

# Field Report

## DHS's 1-2 Punch: Yes to E-Verify, No to No-Match

In a move immigration advocates said sends mixed messages about interior enforcement, Department of Homeland Security Secretary Janet Napolitano July 8 said DHS will “strengthen employment eligibility verification” by implementing a Bush-era regulation mandating the use of E-Verify by federal contractors and by rescinding the controversial “no-match” regulation.

“E-Verify is a smart, simple and effective tool that reflects our continued commitment to working with employers to maintain a legal workforce,” Napolitano said in a July 8 statement.

E-Verify is the federal government’s electronic employment verification program, currently used by about 134,000 employers at more than half a million locations nationwide, DHS said. The Bush administration’s regulation mandating its use by federal contractors has been postponed four times since it was published, most recently on June.

“Requiring those who seek federal contracts to use this system will create a more reliable and legal workforce,” Napolitano said. “The rule

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## Federal Judge Issues Injunction Blocking DOL Suspension of H-2A Rule

A federal judge in North Carolina June 29 issued a temporary injunction blocking the Labor Department’s suspension of a Bush administration rule governing the employment of aliens under the H-2A temporary agriculture visa program (*North Carolina Growers Ass’n v. Solis*, M.D.N.C., No. 1:09-cv-00411-WO-WWD, injunction issued 6/29/09).

The suit, brought by several growers associations, including the North Carolina Growers’ Association, National Christmas Tree Association, and National Council of Agricultural Employers, alleges that DOL suspended an H-2A rule and reimposed the old rule without following the requisite rulemaking procedures under the Administrative Procedure Act.

To issue a temporary injunction, the court did not evaluate the substantive merits of the rule, but instead used a “balance of hardships test” to determine which party would suffer the most harm if an injunction is not granted.

Judge William L. Osteen, Jr., of the U.S. District Court for the Middle District of North Carolina,

agreed with the plaintiff’s argument that they would suffer irreparable harm in the form of unrecoverable economic damages because they would be required to pay higher wages if DOL suspends the current rule and reverts to the regulation that was previously in place.

The temporary injunction will remain in effect until the completion of the trial on the merits of the case, the creation of a new H-2A rule following the steps set forth in the APA, or a further order of the court, the court said.

### DOL Restored Old Rule

The DOL’s Employment and Training Administration May 29 published a notice in the Federal Register (74 Fed. Reg. 25971) suspending for nine months a Bush-era final rule governing the employment of aliens under the H-2A temporary agriculture visa program.

Simultaneously, DOL republished and reinstated the H-2A regulations that were in place Jan. 16, 2009, the day before the new rule took effect. The reinstated regulations were set to be in effect for nine months, after which DOL would have engaged in further rulemaking or lifted the suspension.

DOL said that the suspension of the rule and temporary reinstatement of the prior rule would allow the department to “review the December 2008 rule to ensure that it effectively carries out the statutory objectives and requirements of the program in a manner that minimizes disruption” to DOL, the state workforce agencies, and workers.

### Rule Was Controversial

The final rule that DOL suspended was a controversial regulation issued at the end of the Bush administration. Both DOL and the Department of Homeland Security Dec. 11 issued final rules to amend the H-2A visa program, which DOL

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# DHS Says Yes to E-Verify, No to No-Match

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complements our Department's continued efforts to strengthen immigration law enforcement and protect critical employment opportunities."

Meanwhile, DHS said that the department will propose a new regulation rescinding the no-match rule, which was blocked by a court order shortly after it was issued and never went into effect.

Under the no-match rule—also called the safe harbor rule—the Social Security Administration would be required to include in no-match letters, sent to employers when employees' Social Security numbers do not match government records, information telling employers that they are required to resolve discrepancies or face liability. The Bush administration initially issued a final no-match rule in August 2007.

## **September Compliance Set**

The Senate has also taken up the issues of E-Verify and the no-match rule as part of the debate on the fiscal year 2010 homeland security appropriations bill (H.R. 2892). An amendment to make permanent the voluntary E-Verify system, which is currently a pilot program, and to mandate its use by federal contractors was approved July 8. Meanwhile, an amendment prohibiting funds in the bill from being used to rescind the no-match rule was introduced the same day.

DHS said that "after a careful review, the Administration will push ahead with full implementation of the [E-Verify federal contractor] rule, which will apply to federal solicitations and contract awards Government-wide starting on September 8, 2009."

In June 2008 President Bush issued an executive order requiring

federal government contractors to verify the work authorization of all new hires and existing personnel assigned to perform work on future federal contracts.

