



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION



April 6, 2020

Mr. Thomas Shepherd
Clerk of the Appellate Boards, Room S-5220
200 Constitution Avenue NW
Washington, DC 20210

Submitted via www.regulations.gov

Re: RIN 1290-AA39 Department of Labor Direct Final Rule and Notice of Proposed Rulemaking Establishing System of Secretarial Review of BALCA and ARB Cases

Dear Mr. Shepherd,

The American Immigration Lawyers Association (AILA) and American Immigration Council (Council) submit the following comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM) and Direct Final Rule (DFR) issued by the Department of Labor (DOL or Department) concerning the establishment of a system for discretionary secretarial review over cases pending before or decided by the Board of Alien Labor Certification Appeals (BALCA), as well as several technical changes to DOL regulations governing the timing for a decision from the Administrative Review Board (ARB) and BALCA, in line with the new discretionary authority granted to the Secretary of Labor (Secretary). These comments address both the NPRM and DFR published in the Federal Register on March 6, 2020.¹

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a nonprofit organization that strengthens America by shaping how America thinks about and acts towards immigrants and immigration. In addition, the Council works toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council envisions an America that values fairness and justice for immigrants and advances a prosperous future for all.

We appreciate the opportunity to comment on the establishment of a system for secretarial review and believe that our collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.

¹ *Discretionary Review by the Secretary*, NPRM, 85 Fed. Reg. 13086 (Mar. 6, 2020); *Discretionary Review by the Secretary*, DFR, 85 Fed. Reg. 13024 (Mar. 6, 2020).

At the outset, AILA and the Council note that the DOL has chosen to issue these regulatory changes in a manner that is not consistent with the normal course of Administrative Procedure Act (APA) rulemaking, as it both issues identical changes as a final rule, while “hedging its bets” by issuing an NPRM, without providing a full regulatory analysis and opportunity for the public to comment. This process is not only confusing for the Department’s stakeholders, but it camouflages important substantive changes under the mask of a mere procedural rule, as explained below. Moreover, rather than providing a 60-day comment period pursuant to Executive Order 12866, the Department has given only 30 days to comment on two rulemakings. As such, the Department should withdraw both the DFR and the proposed rule in order to allow the public full notice and opportunity to comment on changes that have a significant adverse impact on the public.

The Regulatory Changes in the NPRM and Direct Final Rule Require Public Notice and an Opportunity to Comment Because They Are Not Merely Procedural Changes

The proposed rule and DFR both state that the proposed regulatory changes are suitable for direct final rulemaking because the changes are “entirely procedural” and the “vast majority” are “merely technical amendments” to the internal agency review process.² However, this is not the case.

First, and most significantly, the proposed rule and DFR are not procedural because they give the Secretary new authority to create precedent decisions.³ Nothing in the current regulations confers any precedential authority on BALCA decisions. Yet, the Secretary will now be able to issue precedent decisions without any mechanism for the Secretary’s decisions to be modified or overruled by later precedent decisions. This is no mere procedural change. Rather, it establishes an entirely new method for establishing binding agency policy, without any public input on those policy decisions. The Department cannot issue a direct final rule when implementing a change which alters long-standing administrative review policy on which stakeholders have relied and have a substantial interest; rather, it must undertake notice and comment rulemaking that provides full regulatory analysis.

Second, the changes detailed in the proposed rule and DFR are not merely procedural because they would substantially impact the financial interests of the parties involved due to the uncertainty being introduced into the administrative review process. Circuit courts have found that, “In general, a procedural rule does not itself alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.”⁴ Further, because “[t]he distinction between substantive and procedural rules is one of degree,” the classification of a rule often “depend[s] upon whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.”⁵ Those policies encompass both the “need for public participation in agency decisionmaking” and the need “to ensure the agency has all pertinent information before it when making a decision.”⁶ Because

² NPRM, 85 Fed. Reg. at 13087; DFR, 85 Fed. Reg. at 13026.

³ NPRM, 85 Fed. Reg. at 13094-95; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. §18.95(c)(2)(iii)).

