

BEFORE THE
U.S.CITIZENSHIP AND IMMIGRATION SERVICE
DEPARTMENT OF HOMELAND SECURITY

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO A NOTICE OF PROPOSED RULEMAKING
PETITIONS FOR ALIENS TO PERFORM TEMPORARY
NONAGRICULTURAL SERVICES OR LABOR (H-2B)

DHS NO. 2004-0033
RIN 1615-AA82

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.
1 NW OOIDA Drive
Grain Valley, MO 64029

CLAIRE SHAPIRO
Eisen & Shapiro
10028 Woodhill Rd.
Bethesda, MD 20817

Counsel for Owner-Operator Independent
Drivers Association, Inc.

February 28, 2005

BEFORE THE
U.S.CITIZENSHIP AND IMMIGRATION SERVICE
DEPARTMENT OF HOMELAND SECURITY

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) hereby submits its comments in response to the January 27, 2005, notice of proposed rulemaking issued by the U.S. Citizenship and Immigration Services, Department of Homeland Security (“DHS”), at 70 Fed. Reg. 3984, proposing changes to the application process for obtaining H-2B visas for foreign workers who come to the United States on a nonimmigrant, temporary basis to fill temporary positions for nonagricultural labor or services.

OOIDA is a not-for-profit trade association incorporated in Missouri with its principal place of business located at 1 NW OOIDA Drive, P.O. Box 1000, Grain Valley, Missouri 64029. OOIDA is the largest trade association representing the interests of independent owner-operators and professional truck drivers on all issues that affect small business truckers. OOIDA actively promotes the views of small business truckers before a broad variety of forums, including federal and state agencies, legislatures, courts, other trade associations, and private businesses, in an ongoing effort to obtain equitable and safe working conditions for these commercial truck drivers.

OOIDA’s more than 120,000 members collectively own and operate approximately 180,000 heavy-duty trucks. Accordingly, the job prospects of these member truckers are adversely affected when motor carriers employ foreign workers to provide truck driving services. When foreign drivers accept lower wages or poor working conditions, it is more difficult for our member drivers to insist upon better pay or improved working conditions. Thus,

the procedures for approving petitions for H-2B foreign worker visas could have a significant impact upon the day-to-day operations of OOIDA's members.

DISCUSSION

Background

An H-2B nonimmigrant visa is intended for use by U.S. employers who are seeking workers to fill temporary nonagricultural positions. The H-2B visa is most commonly used for seasonal workers such as landscape laborers, cleaners, hotel and restaurant employees. However, it can be used for any occupation, including truck driving, when the need for the worker is less than one year. "Temporary" is the key criteria here. The H-2B rules require that both the job and the employer's need must be a one-time occurrence, or be based upon a seasonal, peak load, or intermittent need. The temporary additions to staff may not become a part of the employer's regular operation after their H-2B visas expire. Further, petitioners must demonstrate that there are no qualified U.S. workers willing to fill the temporary job. Finally, to ensure that the employment of foreign workers will not adversely affect U.S. workers, the employer must pay the H-2B workers the prevailing wage for the position and provide working conditions comparable to those afforded to similarly-employed U.S. workers.

Under the present H-2B application system, the prospective employer first requests a temporary labor certification from the Department of Labor ("DOL"). To obtain the certification, the employer must demonstrate through supporting documentation that he has tested the relevant labor market and that his need for the temporary workers can not be satisfied with U.S. workers. With the certification, the employer then petitions DHS for approval to use foreign workers to fill the involved positions. Finally, if the petition is approved, the sponsored

employees apply for H-2B visas at a U.S. Consulate.

DHS is now proposing to modify 8 CFR § 214.2(h)(2) to eliminate the need for a labor certification for most occupations and, in its place, to impose an attestation requirement. Motor carriers seeking drivers would be included in the category of employers who no longer need to obtain a labor certification. These employers will now simply state that they have made the required efforts to obtain U.S. workers for the involved temporary positions and have not been successful. The new attestation form, for the most part, requires yes or no answers to several questions. *See* 70 Fed. Reg. 3993, 3994. No supporting evidence relating to the involved labor market will be submitted to support the petition or the H-2B visas.