Under the final rule, E-Verify will be required for all federal contractors, regardless of size, holding a contract with a period of performance longer than 120 days and a value above \$100,000. Subcontractors will be required to participate in E-Verify if they provide services or construction with a value of more than \$3,000.

A lawsuit challenging the rule was filed Dec. 23 in U.S. District Court for the District of Maryland by a coalition of business groups led by the U.S. Chamber of Commerce. In the suit, the plaintiffs argue that the requirements imposed by the executive order and regulation are "illegal and must be set aside" because they violate the Illegal Immigration Reform and Immigrant Responsibility Act's express statutory prohibition against requiring participation in the program.

Robin Conrad, executive vice president of the National Chamber Litigation Center, the chamber's public policy law firm, told BNA July 8 that the lawsuit is still ongoing and the Obama administration decision to implement the rule does not change the chamber's approach to the case.

## **No-Match Never Implemented**

The no-match letters "most often inform an employer many months or even a year later that an employee's name and Social Security number provided [in] a W-2 earnings report do not match SSA records—often due to typographical errors or unreported name changes," DHS said.

This long delay is one of the problems with the no-match rule, DHS said July 8. "E-Verify addresses data inaccuracies that can result in no-match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals and combating illegal employment," the department said.

The no-match rule has been in legal limbo since late 2007, after a coalition of labor unions, business groups, and immigrant rights groups—including the U.S. Chamber of Commerce, the AFL-CIO, the American Civil Liberties Union, and the National Immigration Law Center—challenged the final rule in court.

Judge Charles Breyer of the U.S. District Court for the Northern District of California blocked the government from sending the DHS portion of the no-match letters to employers. SSA suspended sending out no-match letters, even without the DHS insert, until resolution of the lawsuit.

John Sweeney, president of the AFL-CIO, congratulated Secretary Napolitano for her decision "to rescind the fatally-flawed 'no-match' rule, which would have caused tens of thousands of U.S. citizens and other authorized workers to lose their jobs—an unacceptable result, particularly in these tough economic times."

But SEIU Secretary-Treasurer Anna Burger said that "relying on E-Verify as a tool for employee verification is like relying on an AIG executive to lead an economic recovery plan." Burger said E-Verify is "full of discrepancies" and may lead to "unfair firings of American workers. and untold misery for many of our nation's hardest, most underpaid workers."

# AgJOBS Bill Reintroduced in Congress, Includes Path to Citizenship, H-2A Changes

Legislation has been reintroduced in both houses of Congress that supporters say would ease shortages of farm labor by allowing illegal immigrants to continue working in the U.S. agricultural sector while they gradually obtain full legal status.

The proposed Agricultural Job Opportunities and Benefits Act (AgJOBS) was sponsored in the Senate by Sen. Diane Feinstein (D-Calif.). In the House, it was sponsored by Reps. Howard Berman (D-Calif.) and Adam Putnam (R-Fla.).

“The central issue here is not immigration—it is about protecting and preserving the American economy,” Feinstein said in a May 14 statement. “We in Congress should be doing everything possible to prevent U.S. farms from shutting down.”

The AgJOBS bill has two major parts, Feinstein said. First, the bill would create a five-year pilot program to identify undocumented agricultural workers and legalize the immigration status of those who have been working in the United States for two years or more.

Second, the bill would revamp the H-2A visa system to provide farmers and growers with a legal path to bring guestworkers to the United States to harvest their crops.

Various versions of AgJOBS legislation have been introduced over the last several years (21 LRW 122, 1/25/07). A Feinstein staffer told BNA that the current bill is essentially unchanged from the legislation introduced in the 110th Congress.

“Today across the United States, there are not enough agricultural workers to pick, prune, pack or harvest our country’s crops,” Feinstein said.

“With an inadequate supply of workers, farmers from Maine to California, and from Washington State to Georgia, have watched their produce rot and their farms lay fallow over the years.”

“As a result, billions of dollars are being drained out of our already struggling economy,” Feinstein said. “This legislation would help to ensure a consistent, reliable agriculture workforce to ensure that farmers and growers never again lose their crops because of a lack of workers,” she said.

Feinstein said that if Congress does not act to pass AgJOBS, the United States stands to lose between \$5 billion and \$9 billion in sales to foreign growers over the next several years.

Farmers who cannot find enough laborers to harvest crops have been shutting down their farms, Feinstein said. Between 2007 and 2008, 1.56 million acres of farmland were shut down in the United States, she said.

