that, before an H-2B visa can be issued by DHS, the Secretary of Labor ***must*** certify to the Secretary of State and the Attorney General (now the Secretary of Homeland Security) that there are not sufficient able, willing, qualified U.S. workers available at the time an application for an H-2B labor certification is issued at the place where the H-2B worker is to perform such skilled or unskilled labor, and that the employment of such alien will not adversely affect the wages and working conditions of U.S. workers similarly employed. 8 U.S.C. § 1182(a)(5)(A)(i) (2007).

This statutorily mandated labor certification requirement cannot be discarded unless Congress changes the law. Inasmuch as Congress has not deemed to make such a change, DOL lacks the authority to adopt the proposed attestation-based process in lieu of the current labor certification process applicable to applications for H-2B labor certifications.

Thus, for the foregoing reasons, the Building and Construction Trades Department, AFL-CIO, is unalterably opposed to the proposed regulations implementing an attestation-based process in place of the current H-2B labor certification process and, therefore, urges DOL to withdraw this proposed change.

A Multiple-Year Need for Labor is not a “Temporary” Job Opportunity Eligible for Labor Certification under the H-2B Program.

The BCTD will now address the proposal to recognize what DOL characterizes as an employer's need in some cases for workers to fill “temporary positions” on a multi-year basis. Historically, DOL has considered a job opportunity to be “temporary” under the H-2B program if the employer's need for particular services or labor does not exceed one (1) year, although DOL has always recognized there may be extraordinary circumstances where the need may be for longer than one year. In any case, DOL's

policy has been to restrict applications for H-2B labor certifications to not more than one year. See Foreign Labor Certification Training and Employment Guidance Letter No. 21-06, Change 1 ("TEGL 21-06, Ch. 1"), Attachment A at 1-2, 72 Fed. Reg. 38621, 38622 (Jul. 13, 2007) ("The Federal regulations at 8 CFR Part 214.2(h)(6)(ii) state that the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. If there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one year. However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature will not be accepted").

DOL's current policy regarding the permissible duration of an employer's need for temporary services or labor is clearly based on regulations issued by DHS, which unequivocally limit the period of a petitioning employer's need for temporary services or labor to one year or less.^{12/} Putting aside for the moment which agency, DOL or DHS, has the ultimate authority to determine policy and practice regarding H-2B labor certifications, as a practical matter the two agencies must have a uniform policy regarding what constitutes a need for temporary services. It seems obvious that an H-2B labor certification issued by DOL for a period that exceeds one year (but not more than three years) is questionable if DHS regulations clearly state that except in extraordinary circumstances it will not issue an H-2B visa for a period that exceeds one year. Nonetheless, there is no mention in the NPRM that DHS will alter its current policy set forth in its regulations at 8 C.F.R. § 214.2(h)(6)(ii)(B) (2007).

Despite this apparent contradiction with DHS policy and regulations and the fact that DOL "readily recognize[s] the importance of protecting U.S. worker access to [jobs where an employer's need is temporary but may be longer than one year]," 73 Fed. Reg. at 29953, DOL proposes redefining what constitutes a temporary need for services or labor for H-2B labor certification purposes from not more than one year to not more than three years. As such, DOL's proposal to expand the period of temporary need to as long as three years begs the fundamental question of whether, except under extraordinary circumstances, an H-2B temporary labor certification should ever be issued for a period that exceeds one year. Perhaps in an alternative universe,

^{12/} DHS regulations state:

(B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

“temporary need” means a period that exceeds one year or more, but not in this world, because it is well established that if an employer’s need is for longer than a short duration it is not a “temporary need.” A period longer than a year is not, as is also well established, not a short duration. One need only consider the well-settled standards, which DOL has applied over the years to determine whether an employer’s need for non-agricultural labor or services is “temporary.”

Under the H-2B labor certification program, an employer’s need for services or labor must be either (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. TEGL 21-06, Ch. 1, 72 Fed. Reg. at 38622. TEGL 21-06, Ch.1, defines each of these four standards in terms that convey the idea that the need of an employer applying for an H-2B labor certification must be for a short duration. *Id.*^{13/} Therefore, an employer’s need for services or labor that exceeds one year and may last as long as three years is not for a short duration and hence is not a “temporary need” for H-2B labor certification purposes.

Accordingly, the BCTD strongly opposes the proposal in the NPRM to redefine a “temporary need” for H-2B labor certification purposes as lasting more than one year but not more than three years and urges DOL to withdraw this proposed change.

Your consideration of these comments is greatly appreciated.

Sincerely,



Mark H. Ayers
President

^{13/} See “One-Time Occurrence” (petitioner must establish that it has not employed workers to perform the services or labor in the past and will not need workers to perform the services or labor in the future, or that the petitioner has an employment situation that it otherwise permanent but a temporary event of short duration has created the need for a temporary worker(s)); “Seasonal Need” (petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature, and petitioner must specify the period(s) of time during each year in which it does not need the services or labor; “Peakload Need” (petitioner must establish that (1) it regularly employs permanent workers to perform the services or labor and that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, and (2) that the temporary workers will not become a part of the petitioner’s regular workforce; and “Intermittent Need” (petitioner has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently. *i.e.* sporadically, now and then, from time to time, erratically, needs temporary workers to perform services or labor for short periods).

Thomas Dowd, Administrator
Office of Policy Development and Research
July 7, 2008
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cc: General Presidents of the National and International Unions Affiliated with the
Building and Construction Trades Department, AFL-CIO

The Honorable Edward M. Kennedy, Chairman, United States Senate Committee
on Health, Education, Labor and Pensions

The Honorable George Miller, Chairman, United States House of Representatives
Committee on Education and Labor