⁴ See *Epic v. U.S. Dep’t of Homeland Sec’y*, 653 F.3d 1, 5 (D.C. Cir. 2011); accord, e.g., *Chamber of Commerce v. U.S. Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

⁵ See *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (quoting *EPIC*, 653 F.3d at 5-6)

⁶ *Id.* (quoting *Epic*, 653 F.3d at 6)

of the importance of those policies, “[t]he exception” to the APA’s notice and comment process for procedural rules is “narrowly construed and cannot be applied where the agency action trenches on substantial private rights and interests.”⁷

Under this test, neither the proposed rule nor the DFR is merely procedural. They substantially alter the Department’s internal agency review process for rendering decisions in a manner that leaves uncertainty as to when administrative decisions are final. The current regulation provides that administrative judges’ decisions are final unless the statute or regulation conferring hearing jurisdiction provides a different review procedure.⁸ The regulatory change will render what used to be a final administrative judicial decision subject to further review. The new regulation creates more uncertainty as it provides that the Secretary may assume jurisdiction within 30 business days after BALCA has issued a decision,⁹ but provides no timeframe, following assumption of jurisdiction, during which the Secretary must render a final, binding decision.¹⁰

These changes substantially impact the ability of U.S. employers to ensure the ongoing employment authorization of the foreign nationals in their workforce and to plan, budget for, and manage their immigration process. These changes could substantially increase the period of time during which the sponsored foreign national is required to maintain a nonimmigrant status such as H-1B prior to becoming a lawful permanent resident, thereby increasing the legal and filing fees the sponsoring employer must pay to the government and for legal counsel. The potential delays caused by an added layer of administrative review that leaves uncertainty as to the finality of administrative decisions ultimately increase the amount of time and money that employers are required to expend on the administrative process. As such, the Department of Labor must withdraw the Direct Final Rule and issue a new proposed rule for notice and comment, consistent with 5 U.S.C. § 553(b)-(c), to provide a reasoned explanation for intervention and the time required and consider stakeholder input.

The Time Allowed for Reopening and Reviewing BALCA Determinations Is Unclear and Will Increase the Likelihood of Disrupting Work Authorization for a Sponsored Worker and Significant Economic Harm to Employers and Workers

Under the proposed rule and DFR, the timeline for secretarial review of BALCA decisions is unclear in two ways. First, it does not establish a clear standard for when the 30-*business*-day Secretarial review period begins. Second, it does not establish a clear timeline within which BALCA must notify stakeholders of a case being subject to additional review.

Related to the first ambiguity, the rule permits the Secretary’s review authority to extend beyond the date BALCA issues a decision.¹¹ The rule establishes parameters on the timeline for secretarial action as measured against actions taken by only the BALCA, but goes on to state that the Secretary

⁷ *Id.*

⁸ 29 C.F.R. § 18.95.

⁹ *See* NPRM, 85 Fed. Reg. at 13094; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. § 18.95(b)(3)).

¹⁰ *See* NPRM, 85 Fed. Reg. at 13094-95; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. § 18.95(b),(c)(1)-(2)).

¹¹ *Id.*

may “in his or her sole discretion, assume jurisdiction to review the decision or determination of the Certifying Officer, the Office of Foreign Labor Certification Administrator, the National Prevailing Wage Center Director, or the BALCA, as the case may be.”¹² Because of this language, it is difficult, if not impossible, to determine when the 30-business-day review period begins. When the BALCA orders certification in a case, it remands the file to the Certifying Officer (CO) within the Office of Foreign Labor Certification for issuance of the original ETA Form 9089.¹³ Based on a plain reading of the proposed language, in the case of any determination where the BALCA orders certification the 30-business-day period could begin from *either* the date that the BALCA decision is issued, or from the subsequent issuance of the original ETA Form 9089 by the CO. It appears that the agency’s intention is for this period to extend for 30-business days from the date of the BALCA decision. However, subsequent reference to action taken by the CO creates confusion as to how long a decision will remain open for review by the Secretary without a final determination.

Related to the second issue of the timeliness of the Secretary’s action, the rule does not establish a specific time frame within which the BALCA must notify an employer stakeholder. Rather, the rule only requires that the employer be notified “promptly,” with no associated definition providing a particular time period.¹⁴ In the PERM program, employers rely on decisions by the BALCA to coordinate subsequent filing activities. Without a well-defined time period for notification (e.g. a number of days following the Secretary’s decision to assume jurisdiction), an employer would be unable to verify that a decision by the BALCA was final and thus unable to continue forward in the immigrant petition process with U.S. Citizenship and Immigrations Services (USCIS) within a certain timeline. It is imperative in this process that the employer be notified at every step of the process immediately, including at the time the Chief of BALCA or his designee makes a recommendation as to whether Secretarial review is warranted.