Feinstein said that there is a ripple effect throughout the economy when farmers suffer economically. “For every job lost on family farms and ranches, the country loses approximately three jobs in other agriculture-related industries,” Feinstein said.

## ***Bill Would Establish ‘Blue Card’***

Under the AgJOBS bill, undocumented agriculture workers would be eligible for a “blue card” if they demonstrate that they have worked in the United States at an agriculture job for at least 150 work days (863 hours) over the two years that ended Dec. 31, 2008.

The blue card would provide the worker with temporary legal resident

status. Under the legislation, the total number of blue cards would be capped at 1.35 million over a five-year period, and the program would sunset after five years.

Workers issued blue cards would be required to work in American agriculture for three years, working at least 150 days per year, or five years, working at least 100 days per year before becoming eligible to apply for a green card to become a permanent legal resident.

Under the proposed legislation, all blue cards would include encrypted biometric identifiers and would contain other anti-counterfeiting protections.

Before applying for a green card, workers would be required to pay a fine of \$500, show that they are current on their taxes, and show that they have not been convicted of any crime that involves bodily injury, the threat of serious bodily injury, or harm to property in excess of \$500.

Under the bill, the H-2A temporary agricultural visa program would be updated, “so that it realistically responds to agriculture needs,” Feinstein said.

The bill would shorten the labor certification process, which often takes 60 days or more. Under the bill, the Department of Labor would be required to complete H-2A application processing within seven days and notify the consulate or port of entry within seven days of receipt.

The bill would require that growers first advertise and recruit U.S. workers in the local area by filing job notifications with the state employment agencies. The adverse effect wage rate would be frozen for three years, to be gradually replaced with the prevailing wage standard.

# Judge Blocks DOL Suspension of H-2A Rule

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said would modernize the program and strengthen worker protections. The DOL final rule was published in the Federal Register Dec. 18.

It took effect Jan. 17 and was intended to update the process by which employers may obtain temporary labor certification from the agency for use in petitioning DHS to employ immigrants as temporary agricultural workers.

## Attestation-Based Process

The rule changes the H-2A program to an attestation-based process, uses Bureau of Labor Statistics data to calculate wages under the program, and bars employers from passing along to workers any of the costs the employer incurs as a result of participating in the program, among other provisions.

In issuing the temporary injunction, Osteen found that replacing the Bush administration rule with the prior rule for nine months would increase business costs for the plaintiffs because of differences in the data used to calculate wages under the rules.

According to the court, the adverse effect wage rate under the 2008 rule for North Carolina farmers is between \$7.25 and \$8.51 per hour, compared with \$9.34 per hour under the old rule.

## Growers Likely to Succeed

In addition, the court said that “based on a forecast of the evidence, plaintiffs have shown that they are likely to prevail on the merits,” because the APA requires that comments be accepted for all new rulemaking.

Limits on the type of comments that DOL reviewed in suspending the Bush administration regulation and reinstating the old regulation may have violated the APA, the court said.

“The APA does not contain a ‘reinstatement of old rules’ exception to the ‘opportunity to comment’ right

conferred to interested parties,” Osteen wrote.

## Agriculture Industry Protected

An attorney for the plaintiffs Randy Loftis, of Constangy, Brooks & Smith in Winston-Salem, N.C., said that the injunction is important because it “prevents the agricultural industry from being ‘whipsawed’ in the middle of the busiest time of the year for agriculture.”

In a statement released June 30, Loftis said that DOL provided only 10 days for comments on the rule suspension, and decided not to consider any comments related to the merits of the old rule that was to be reinstated.

“Despite these restrictions, approximately 800 comments were submitted, and approximately 99 percent of those opposed the suspension,” according to Loftis.

DOL declined to comment on pending litigation.

## UFW Disappointed

In a joint June 30 statement, the United Farm Workers union and Farmworker Justice, a farm laborer advocacy group, said that they are “very disappointed that thousands of vulnerable farm workers in the United States will suffer lower wages, lost benefits, and reduced enforcement of their labor rights due to a federal court’s decision reinstating the Bush Administration’s illegal and harsh changes to the agricultural guest worker program.”

“Current Secretary of Labor Hilda Solis made the right decision, the moral decision, and the completely lawful decision in a public process to suspend the Bush Administration rules which lowered wages and worker protections for our nation’s farm workers and reinstate the regulations that had been in place previously,” the groups said.

According to the groups, the consequence of the preliminary injunction is that “agricultural employers who apply for H-2A guest workers will continue to be able to offer the lower wage rates and other lower benefits.”