For the reasons discussed below, OOIDA strongly opposes the proposed elimination of the labor certification requirement and the adoption, in its place, of an unsupported attestation procedure. OOIDA firmly believes that fraud and misrepresentation in securing these visas will increase once the labor certification requirement is abandoned. If an attestation procedure is nevertheless adopted, OOIDA believes that employers who deliberately misuse the H-2B process should potentially be subject to debarment, administrative fines, and criminal penalties, in addition to denial or revocation of existing petitions.

H-2B visas are misused by motor carriers

The shortage of qualified drivers is a critical problem that has plagued the trucking industry for many years. This is not a temporary situation that can be solved by the importation of temporary foreign workers under the H-2B visa program. Rather, this is a continuing problem resulting from low pay, long hours, and generally poor working conditions.

Most drivers are paid by the mile, not by the hour, and do not earn overtime even though

they often work in excess of 3,000 hours per year. Those long hours include much time spent waiting to load or unload trucks. Witnesses at the Federal Motor Carrier Safety Administration hearing held to address hours-of-service regulations for commercial truck drivers testified that their drivers waited an average of three to five hours per day, all without compensation. A recent driver survey shows that more than half of all non-union drivers are also not paid for the actual loading and unloading time. The result, notwithstanding the long hours, is that OOIDA's member profile survey shows net incomes average about \$35,000 annually for company drivers and about \$45,000 per year for owner-operators. Further, truck driving is one of the most stressful occupations, with pressure from management to meet unrealistic delivery schedules clashing with pressure from family to be at home and work more regular hours. These factors all combine to cause a shortage of able and willing drivers. Instead of changing the underlying conditions that have created the shortage, however, some motor carriers are illegally filling the permanent gap by employing foreign drivers with H-2B visas.

OOIDA has received multiple reports of abuse of foreign drivers with H-2B visas. A typical example involved New Rising Fenix, a motor carrier located in OOIDA's home state of Missouri. According to H-2B workers brought to the United States from New Zealand to drive trucks for New Rising Fenix, the company's owner travels to New Zealand on a periodic basis to recruit drivers to haul refrigerated freight. One driver estimated that the company has gone through 450 foreign drivers, trained and untrained, in a two-year period.

Training for these drivers is inadequate. One driver told OOIDA she was given only five hours of in-truck training together with the correct answers to questions in the commercial driver license ("CDL") test booklet. The very first time she drove on the interstate was during the test

for her CDL. New Rising Fenix also failed to pay these drivers the prevailing wage or to provide acceptable working conditions. The carrier expected these driving teams to be on the road 24 hours a day, seven days a week. One husband and wife team reported combined compensation of 32-cents per mile, minus any costs for damage to the truck, regardless of fault. When this team reported mechanical defects in their truck to the company, they were told either to take the loads and drive as instructed or be deported back to New Zealand.

The steady recruitment of foreign drivers shows that New Rising Fenix was not using these drivers to fill a temporary need. To the contrary, they were given company trucks purchased by the carrier to satisfy a continuous need for permanent company drivers. New Rising Fenix's treatment of its foreign drivers also reveals that it hired them because it could pay them less and make them work harder than U.S. workers.

OOIDA has also received similar reports of inadequate pay and abusive treatment of H-2B drivers by Pullen Brothers, another motor carrier located in Missouri. Further, Pullen Brothers obtains these drivers through a clearly fraudulent scheme. A motor carrier recruiting agent has reported to OOIDA that a resort in Colorado routinely petitions for 400 seasonal H-2B workers, which is more than is required to satisfy its actual needs. Because this appears to be precisely the type of situation for which the H-2B visa was created, the petition is not questioned. The resort's agent recruits foreign truck drivers to apply for the visa positions not needed by the resort and instructs them to tell the U.S. consulate they are coming to the United States to work at the resort. The visas, with drivers, are then sold to motor carriers in Arkansas and Missouri, including Pullen.

The increasing demand for H-2B workers in recent years, which caused DHS to stop

accepting H-2B applications in mid-March of 2004 and early January of this year, has led unscrupulous motor carriers to turn to other sources for drivers. Specifically, OOIDA has received reports that some carriers are using the H-2A visa program, intended for temporary agricultural workers, to obtain visas for drivers. Like truck drivers brought over as resort workers, these drivers are told to lie to the consulate about their intentions in coming to the United States. The visas, with drivers, are then sold to motor carriers, reportedly for \$450 a piece.

