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April 14, 2008

Thomas Dowd, Administrator  
Office of Policy Development and Research  
Employment and Training Administration  
US Department of Labor  
200 Constitution Avenue, NW, Room N-5641  
Washington, DC 20210

RE: **RIN- 1205-AB55** – Temporary Agricultural Employment of H-2A  
Aliens in the United States; Modernizing the Labor Certification Process  
and Enforcement

Dear Mr. Dowd:

Oregon Association of Nurseries (OAN) is non-profit trade association 501(c)(6) that represents and serves the interests of its 1000 Oregon members who grow, handle and retail nursery and greenhouse plant material, and Christmas trees. The Oregon nursery and greenhouse industry produced and sold \$944 million worth of plant material in 2007 and is the third largest nursery state in the country. We join our national association, the American Nursery & Landscape Association's testimony submitted into the record.

The OAN appreciates steps toward improving the H-2A program. It is our hope that administrative efforts to streamline and improve H-2A must align with broader labor enhancing programs to resolve the growing labor shortage facing this country. In some areas of the country, H-2A is a very viable option – however in its current configuration it meets only a fraction of the need for workers and the timing that is essential for year-round agriculture. While administrative efforts can mask some of the symptoms of the labor supply issue, it is not the place where the matter is resolved – that is squarely on the legislative branch – Congress. Without Congress acting on meaningful measures to increase the labor supply to meet current and future needs, H-2A reform will only have marginal impact.

It is our view that the proposed changes must address several core issues:

**1. Expanded Definition of Agriculture and Allowance for Incidental Non-Ag Work:**

The expansion of the definition of “agriculture” and qualification for H-2A employment is positive. Nursery and greenhouse operations commonly are vertically integrated. Operations that are primarily engaged in growing plants may also engage in sale and distribution of their products to the trade, or in on-site retailing, for example. We believe that this change would provide more flexibility for nursery and greenhouse employers to include duties in H-2A certified job opportunities that reflect the actual duties that may be performed by nursery and greenhouse workers

## **2. Verification of Employment Eligibility**

We see the eventual use of verification of employment eligibility as a component of immigration reform. It is important that State Workforce Agencies be properly trained and the H-2A system is workable to ensure that properly documented employees are referred to employers. The H-2A system should enable employers to utilize an accurate verification system with a high confidence rate.

## **3. Provision of Worker Housing Through a Voucher**

The proposed regulations permit H-2A employers to meet the obligation to provide housing for H-2A workers to provide vouchers if distance or land use laws create burdens to provide proper housing. The State of Oregon has significant land use restrictions which prohibit housing on Exclusive Farm Use or core agricultural lands. This land use restriction is at odds to requirements under the H-2A system and a remedy should be flexible to the needs of the individual states.

## **4. Certification Fees**

As stated by the ANLA, proposed regulations increase the fee for issuance of a labor certification from \$100 to \$200 per application plus from \$10 to \$100 per worker. It also eliminates the current \$1000 cap. Even ignoring the elimination of the \$1,000 cap, this is a 7-fold increase in the certification fee based on FY 2007 program usage. Prior to proposing any increase in fees, we believe DOL must provide detailed information in the Federal Register as to what activities it is including in the costs of processing an H-2A application, and what these costs are. After all, the proposed streamlining should reduce, not increase, actual processing costs. If this is not the case, then perhaps further attention should be given to streamlining the certification process.

## **5. Additional Advertising Requirements**

The proposed regulation substantially expands H-2A employers' advertising requirements. OAN agrees with the ANLA in their assessment that enhanced advertising requirements are in direct conflict with the DOL's stated intent of streamlining the program and making it more useable. The Immigration and Nationality Act, which was written more than 20 years ago, requires H-2A employers to engage in positive recruitment, but does not specify specific recruitment activities and, in particular, does not require advertising. In order to streamline and rationalize the H-2A recruitment process, the proposed regulations should reduce, not augment, unproductive advertising requirements.

## **6. New Adverse Effect Wage Rate Methodology**

The proposed regulations retain the requirement that H-2A employers pay the highest of three wage standards: (1) the applicable federal, state or local statutory minimum wage, (2) the prevailing wage for the occupation in the area of intended employment, if such a prevailing wage has been determined by the SWA, or (3) an administratively established "Adverse Effect Wage Rate" (AEWR). Presumably, DOL has concluded that an AEWR continues to be necessary to avoid wage depression. Indeed, DOL asserts in the preamble that the wages and working conditions of agricultural workers are depressed by the presence of a high proportion of illegal aliens, but does not offer any independent analysis to support this proposition. The DOL, in good faith, should examine labor market conditions to seek a valid economic justification for AEWR.

We feel that the evidence does not support this standard. Oregon has one of the highest minimum wages in the country. This section of the rule has a baseline assumption that we feel is not justified nor validated.

#### **7. Christmas tree growers**

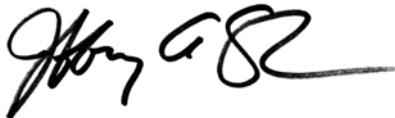
It is our belief that the DOL did an admirable job understanding the nature of the Christmas tree industry in its preamble to the proposed rule. This industry has changed over the years since the initial passage of the Fair Labor Standards Act. Growing techniques and the market have changed significantly and our industry has found that a vast majority of trees sold each year are farmed in a manner that is closely related to horticultural and agricultural production methods. In past years, the status has not had the fiscal impact as it does today. The market determines if a tree is cut or is shipped with a soil ball – which is commonly associated with nursery production. It is important for DOL to recognize that these methods of production and rules need to reflect a broad set of rules and limit the ambiguity that exists within the DOL and the federal court system.

#### **Conclusion**

The OAN joins many voices across the nation regarding the need for relief under the H-2A system. While there seems to be limited use in Oregon, it does not diminish the need to assist labor-intensive agricultural industries. H-2A reform alone cannot solve the growing labor shortage in the United States. However, increased clarity and a streamlined administrative process will provide much needed transition to comprehensive immigration reform. In the absence of a timely opportunity to advance permanent legislative reforms, we respectfully urge support for emergency legislation, even if temporary in nature, which would begin to address the agricultural labor crisis.

We support the comments submitted by the American Nursery & Landscape Association on this proposed rule. On behalf of the OAN, we hope you will give consideration the issues raised in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Stone", with a stylized flourish extending to the right.

Jeff Stone  
Director of Government Relations