“We urge the Secretary of Labor Solis and the Department of Labor to appeal this decision immediately,” the groups said.

UFW, represented by Farmworker Justice, Florida Legal Services and Robert Willis of North Carolina, intervened in the case and intends “to continue to advocate for farm workers’ interests in the case,” it said.

## Another H-2A Lawsuit

The final Bush administration DOL H-2A regulation also has been challenged in court by the UFW and Farmworker Justice. The union filed suit under the APA, alleging that the regulations are invalid because they conflict with the H-2A program’s governing statute (8 U.S.C. § 188(a)(1)A).

The U.S. District Court for the District of Columbia Jan. 15 denied the UFW’s motion for a temporary restraining order and preliminary injunction to postpone the effective date of the regulation (*United Farm Workers v. Chao*, D.D.C., No. 09-00062, 1/15/09).

The court rejected the union’s argument that implementation of the regulations would cause irreparable harm because H-2A and U.S. agricultural workers were likely to suffer economic loss because of lower wages if the regulations became effective. The union has appealed the case to the U.S. Court of Appeals for the District of Columbia Circuit.

Text of the order granting the preliminary injunction may be accessed at <http://op.bna.com/dlrcases.nsf/r?Open=amky-7tjsrc>.

## CIS Issues Memo on H-2As From Ineligible Nations

The Department of Homeland Security's Citizenship and Immigration Services June 1 issued a memorandum to all service center directors instructing them about what evidence is necessary for H-2A and H-2B visas to be issued to individuals who are not from nations listed on the eligible countries list.

DHS published a final rule for the H-2A visa program, which applies to temporary foreign workers in the agricultural industry, on Dec. 18. DHS published a final rule regarding the H-2B program for temporary, low-skilled foreign workers on Dec. 19.

Each of these final rules limited eligibility in the guestworker programs to aliens from certain approved countries, according to CIS.

Countries listed as H-2A and H-2B eligible include Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine, and the United Kingdom. DHS said the department will update the list regularly.

DHS may allow on a case-by-case basis a worker from a country not on the list, at the discretion of the Secretary of Homeland Security, if it is in the U.S. interest to allow the worker to participate in the visa programs.

The CIS memo outlines four factors to take into

account when determining whether the U.S. interest requirement has been met, including:

- evidence that the alien has been admitted to the United States previously as an H-2A or H-2B worker and complied with the terms of the program;
- evidence that a worker with the required skills is not available from a country on the list of eligible countries;
- potential for abuse, fraud, or other harm to the integrity of the guestworker programs due to admission of the alien; and
- other factors that would serve the U.S. interest.

CIS stressed that each request for a U.S. interest exception is fact dependent.

CIS said the agency will consider any evidence submitted to address each factor outlined above, but it is not necessary to satisfy all four factors. "Instead, a determination will be made based on the totality of circumstances," CIS said.

CIS said the potential for abuse or fraud in the program may include the consideration of whether the alien is from a country that cooperates with the repatriation of its nationals.

Regarding the additional factors that would serve the U.S. interest, CIS said it would consider evidence substantiating the degree of harm that a particular U.S. employer, industry, or government entity might suffer without the services of the H-2A or H-2B workers from noneligible countries.

## No Action Taken on Cal/OSHA's Heat Standard

The California Occupational Safety and Health Standards Board took no action June 18 on the newly proposed emergency amendments to the state's heat illness prevention standard.

After hearing concerns raised by farm workers during a public hearing, the board asked the Division of Occupational Safety and Health to provide additional information on the revisions it unveiled June 10.

Cal/OSHA spokeswoman Erica Monterroza told BNA June 22 that the board especially wants to learn more about the temperature thresholds in the amendments that trigger various requirements, such as when to provide outdoor workers a shady area, drinking water, and training on how to avoid heat stress.

Monterroza said the board did not set a new date to weigh the proposed amendments.

Adopted in 2006, the current heat illness prevention regulation needs to be clarified and be more specific to increase compliance, according to Cal/OSHA.

The United Farm Workers union believes the proposed amendments are not strict enough. In testimony before the standards board, union representatives said the proposed revisions offer employers too many loopholes.

Cal/OSHA needs to increase employers' incentives to comply and to give workers a means to enforce the law themselves, the union said in statements critical of the proposed revisions that were posted on its website.

UFW's criticism of the proposed amendments are available at <http://www.ufw.org/>. Information on California's current heat illness standard is available at <http://www.dir.ca.gov/dosh/HeatIllnessInfo.html>