The elimination of the labor certification requirement will make it even easier for motor carriers like New Rising Fenix, Pullen Brothers, and others who have already shown their willingness to ignore the rules, to obtain H-2B workers under false pretenses. It will also make H-2B and H-2A visa petitions a more attractive option to carriers who were deterred in the past by the labor certification process from improperly applying for such visas to deal with a permanent and long-standing driver shortage.

An electronic filing system must have a security feature that prevents agents and other third parties from filing petitions

DHS has proposed that most employers seeking H-2B workers be required to file their petitions, including the new attestation form, by e-mail. The e-filing process is expected to ease filing burdens and speed up the processing of petitions. OOIDA recognizes that the move away from paper-based to electronic filings is the wave of the future generally and has many advantages.

However, OOIDA believes it could be problematic here to the extent that the proposed rules modify 8 CFR § 214.2(h)(2) and (h)(6) to preclude agents from submitting H-2B visas. OOIDA supports the exclusion of agents from the filing process, as motor carrier recruiting

agents have in the past engaged in fraudulent practices, making promises to foreign workers that are not kept once the drivers have arrived in the United States. Requiring employers to file the petitions personally should result in improved accountability.

DHS will not be able to enforce this personal-filing requirement unless it incorporates safeguards into the system that prevent its use by agents and other third parties. A simple PIN number system, as is currently being proposed, will not achieve this goal because the number can easily be given by the carrier to its agents. Some additional form of security must be adopted to ensure that employers are the only party submitting petitions.

Employers should notify DHS within 10 days of early termination of an H-2B worker's employment

Under the current rules, at 8 CFR § 214.2(h)(11)(i)(A), employers are required to send DHS a letter advising them of the early termination of an H-2B visa employee. Currently no time frame is provided for notification. DHS is now proposing to require notification within 30 days of termination for any employee who does not stay for the entire term of his visa.

OOIDA agrees that a fixed time period for notification of the change in status is required to keep the government's information up-to-date, but believes that the reporting period should be shortened. An H-2B visa holder may stay in the United States only for 10 days after the expiration of his visa. Thus, the notification to DHS should be made within that time period. The shorter time frame will not be unduly burdensome if DHS allows employers to provide the termination notification electronically, through the same system used to submit the original petition and attestation. Because an employer is responsible for the reasonable costs of return transportation for a foreign worker who is dismissed from employment before the end of the period of authorized admission, the termination notification should also report how and when

such return transportation will be provided.

OOIDA would also recommend that DHS establish a procedure that allows terminated employees to provide feedback to the agency about their treatment and the reasons for the early termination. When H-2B employees obtain their visas, they should be provided with a brochure explaining their rights and obligations under the visa. The brochure could also advise them of the mechanism for submitting complaints to the government when they are mistreated and forced to leave their jobs. Given their direct day-to-day relationship with H-2B employers, these individuals could provide DHS with valuable evidence of wrongdoing. Indeed, no other party is better situated than H-2B employees to provide such first-hand information.

DHS should enlist terminated employers, members of the public, and other government agencies in the search for wrongdoing in the H-2B visa process

DHS has proposed that the existing procedures for denying or revoking approval of other nonimmigrant petitions be applied to instances where it is alleged that statements in H-2B petitions and attestations are inaccurate, fraudulent, or misrepresent a material fact. OOIDA supports this proposed utilization of the already-established procedures. These procedures give an employer advance notice of an adverse action on pending or approved petitions, which notice includes a statement of the grounds for the proposed action and gives the petitioner the opportunity to offer rebuttal before a final decision is made. In all cases, the petitioner is given an opportunity to appeal.

However, OOIDA wonders how, under the new H-2B visa system, DHS plans to acquire information that would cause them to doubt the veracity of the information provided in any petition. The petition and the proposed attestation simply do not provide any details that might cause the agency to question the validity of any particular visa request. The agency needs a

mechanism to increase the likelihood that fraud or misrepresentation will be detected.