Moreover, Secretarial review at any stage in the process creates the risk of irreparable financial harm to employers. Under current practice, resolving a case before BALCA requires an extraordinarily lengthy process, and an employer’s request for *en banc* review can extend that timeline further. For example, on January 21, 2020, the BALCA issued a decision reversing a denial and granting certification of a PERM originally denied on July 2, 2013.¹⁵ This final order was issued by the BALCA more than six years after the original decision issued by the CO. An employer seeking remedy through the existing process before BALCA must invest heavily in this administrative process, incurring fees for counsel, potential disruption in the temporary work authorization of its sponsored worker, and other costs. As a result, when an employer receives a

¹² NPRM, 85 Fed. Reg. at 13094; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. § 18.95(c)(2)(i)) (emphasis added).

¹³ See 20 C.F.R. §§ 656.24(d); 656.27(d).

¹⁴ NPRM, 85 Fed. Reg. at 13094; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. § 18.95(c)(2)(ii)).

¹⁵ See *Zodiac Solutions*, 2013-PER-03003, (Jan. 21, 2020), available here:

[https://www.oalj.dol.gov/DECISIONS/ALJ/PER/2013/In_re_ZODIAC_SOLUTIONS_2013PER03003_\(JAN_21_2020\)_144305_CADEC_PD.PDF](https://www.oalj.dol.gov/DECISIONS/ALJ/PER/2013/In_re_ZODIAC_SOLUTIONS_2013PER03003_(JAN_21_2020)_144305_CADEC_PD.PDF)

positive determination from BALCA, it often immediately prepares and files with USCIS the immigrant visa petition that is the next step in the “green card” process.¹⁶

This change will require employers to artificially postpone subsequent filings by at least 30 business days (approximately 6 weeks) to accommodate the possibility of review by the Secretary, increasing the risk of a disruption in work authorization for a sponsored worker and significant economic harm to the employer and worker.

The Potential Delays and Uncertainty the Changes Create in the H-2A Temporary Agricultural Program Are Unacceptable and Need to Be Modified by the DOL

The timely processing of H-2A temporary worker applications is critical to the U.S. agricultural industry and the overall U.S. economy, as emphasized by the administration’s recent designation of agricultural workers “essential critical infrastructure workers” during the novel coronavirus.¹⁷ According to the AGAmerica, 73% of the agricultural workforce is comprised of non-U.S. workers.¹⁸ AGAmerica also reports that currently, most H-2A workers arrive at their farms at least 22 days after the date on which they are needed. DOL added very strict deadlines into its regulations in order to attempt to minimize the delays of getting H-2A workers to their farms by the requested needed date. However, through the proposed rule and DFR, the DOL is now inserting further delays and uncertainty within the program that are not acceptable.

Currently, an H-2A employer may seek administrative review of a decision.¹⁹ The Administrative Law Judge (ALJ) is required by the regulation to expedite the review and issue a decision within five business days.²⁰ The proposed rule and DFR allow the Secretary of Labor another 10 business days to decide whether the Secretary would like to review this decision.²¹ During this two-week period, the H-2A employer will not be able to file Form I-129, Petition for a Nonimmigrant Worker with USCIS due to the uncertainty of whether the ALJ’s decision is actually a final decision. The

¹⁶ As soon as an employer receives an original copy of a certified ETA Form 9089, it can file Form I-140, Immigrant Petition for Alien Worker with USCIS. In some cases, the foreign national can concurrently file Form I-485, the Application to Adjust Status to permanent resident. Each of these forms represents a distinct step in the green card process and is accompanied by significant financial expense. For reasons that are beyond the scope of this comment, in many cases there are considerable benefits to an employer in filing Form I-140 as quickly as possible because securing approval of the immigrant petition confers significant benefits related to an employee’s temporary work visa status.