OOIDA has already suggested that DHS collect information about wrongdoing from terminated H-2B employees. DHS must also encourage interested members of the public to review submitted and/or approved petitions and provide the agency with concrete evidence of wrongdoing. Once an appropriately-secured electronic application system is operational, OOIDA proposes that DHS make all H-2B petitions and attestations generally available to the public, which can then apprise DHS of suspected fraud and abuse. If the entire petition can not be made accessible because of privacy concerns about certain information, OOIDA would suggest that a constantly-updated list of pending and recently-approved petitions be made available via the internet. The listing should include, at a minimum, the identity and address of the employer, the involved job position, the category of temporary need (one-time, seasonal, peak load, or intermittent), and the number of foreign employees sought. The same information should be published periodically in the Federal Register. DHS should also develop an electronic complaint form to be used by members of the public to inform the agency of their concerns about particular petitions together with a procedure for reviewing and determining which complaints should be investigated.

Finally, because of the documented fraudulent use of the H-2B visa process in the trucking industry, OOIDA would also recommend that DHS secure input from its own Transportation Security Administration (“TSA”) and/or DOT’s Federal Motor Carrier Safety Administration (“FMCSA”) on all motor carrier petitions before any of those petitions are approved. Because of its current involvement in checking driver credentials for security purposes, TSA might have accumulated pertinent data about the size and scope of a petitioning

carrier's operations that would raise doubts about the legitimacy of the temporary visa request. Similarly, statistical information collected by the FMCSA or complaints received by the agency might raise suspicions about a particular carrier's petition. DHS should not pass up the opportunity to make use of data already accumulated by other government agencies to improve enforcement of the H-2B visa program.

Strong enforcement options, including debarment, administrative fines, and criminal penalties should be available to ensure the integrity of the H-2B process

Under the proposed rules, the DOL will receive information from DHS about H-2B petitions that have received final approval, and will perform post-adjudication audits on a randomly-selected sample of those petitions. DHS has also proposed a new debarment process, at 8 CFR § 214.2(h)(20), that would allow the agency to deny all petitions (immigrant and nonimmigrant) submitted by an employer for a specified time period based upon DOL's finding in a post-approval audit that the employer has not complied with attestation conditions for a H-2B petition.

Some sanctions in addition to a denial or revocation of a defective petition should be imposed where an employer has intentionally misused the visa system. The debarment remedy would give DHS a much-needed tool that can be used at the agency's discretion to punish wrongdoers. Especially true with the proposed attestation process, which effectively transforms the H-2B petition process into an honor system, OOIDA believes that the agency needs a broader range of remedies to maintain the integrity of the process. DHS should have the option of assessing administrative fines against these offenders using procedures similar to those set forth in 8 CFR Part 270 (penalties for immigration document fraud). In the most egregious cases, for example those involving repetitive intentional violations of the H-2B requirements, DHS should

also use its authority to refer the matter for criminal investigation. Federal criminal statutes currently provide for monetary penalties and/or imprisonment for the fraudulent or unlawful procurement of visas and more generally for the knowing and willful submission of materially false statements or representations to the government. *See* 18 USC § 1546; 18 USC §1001.

OOIDA also has concerns about the effectiveness of the proposed audit and debarment process. The notice does not state what percentage of petitions will be audited and does not provide any time frame for audits. Nor does the notice indicate what type of debarment would be imposed for any particular violation. If possible, all of these details should be included in the regulations. At the very least, the regulations should include the maximum and minimum time limits for debarment, which could vary with the nature and severity of the violation.

The potential for an audit will not deter wrongdoing unless petitioners are convinced that an audit and debarment is a very real possibility. Accordingly, DHS and DOL must allocate significant funds and personnel to the audit process. A superficial review of supporting documentation compiled by an employer will not uncover the various types of motor carrier abuse discussed above. If audits are to be an effective tool, then they must involve a comprehensive investigation of an employer's business. More specifically, either DOL or DHS needs to thoroughly investigate an employer's operation, including payroll and tax information, to determine whether H-2B workers are in reality filling temporary positions, whether identified workers are actually working for the identified petitioners, whether workers are being paid the prevailing wage, and whether their work conditions are abusive.

DHS is also considering the development of its own self-initiated debarment process that is not dependent upon a DOL audit. OOIDA believes that such an in-house procedure based

upon information received from the public or through a pre-approval audit procedure might be more effective in preventing fraud than a system based entirely upon DOL post-approval audits that might not be completed until after the involved H-2B petitions and visas have expired.

According to a simultaneous rulemaking issued by DOL, which describes the proposed attestation form and DOL-audit process, employers are “expected to have assembled supporting documents specified in the regulation” even though such information need not be provided to DHS or DOL in most cases. *See* 70 Fed. Reg 3934. Since the proposed attestation would be submitted to DHS, it would be fitting for DHS to request and audit such information for randomly-selected petitions before approval. Employers who know that such information might be requested at the initial stage of the petition process are more likely to take all required steps to confirm that the positions are temporary and can not be filled by U.S. workers.

Because of the greater potential for any debarment to have an adverse impact on a petitioner’s business, DHS must establish fair and equitable procedures for handling both pre and post-approval debarments. As in the case of denials and revocations of petitions, DHS should give a petitioner advance notice of possible debarment, with the reasons supporting that action, and allow the petitioner an opportunity to provide a written rebuttal setting forth evidence that refutes the agency’s finding or otherwise explains why debarment is not appropriate. If a debarment is imposed, the petitioner should be afforded an appeal at a higher level within the agency and, if he so requests, should be given an opportunity to present evidence at an administrative hearing.

DHS asked whether debarment should extend to all immigrant and nonimmigrant petitions. OOIDA believes that the scope of the debarment should be a case-by-case

determination based upon the nature and severity of the violation.

Finally, DHS asked whether debarment should extend to entities related to the employer, such as affiliates or successors. OOIDA believes that a debarment must be broad in scope if it is to have the desired effect, and should therefore apply to related entities to the extent that they are looking for foreign workers to fill the same type of positions involved in the original petition.

Importantly, debarment must also extend to any new companies with the same principals. Absent such an extension of coverage, a debarred employer can fill the exact same positions by submitting petitions under the name of an affiliate, successor, or other company operated by the same principals. To allow the agency to identify all such related entities, Part 1 of the Petition for a Nonimmigrant Worker, Form I-129, should be amended to require a listing of principals and affiliates of the petitioning company or organization.

Multiple beneficiaries should be named in the H-2B petition
given the 60-day time frame for filing

The H-2B petition rules, at 8 CFR 214.2(h)(2)(iii), currently require petitioners to identify by name all individuals being sponsored by a petition involving multiple employees. “Exceptions may be granted in emergent situations involving multiple beneficiaries at the discretion of the director, and in special filing situations as determined by the Service's Headquarters.” DHS is now proposing that petitioners only be required in their initial petition to specify the number of H-2B positions to be filled, unless the employee is already in the United States.

DHS does not explain the reason for this change and OOIDA fails to see any valid reason for abandoning the current requirement. Employers should be required to enlist potential workers before petitioning, particularly when DHS is also proposing that an employer not be

allowed to file a petition more than 60 days prior to the date upon which the foreign worker's services are needed. OOIDA supports the shortened lead time, both because it will allow greater accuracy in determining whether U.S. workers are available to perform the desired services and will make it easier than in the past for an employer to have identified the potential employees that are the subject of the petition. Requiring all beneficiaries to be identified with the initial petition will also ease the administrative burden on the agency, which will be able to perform all security checks and other checks required by a petition at one time, avoiding piecemeal consideration.

CONCLUSION

OOIDA strongly opposes the proposed substitution of an unsupported attestation procedure for the current labor certification requirement. Motor carriers faced with a chronic shortage of U.S. truck drivers have already resorted to temporary H-2B employees to fill what are really permanent positions. OOIDA firmly believes that such misconduct in securing H-2B visas will become more prevalent once the labor certification requirement is abandoned.

If the proposed attestation process is nevertheless adopted, the temptation to abuse the process could be tempered by allowing only employers to file H-2B petitions. OOIDA also believes that employers who deliberately misuse the H-2B process should be subject to a broad range of sanctions, including debarment based upon pre and post-approval audits, administrative fines, and criminal penalties, in addition to denial or revocation of existing petitions.

DHS could improve the enforcement process by requiring the disclosure in the H-2B application of all affiliates, successors, and principals of the petitioning company or organization. DHS is also more likely to identify abuse if the agency establishes procedures that

encourage terminated H-2B employees as well as interested members of the public to provide the agency with evidence of wrongdoing. Finally, when motor carriers are the petitioning parties, OOIDA believes that DHS could improve the effectiveness of its enforcement program by consulting with the TSA and FMCSA before any petitions are approved.

Respectfully submitted,



JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

CLAIRE SHAPIRO
EISEN AND SHAPIRO
10028 Woodhill Rd.
Bethesda, MD 20817

Counsel for Owner-Operator Independent
Drivers Association, Inc.

February 28, 2005