¹⁷ DHS, Cybersecurity & Infrastructure Security Agency (CISA), *Guidance in the Essential Critical Infrastructure Workforce Ensuring Community and National Resilience in COVID-19 Response*, Food and Agriculture section, Version 2.0 (Mar. 28, 2020), attachment to Director, CISA, *Advisory Memorandum on Identification of Essential Workers During COVID-19 Response* (Mar. 28, 2020), available here: https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf

¹⁸ See The U.S. Farm Labor Shortage (February 2, 2020), available here: <https://agamerica.com/the-impact-of-the-farm-labor-shortage/>

¹⁹ 20 CF.R. § 655.171(a).

²⁰ *Id.*

²¹ NPRM, 85 Fed. Reg. at 13094; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. § 18.95(b)(1)).

proposed rule and DFR do not explain the reason why the Secretary would require double the amount of time allotted to the ALJ to issue a decision, in order to review the case and make a determination as to whether to intervene. At most, the Secretary should be granted the same five business day timeframe granted to the ALJ in order to issue the decision. DOL should withdraw the DFR and issue a new proposed rule for notice and comment, consistent with 5 U.S.C. § 553(b)-(c), to provide a reasoned explanation for intervention and the time required and consider stakeholder input.

Currently, an H-2A employer may seek *de novo* review of a decision.²² After the *de novo* hearing, the ALJ is required by regulation to expedite and issue a decision within 10 calendar days.²³ The proposed rule and DFR allow the Secretary another 15 business days (*not calendar days*) to decide whether to review the decision.²⁴ During this three-week period, the H-2A employer will not be able to file its I-129 petition, have it reviewed and approved by the USCIS within 15 calendar days (assuming that the USCIS premium processing service is used), and potentially have the H-2A worker apply for a visa through the U.S. consulate.

Instead, because of the changes in the proposed rule and DFR, the employer will not be certain that the ALJ's decision is final, and thus will have to waste three weeks waiting to determine whether or not it can move forward with the H-2A petition process. At a time in which most H-2A workers are already beginning work more than three weeks after they are needed, a potential delay of three additional weeks would be highly detrimental and costly to H-2A employers. Neither the proposed rule nor the DFR explain why the Secretary will need up to three weeks to decide whether it is necessary to intervene in a decision, when an ALJ is required by regulation to issue a decision within 10 calendar days. At most, the Secretary should be given up to 10 calendar days in order to determine if an ALJ decision will require further review and intervention. Through coordination and communication between the Office of Administrative Law Judges and the Secretary's office, a determination for the need for intervention from the Secretary should be clear within five business days for administrative reviews or 10 calendar days for *de novo* hearings.

Additionally, the DFR does not provide any limitations on the time in which the Secretary must make a determination on a decision after deciding to intervene. The DFR states multiple times that the Secretary will promptly review a decision. However, especially in the H-2A program where time is of the essence, DOL must provide concrete deadlines, no longer than those imposed on ALJs under the current regulations. Without confirmed timelines, this DFR injects a new level of uncertainty into the H-2A program as H-2A employers will be unsure if they will have a sufficient workforce to harvest crops in a timely manner.

According to AgAmerica, the H-2A program is underutilized because of its many inefficiencies that often create more challenges than solutions for farmers.²⁵ Through this DFR, DOL creates even more challenges and delays for H-2A employers. The agency should not create further hinderances for H-2A employers. Instead, AILA and the Council recommend that DOL withdraw both the DFR and the proposed rule, and appropriately solicit stakeholder feedback from the H-

²² 20 C.F.R. § 655.171(b).

²³ 20 C.F.R. § 655.171(b)(1)(iii).

²⁴ NPRM, 85 Fed. Reg. at 13094; DFR, 85 Fed. Reg. at 13032 (to be codified at 29 C.F.R. § 18.95(b)(2)).

²⁵ *Id.*

2A industry concerning whether Secretarial review should be implemented, and if so, how to do so without delaying the H-2A program. A rulemaking under 5 U.S.C. § 553(b)-(c) is the correct approach to determining whether a rule can be implemented without severely adversely impacting the U.S. agricultural industry.

Conclusion

Given the significant adverse comments that AILA and the Council have made, DOL must not issue these regulatory changes through a Direct Final Rule, and must reissue the proposed rule to provide appropriate analysis of the substantive impact on the regulated public before finalizing any rule.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL