

The undersigned groups hereby submit the following comments for your consideration regarding the Department of Labor's Proposed Regulations to the H-2A Program, re: RIN 1205-AB55:

Advocates For Basic Legal Equality, Inc. (OH)  
California Rural Legal Assistance, Inc.  
California Rural Legal Assistance Foundation  
Columbia Legal Services (on behalf of clients) (WA)  
Community Legal Services (AZ)  
Equal Justice Center (TX)  
Farm Labor Organization Committee, AFL-CIO (FLOC)  
Farmworker Justice  
Farmworker Legal Services of Michigan  
Florida Legal Services, Inc.  
Friends of Farmworkers, Inc. (PA)  
Global Workers Justice Alliance  
Legal Aid Bureau, Inc. (MD)  
Legal Aid Services of Oregon  
Legal Aid Justice Center -- Immigrant Advocacy Program (VA)  
Legal Aid of North Carolina Farmworker Unit  
Michigan Migrant Legal Assistance Project, Inc.  
Migrant Farm Worker Division, Colorado Legal Services  
The North Carolina Justice Center  
Northwest Workers' Justice Project  
Pineros y Campesinos Unidos del Noroeste (PCUN)  
Southern Poverty Law Center  
Texas RioGrande Legal Aid, Inc.  
United Farm Workers

For further information, please contact Bruce Goldstein, [bgoldstein@farmworkerjustice.org](mailto:bgoldstein@farmworkerjustice.org), or Adrienne DerVartanian, [adervartanian@farmworkerjustice.org](mailto:adervartanian@farmworkerjustice.org). We can also be reached at (202) 293-5420.

April 14, 2008

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

Re: Comments re: RIN 1205-AB55, DOL Proposed Regulations

Dear Mr. Dowd:

The organizations listed below submit these comments to strongly oppose the Department of Labor's proposed regulatory changes to the H-2A temporary foreign agricultural worker program and request that DOL immediately withdraw them. If DOL chooses not to withdraw its proposal, it should substantially revise it and seek additional public comment before implementation. We also propose several changes that should be made to the current H-2A program to fulfill the law's requirements.

## **I. INTRODUCTION**

DOL's proposed regulations are extensive, complex, and substantially alter or eliminate the foundations of the H-2A program. Many proposed changes are not obvious or explained and should not be adopted without further explanation and opportunity for comment. After years of failing to enforce the modest worker protections in the H-2A program, DOL now suddenly rushes an immense, complex, and deeply flawed proposal to eradicate most protections. We object to the short time frame for submitting comments; it has been wholly inadequate and unduly burdensome for individuals and organizations, especially the many nonprofit groups that serve farmworkers, to analyze, discuss and prepare comments.

DOL's proposed H-2A regulations contravene decades of lessons learned about farmworkers and temporary worker programs and in many respects violate the law that has developed in response to those lessons. Rather than propose policies to stabilize the farm labor force by encouraging improvements in wages, working conditions and productivity, and by reducing the discrimination against agricultural workers in our employment laws, the Administration proposes changes that would drastically lower wages, labor protections, and housing standards for farmworkers, severely limit the ability of U.S. workers to obtain employment with H-2A employers, and limit the oversight and enforcement of the few protections that remain. The Administration proposes to eliminate protections that even the notorious Bracero guestworker program maintained during its twenty-two year history that finally ended in 1964 after years of criticism.

At their heart, the proposed changes would reduce the ability of U.S. workers to find and maintain employment with employers that decide to apply for permission to hire H-2A workers. The proposed regulations also would undermine the statutory requirement that the wages and

working conditions offered will not “adversely affect” those of U.S. farmworkers. Through a series of changes, DOL would reverse its longstanding policy of ensuring that U.S. workers are offered the same wages and benefits as H-2A workers and would affirmatively allow employers to treat U.S. workers less favorably than H-2A workers.

The thrust of DOL’s intent in promulgating new regulations is, perhaps, most dramatically demonstrated by the elimination of two subsections currently found at 20 C.F.R. 655.90. These sections set the standard for considering and approving H-2A applications and expressly incorporate holdings of established case law, as well as the express language of 8 U.S.C. § 1188. These current provisions state:

(c) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities below which similarly employed U.S. workers would be adversely affected must be established. (The regulations in this subpart establish such minimum levels for wages, terms, benefits, and conditions of employment). Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976). Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this subpart set forth requirements for recruiting U.S. workers in accordance with this principle.

(d) Construction. This subpart shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974); *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed. *Williams v. Usery*, 531 F. 2d 305, 306 (5th Cir. 1976), cert. denied, 429 U.S. 1000, and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

20 C.F.R. 655.90. These two subsections reiterate the congressional mandate, and judicial holdings regarding the standards that must be applied under the H-2A provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986. *See also* *Alfred L. Snapp & Sons v. Puerto Rico*, 458 US 592, 597 (1982).

The absence of these subsections from DOL’s proposed regulations shows a deliberate disregard for, or intent to undermine, the mandates imposed upon both DOL and H-2A employers.

DOL’s proposed regulations cast aside protections designed to ensure that U.S. workers are not displaced in order to eliminate perceived impediments to employers using the H-2A program. DOL – after proclaiming the legitimacy of concerns about labor shortages – states unequivocally that employers are faced with the choice of employing H-2A workers, employing undocumented workers, or ending U.S. farm operations.<sup>1</sup> No consideration is given to economic reality that improving wages and working conditions will improve the availability of agricultural labor. Nor is any effort made to improve recruitment support from state workforce agencies, or to ensure that H-2A employers undertake U.S. recruitment at the same level and breadth of recruitment of foreign workers. While avoiding ample evidence of hundreds of thousands of U.S. workers, DOL decries the fact that the H-2A program is “woefully underutilized.” (DOL proposed regulations, 73 FR 8541.) If the DOL proposal is finalized, an increasing number of H-2A employers will be permitted to offer terribly low wages and poor working conditions.

The end result of DOL’s proposed changes—developed with the requested input of agricultural employers who have made clear their preference for a captive workforce of young, male guestworkers—would be a diminishing workforce of U.S farmworkers replaced by a vulnerable workforce of exploitable imported temporary workers who are forced to accept low wages and onerous conditions. The historical record demonstrates that such policies have been tried before and inflicted great harm while failing to achieve any valid public policy goal. Apart from the obviously inappropriate substance of the proposed policies, these proposed changes will violate the H-2A statute in numerous ways and are arbitrary and capricious, in violation of the Administrative Procedure Act.

## **II. THE PROPOSED LABOR CERTIFICATION PROCEDURES VIOLATE THE H-2A STATUTE AND UNDERMINE THE RIGHTS OF U.S. FARMWORKERS AND H-2A WORKERS.**

The stripped-down process for granting employer applications to hire foreign workers for temporary or seasonal agricultural jobs (§§655.107, 655.109-10) violates the H-2A statute. The Immigration and Nationality Act requires the Government to condition issuance of H-2A visas on approval of an employer’s application for a “labor certification.” 8 U.S.C. § 1188(b) and (a)(1). In the proposed rule, the labor certification process would be replaced by “labor attestation.” These terms have different meanings, under the law and in practice. DOL may not substitute one for the other without Congressional approval, which would undoubtedly be accompanied by additional changes to prevent abuses associated with labor attestation. The proposed regulations continue to use the word “certification,” but this is for effect, only, as the proposal fundamentally alters the H-2A approval process by repealing provisions that require substantive review of applications and genuine findings of compliance with the statutory criteria for labor certifications: the existence of a shortage of qualified U.S. workers, willing to work for legitimate wages and conditions, and a finding that foreign labor will do no harm to American workers. What remains is non-substantive paperwork review, abrogating DOL’s duties under the statute.

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<sup>1</sup> Federal Register, Vol. 73, No. 30, Feb. 13, 2008, at 8541.

These changes, and the repeal of protection after protection in the certification process, place U.S. farmworkers at extraordinary risk of job loss and wage deflation. By eliminating real scrutiny of the statutory criteria and employer filings, DOL will encourage agricultural employers to displace their U.S. farmworkers wholesale, a practice that advocates have already seen with growing frequency. *See* Exhibit X-1, including X-1-10a (more than 200 experienced U.S. farmworkers displaced by H-2A's). The proposed procedures require American farmworkers, who already labor for some of the worst wages, and under the harshest working conditions, to bear the costs of DOL's proposal for cheap foreign labor as the "solution" to the farm labor supply problem.

These procedures reflect no improvements to the current rules. *None.* As advocates for U.S. farmworkers, we oppose them, in their entirety for this reason. We also oppose them because they violate the statute.

Changes to §§655.104, 655.109 and 655.110 (and those incorporated provisions of §655.105) which violate the H-2A statute, include at least the following:

- The entirety of §§655.107, 655.109, in repealing substantive determinations of whether an employer's application complies with the statutory criteria for labor certification. *See* 8 U.S.C. §§1188(a)(1) and (c)(3)(A);
- §655.105, as incorporated into §655.107(a)(2). The statute allows employers to include in their job offers only those "normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations or crops." 8 U.S.C. §1188(c)(3). The proposed regulations violate the statute by allowing the application of qualifications that are neither normal nor accepted, as long as the qualification does not involve an abnormal "combination" of duties;
- §655.105, as incorporated into §655.107(a)(2). The proposed rule would allow certification of foreign labor based on job offers that provide "normal" (*i.e.* not aberrant) terms and conditions. To comply with each of the statutory mandates -- proof of a labor shortage, and no adverse effect -- job offers to U.S. workers must meet or exceed *prevailing* practices;
- §655.109(b), in allowing DOL to certify applications for the total number of positions requested in an employer petition, without reduction to reflect positions that have been filled by qualified U.S. farmworkers;
- The repeal of language (from the current §655.106(c)) making a labor certification subject to the assurances in the employer application. The statute directs DOL to make the certification "if" (and only if) the employer has complied with all of the criteria for certification, including positive recruitment of U.S. farmworkers, and if the employer has not actually received an adequate number of referrals of eligible U.S. farmworkers in response to a legitimate job offer. *See* 8 U.S.C. §1188(c)(3)(A). Therefore, certification under the statute is *necessarily* subject to employer assurances;

- The repeal of provisions requiring H-2A employers to make the terms and conditions of the job offer available to their current U.S. farm labor force.

Other unacceptable changes (of questionable legality) include:

- Repealing the prohibition on unauthorized changes in wages, benefits and working conditions.
- In regulating the transfer of workers from one employer to another, in cases of association certifications, failing to incorporate the “virtually identical” language in the H-2A Program Handbook.

#### **A. An Attestation-Based System Violates the H-2A Statute.**

The H-2A statute requires an employer seeking permission to hire temporary foreign agricultural workers to first obtain a “labor certification” from DOL predicated on a determination that there is a shortage of qualified workers at the place and time needed and that the wages and working conditions offered will not “adversely affect” those of U.S. farmworkers. *See* 8 U.S.C. §1188(a)(1). The “labor certification” process has always been understood to require active oversight by DOL of the employer’s recruitment and hiring of U.S. workers and the details of the job offer. By contrast, under the proposed rules, DOL would require merely that the employer sign a form promising to comply with whatever obligations it has. This sea change -- from the genuine certification process contemplated by Congress, to an attestation-based program -- violates the H-2A statute. DOL cannot lawfully waive the statutory obligation of a labor certification.

This system is also harmful to U.S. farmworkers, and as advocates, we oppose it. The extent to which DOL is thumbing its nose at the congressional mandates, and at the American worker, is manifest in the systematic dismantling of protections in the current labor certification regulations.

Most fundamentally, current regulations call for substantive review of the statutory criteria, from the point of initial filing through the very end of the certification process, beginning with current §655.104(b), which requires a determination at the outset as to whether an employer application is even “acceptable for consideration,” based on (*inter alia*) compliance with the adverse effect criteria. This language is repealed in the proposed rule (at §655.107), and replaced with nothing but air. The subsection of the rule (mis)named “review” (§655.107(a)(2)) incorporates no actual determination of whether the application complies with the statutory requirements for labor certification. The identified “criteria for certification” include: “the employer’s need for the agricultural services or labor to be performed is temporary” [sic]; “all assurances and obligations outlined in §655.105,” that is, the employer attestations; that the application is timely; and “lack of errors in the application.” (*See also* proposed §655.109(b) (“determinations”), providing that the CO will grant the application if the employer has made the attestations, the job is temporary or seasonal, and the application was timely.) Under this system,

DOL will grant labor certifications if the employer makes the required attestations, files on time, and does not foul up the paperwork. This lack of substantive review violates the statute.

Certain changes in the regulations (now at §655.105, and incorporated into the “criteria for certification” in §655.107) violate the statute by permitting job offers with bogus qualifications and terms and conditions that will deter U.S. workers, in violation of Congressional mandates. The statute does not permit DOL to certify applications based on job offers containing qualifications that are not “normal and accepted.” *See* 8 U.S.C. §1188(c)(3) (“[i]n considering the question of whether a specific certification is appropriate in a job offer, the Secretary *shall apply* the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.”) (emphasis supplied). The proposed regulations tack on language that undermines and violates this mandate, by allowing job qualifications that are neither objectively normal nor accepted, so long as they do not involve a “*combination of duties not normal to the occupation.*” Proposed §655.105(i) (emphasis supplied). *See also* proposed §655.109(b)(4)(vi) (interpreting “normal and accepted” criteria as “combination of duties not normal to the occupation”). This “definition” of terms is beyond arbitrary and capricious – it is a direct violation of the statute. Countless farcical qualifications, neither normal nor accepted for a given position, could be included in a job offer without constituting an abnormal “combination” of duties. Requiring that U.S. farmworkers have a college degree in order to be considered for a job would comply with these regulations. They invite mischief, and violate the statutory mandate that DOL determine, as a condition for certification, that the employer has a genuine labor shortage.

Similarly, the proposed rules permit labor certifications based on job offers with “normal” terms and conditions. (§655.107(a)(2), incorporating §655.105(b).) This standard is not sufficiently protective of the wages and working conditions of U.S. farmworkers to meet the statutory precondition that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. “Normal” is not defined in the regulations, but in common usage means something other than aberrant. A practice applying to a small percentage of workers may still be considered “normal” (just as left-handedness is “normal”). This criteria violates the statute, because requiring anything less than *the prevailing practices of non-H-2A employers* with respect to job terms will necessarily harm U.S. workers, either by putting downward pressure on wages and conditions and/or by facilitating farcical job offers that are meant to deter U.S. workers from applying and accepting work.

In fact, the stronger prevailing practice standard is not even sufficient. In a labor market where a large percentage of employees lack authorized immigration status, practices that have become “normal” or “prevailing” do not reflect the standards necessary to prevent an adverse effect on lawful U.S. workers. The market is skewed, and wages and working conditions suppressed, because undocumented workers are vulnerable. To meet the requirements of the H-2A statute, DOL must require wage and non-wage employment practices that attract and retain U.S. citizens and lawful resident immigrants in the marketplace.

Work-week expectations in the job offer are a good illustration of the use of bogus job terms to deter U.S. workers. Employers wanting to rely exclusively on exploitable foreign labor use job offers with depressed work hours, e.g. 30 hours/week, to deter U.S. farmworkers from

applying. (They then proceed to work the H-2A's 50, 60 or more hours/week.) Under current rules, DOL should scrutinize such an application (with the assistance of the local SWA) and reject it, because 30 hours/week is inconsistent with prevailing practices for non-H-2A employers. Under the new rules, the bogus job offer would be acceptable and "certification" granted, because the standard for "normal" is so lax.

These changes and a host of others -- striking here, there and everywhere language emphasizing that all decisions on applications are to be made with reference to the statutory criteria -- reflect that DOL has little regard for the concept of adverse effect. But Congress does, and the changes violate the statute.

### **B. Certifying Applications in Full, When U.S. Workers Have Filled At Least Some of the Jobs, Violates the Statute.**

The proposed rule repeals language in the current §655.106(b)(1) ("determinations") which provides that DOL grant the labor certification "for enough H-2A workers to fill the employer's job opportunities for which U.S. workers are not available." This language is replaced by §655.109(b), providing that an application (in its entirety) be approved, and the addition of subsection(f), providing for *discretionary* "partial certifications." This system violates the statutory precondition for certification, that the employer does not actually have qualified eligible individuals. See 8 U.S.C. §1188(c)(3)(A)(ii) and (B)(i). The harm to U.S. farmworkers from a system that allows employers to import more foreign labor than they need is self-evident. Each job is subject to the statutory requirements. The proposal contains an obvious inconsistency with the statutory prerequisite of a finding of a shortage of sufficient U.S. workers before a "petition to import *an* alien as an H-2A worker" may be granted. 8 U.S.C. § 1188(a)(1) (emphasis added).

### **C. The New Rules on Amendments to Applications Invite Abuse.**

The current regulations, at §655.106(c) provide:

(1) *Changes.* Temporary alien agricultural labor certifications are subject to the conditions and assurances made during the application process. Any changes in the level of benefits, wages, and working conditions an employer may wish to make at any time during the work contract period must be approved by the OFLC Administrator after written application by the employer, even if such changes have been agreed to by an employee. Temporary alien agricultural labor certifications shall be for the specific period of time specified in the employer's job offer, which shall be less than twelve months; shall be limited to the employer's specific job opportunities; and may not be transferred from one employer to another, except as provided for by paragraph (c)(2) of this section [regarding associations].

These limitations on post hoc changes to labor certifications are necessary to prevent mischief and abuse, and the new rule (at proposed §655.107(a)(6)) waters them down unacceptably.

First, the language making explicit that labor certifications are subject to the conditions and assurances made during the application process has been stricken. In the context of a rule implementing a change to an attestation-based system, repeal of this language is rather stunning. Indeed, the preamble emphasizes how an attestation-based system will require the employer to attest, under penalty of perjury, to the program requirements, to compliance with all Federal, state and local employment-related laws, etc. The language making the certification, explicitly, subject to the conditions and assurances of the application process should remain intact.

Second, the language prohibiting changes to the benefits, wages and working conditions has also been repealed. However, any diminution in the job terms would violate the H-2A statute. Therefore, the express prohibition on such changes should also remain intact.

Third, proposed §655.107(a)(6) includes a new subsection (ii) allowing for “minor changes in the period of employment,” upon approval of the CO. The provision does contain a provision requiring an assurance that U.S. workers will be provided with housing and with subsistence costs under certain circumstances when the season is delayed, but does not adequately confront problems that H-2A workers will have regarding housing, subsistence, lost work opportunities and potential negation of an employer’s obligation under the three-fourths minimum work guarantee.

#### **D. Proposed §655.110 Should Incorporate Limiting Language from the H-2A Program Handbook.**

In providing for the transfer of workers from member to member, on certifications granted to employer associations, the language in the proposed (§655.110(c)) and current (§655.106(c)(2)) rules are the same. However, the current H-2A Program Handbook limits applications from associations to those involving “virtually identical job opportunities.” To avoid fraudulent practices that harm workers, this language should be incorporated into the new rule.

#### **E. Other Problems with the Use of Attestation for H-2A Certifications**

The proposed changes would allow employers seeking approval to hire H-2A workers merely to attest under penalty of perjury to adherence to H-2A program obligations. This change satisfies the employers’ desire for ease in application but ignores the irreparable damage could be caused by false attestations and the failure of DOL to engage in active oversight of the offered job terms, recruitment, and hiring of U.S. workers.

The change to attestation, as the government freely admits, is being done to placate those employers who have criticized the H-2A program in the past for being too bothersome in order to encourage them to enroll in the program. The reasoning seems to be that if employers are more readily able to employ H-2A workers, they will fully comply with the requirements of the program and the law. This seems overly sanguine when gauged by virtually any philosophy of human nature and quite dubious given the long history of labor abuse in agriculture. It seems especially illogical in light of the government’s concern that agricultural employers are now employing predominantly unauthorized immigrants. Normally, when “self-inspection” or other

procedures are allowed by a government agency, they are premised upon a party's prior record of compliance, and it is deemed, in light of that record of compliance, that the resources that would be used to inspect or investigate that party may better be used in another pursuit. In this case, the government seeks to use attestation to increase participation in a sensitive program in which employers and workers could hardly have greater bargaining disparities by promising less meaningful scrutiny of the process.

The attestation process relies upon the integrity of the person making the attestation. The most unscrupulous employers are the most likely to ignore core obligations and the most likely to lie if it will benefit them. The persons most likely to be affected directly, H-2A workers, are the least likely to complain, given their dependence upon the employer. While many decent employers may be harmed by unfair competition from H-2A program users that take advantage of the proposed reduced labor protections and oversight, many such victimized employers would be reluctant to complain about their fellow farm operators for fear of retaliation or bringing bad publicity to the sector.

H-2A employers had already been required to certify under penalty of perjury as to the accuracy of their job order and their intent to follow the law. Numerous employers have amply demonstrated their ability to lie under oath, or at least to mislead, about the true nature of the H-2A job terms and the U.S. Department of Justice has yet to charge **any** of them with perjury. Despite the supposedly enhanced penalties in the proposed regulations, employers have good reason to be unconcerned about the lack of consequences that stem from false attestation.

### **1. Lack of Procedure to Gather Essential Extrinsic Evidence**

Attestations are particularly problematic given the reduced role of the state workforce agencies (SWAs) in the certification process and the intent to centralize that process in one office in the proposed regulations. DOL claims that requiring temporary labor certifications to be filed simultaneously is costly and has resulted "in little associated benefit to workers."<sup>2</sup> This claim is patently false. There are numerous examples from North Carolina alone of SWA knowledge proving useful to workers.<sup>3</sup> The advantage of SWA involvement is, of course, the detailed knowledge many of their experienced staff bring to bear about local agricultural practices and the use of agricultural labor in their locales. Terms and conditions of the applications which may appear quite innocuous to an official hundreds or thousands of miles from the proposed worksite could be spotted as grossly inaccurate or false by a SWA staff member on the ground in the locale.

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<sup>2</sup> Federal Register, Vol. 73, No. 30, Feb. 13, 2008, at 8543.

<sup>3</sup> See Exhibit LC2-1 in which the NC SWA alerts ETA that the largest H-2A employer in the U.S. is refusing to accept referrals from the Puerto Rico Department of Labor, LC2-2 in which an NC SWA employee alerts the agency that a grower whose farm was the worksite for an FLC's H-2A certification has informed him that he will need less than half the number of workers on the order, LC2-3 recounting the NC SWA's efforts to alert ETA to developments which made a suspect order by an FLC even more suspicious (see Section VIII for the full story on how the NC SWA's suspicions regarding GTN Employment Agency were well-founded) and LC2-4, in which the NC SWA provides ETA with proof that the starting dates for the North Carolina Growers' Association orders are inaccurate and that U.S. workers are affected. These are a small sample of the pertinent information an SWA can obtain or provide that can inure to workers' benefit. Indeed, if SWA activity has resulted in little benefit to workers, USDOL's reluctance to take action when the information is brought to its attention is the likely culprit.

Since one of the primary responsibilities of the SWAs is to assist growers with their labor needs, SWA local offices are well acquainted with the farmers and legitimate farm labor contractors in their areas and their labor needs. The regulations should require the prospective employer to file the application with the SWA as well as the DOL Office of Foreign Labor Certification (OFLC) so that the SWA can timely advise the DOL if the application does not appear to be legitimate. In light of the still active congressional mandate at 8 U.S.C. § 1188(a)(1)(B) that the employment of H-2A workers not adversely effect the wages and working conditions of U.S. farmworkers, SWAs, upon the filing of either a job order or an application that raises labor needs which seem greatly inconsistent with prior patterns or that contains terms and conditions which are not the norm, should be required to investigate the matter. The rise of labor contractor-based applications, which may or may not be submitted by individuals with farm experience, necessitates trained SWA professionals acting as a reality check upon officials in a remote national processing center.

ESA's Wage and Hour Division is another source of valuable information that should be available to the OFLC in making a determination upon an application. The new regulations do not mandate that the Wage and Hour Division and OFLC share any prior or pending investigations involving the employer, any outstanding civil money penalties or unpaid wages, any unpaid judgments relating to employment-related claims, or any failure to cure violations. ESA should uniformly and regularly report to ETA and to OFLC in particular the names of any employers who are the subjects of investigations. OFLC should share with ESA promptly the names of all interested parties on any H-2A application for certification, so that ESA can be sure that the OFLC has timely information about any history of violations of the Fair Labor Standards Act or the AWWA.

One egregious example of the importance of this oversight involves Evergreen Forestry Services, Inc. This labor contractor brought in H-2B workers from Mexico and Central America. For many years, Wage-Hour routinely investigated the company and found wage and safety violations. Wage-Hour's fines were generally reduced with an employer promise of future compliance. The same cycle of violations, investigation, fines, reduction of fines, more violations, new investigations, etc. occurred again and again. Despite an Wage-Hour investigator's statement that Evergreen had "a woeful history" of labor violations, and despite a requirement that Wage-Hour and ETA communicate, Evergreen nonetheless continued to obtain H-2B workers. This tragic situation finally ended in September, 2002, when fourteen (14) Evergreen workers drowned when their vehicle veered off the road in Maine. Some of the same safety violations previously cited may have contributed to the accident.<sup>4</sup> Another example occurred when the OFLC office in Chicago ignored evidence of a Wage and Hour investigation finding that H-2B workers were employed by a Colorado employer in agriculture and certified the employer again for H-2B workers (who were, of course, once again employed in agriculture without receiving the benefits to which they were entitled as H-2A agricultural workers).<sup>5</sup>

Given the dismal failure of the "coordinated enforcement" mechanism between ETA and Wage-Hour, this cooperation should not be assumed and should be mandated in the regulations.

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<sup>4</sup> Exhibit LC2-5 and Exhibit LC2-6, p. 33.

<sup>5</sup> See Exhibit LC2-7.

The proposed regulations allow either ETA or Wage-Hour to initiate penalties. This, however, is akin to closing the barn door once the horse has left. At a minimum, the regulations should specify that an employer who has not paid assessed back wages or civil money penalties or complied with an injunction sought by DOL or paid a judgment for employment-related claims cannot receive certification. The OFLC should also have the discretion to deny a certification to an employer who has previously engaged in violations of employment-related laws, whether or not there has been a final administrative or judicial finding of such violations and whether or not the employer has previously employed H-2A workers or sought to do so.

## **2. Lack of Authority to Deny Based on Misinformation or Fraud**

Even if everything within the four corners of the paper application appears to be in compliance, the application may contain false or misleading information. The proposed regulations, at §655.107(a), do not explicitly give the Certifying Officer (CO) the authority to deny an application because of suspected fraud, factual inaccuracy or even the appearance of unreality (e.g. workers needed for a strawberry harvest in February in Maine). DOL's experience in the H-2A program requires it to conclude that there is misleading or blatantly false information on some H-2A applications, which should lead it to conclude that such risks must be deterred and confronted through up-front reviews.

For example, the DOL OIG spent months compiling spreadsheets regarding the 2001 North Carolina Growers' Association's use of its thousands of workers over a 6-8 month period of employment. The OIG concluded that over 50% of NCGA's foreign workers abandoned their jobs, that NCGA overstated the number of workers requested in order to accommodate abandonments and that NCGA's misstated the period of employment, contributing to the abandonment rate (and avoiding its  $\frac{3}{4}$  guarantee and return transportation obligations).<sup>6</sup> ETA declined to require NCGA to change the period of employment, a move that has continued to line the pockets of NCGA and cheat workers.<sup>7</sup>

The CO must have and exert the discretion to deny applications based upon application of common sense or on extrinsic information brought to his or her attention by any interested party or member of the public that raises questions as to the accuracy or appropriateness of the application's job terms and other critical components of the H-2A application. In the absence of such oversight, the statutory obligation to prevent U.S. workers from being harmed by the decision of an employer to hire temporary foreign workers will be go unenforced in many instances. The regulations should set forth a process by which the CO will receive and consider supplemental information from SWAs, workers and others.

## **3. Special Concerns for Farm Labor Contractor attestations**

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<sup>6</sup> See Exhibit LC2-8 Semiannual Report to the Congress, October 1, 2003-March 31, 2004, Volume 51, Office of Inspector General, U.S. Department of Labor pp.6-7.

<sup>7</sup> *Id.* See also Exhibits LC2-9, LC2-10, and LC2-11 documented sworn statements of workers submitted by Colorado Legal Services demonstrating that several farms committed fraud when they applied for certification for H-2B packinghouse workers, for all the workers were, in fact, engaged in field work, not packinghouse work.

Attestations are also especially ineffective to deter farm labor contractors from submitting fraudulent orders, as is evidenced by the blatantly fraudulent conduct on the part of the relatively few farm labor contractors who have been certified in the past few years to employ H-2A workers.<sup>8</sup> These farm labor contractors have knowingly tripled the number of workers needed, and lied about whether they had sufficient funds to meet payroll obligations, where they would house workers, where the workers would work, how much and how often the workers would be paid, the amounts that would be deducted from workers' pay, etc. Often workers have not been paid at all for their labor.<sup>9</sup> The reality of recent experiences, as exposed in the New York Times article "Low Pay and Broken Promises Greet Guestworkers in U.S." indicates that farm labor contractors as H-2A employers deserve more upfront investigation rather than less.<sup>10</sup> As discussed elsewhere in these comments, DOL recognizes special problems related to the use of labor contractors but does not meaningfully address those problems.

#### **4. Irreparable Damages from Inaccurate Attestations**

The damages that may stem from inaccurate attestations can be irreparable. H-2A certifications, unlike many other labor certifications, are typically for large numbers of unskilled workers. In fact, H-2A and H-2B workers are the least educated and most desperately poor of all workers who receive temporary employment visas. Therefore, H-2A workers are the least likely workers to have the means to survive without authorized employment if the job opportunities are not as promised. They are the most vulnerable and as the case of the Million Express Manpower workers illustrates, can easily become victims of human trafficking. Even if the level of exploitation does not arise to the level of labor trafficking, H-2A workers who are victims of fraud may be irreparably damaged, because so many borrow heavily (based on misrepresentations of the earnings potential for the job) in order to pay the recruiting fees to get the visas and because they cannot recoup the cost of those recruiting fees given their earnings from the near-subsistence farming they normally depend on.

A Former National Monitor Advocate considered the situation of Thai H-2A workers, and the possibility of finding that there is no real work available:

"...what happens in a scenario such as this where the local growers decide after certification to disassociate themselves from the FLC and pull out of their contracts? We then have H2A workers from Thailand with no work and an FLC with no money or incentive to return them to Thailand."<sup>11</sup>

Workers who return home still in debt normally have no way to repay those debts using their home-country incomes. Thus they become more impoverished and are more vulnerable to becoming victims of trafficking in a desperate attempt to regain their status before seeking H-2A

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<sup>8</sup> See Section VIII re Farm Labor Contractors.

<sup>9</sup> Exhibit LC2-12, affidavits from Global Horizons workers showing that they received no pay for their work in Colorado.

<sup>10</sup> Exhibit LC2-13, The New York Times, "Low Pay and Broken Promises Greet Guestworkers in the U.S.", by Steven Greenhouse, 02/28/07.

<sup>11</sup> Exhibit LC2-14

employment. The stigma of returning home in debt, therefore, is sufficient to cause H-2A workers to continue to work under harsh, illegal conditions and suffer in silence.<sup>12</sup>

A misstatement about workers compensation coverage, which is required of H-2A employers, could also result in irreparable damage.<sup>13</sup> In many states workers compensation is not required of many agricultural employers, and farmers typically purchase only premises liability coverage. While these insurance policies, if they exist, may pay for some portion of medical care, their limits may be too low to protect against serious injuries and the range of medical services provided may be too few to assist a worker to fully recuperate. Additionally, neither US nor H-2A farmworkers have a safety net to provide for them and their families if a worker is recuperating and cannot work or if a worker has suffered a permanent total disability or death. The Social Security disability process for U.S. workers is lengthy, with many disabled workers not receiving benefits for several years after applying. Since H-2A workers typically come from developing countries without such programs, their lives and those of their families invariably become the mirror opposite of what the injured H-2A worker had dreamed – the family loses whatever capital or assets they had, children must leave school and go to work to support their parents, and another generation is condemned to a life of grinding poverty. Finally, tort remedies are not available in some states, like North Carolina, because the old common law defenses such as contributory negligence and negligence of fellow manservant are still barriers to recovery.

The ultimate victims of a false attestation are, of course, similarly employed authorized farmworkers in the U.S. who cannot compete against this government-sanctioned exploitation of foreign workers.

## **5. Referrals of U.S. workers**

At §655.102(b), the proposed regulations state that the employer “shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply . . . “ While there is nothing wrong with “accepting” referrals, the employer’s duty is to hire all qualified U.S. workers who apply. The proposed language leaves room for confusion and mischief.

## **6. Retaliation**

The proposed regulations would curtail the protection against retaliation in the current regulations. At §655.105(1) in the proposed regulations, the employer would be required to attest that s/he will not discharge any person for the **sole** reason of that person’s taking protected action as specified in §655.105(k). This is a significant change from the current regulation

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<sup>12</sup> The wrongs that workers can suffer from employers making inaccurate or blatantly false representations can be grave indeed. For example, an employer did not pay a sheepherder his monthly wages, instead holding his wages until the end of the contract in what amounted to peonage. See Exhibit LC2-15. Another employer deducted the cost of a worker’s treatment for an on-the-job injury from the worker’s pay, even though the employer had represented that he had workers compensation insurance in his application for certification. Exhibit LC2-16 pp. 14-20.

<sup>13</sup> See Exhibit LC2-17, in which the North Carolina Industrial Commission found that Parker Farms let its workers compensation policy lapse during the period of certification when a worker was injured.

which prohibits discharging, as well as intimidating, threatening, restraining, coercing, blacklisting or in any manner discriminating against anyone who, with just cause, took one of the protected actions. Proving that the **sole** reason for a discharge was retaliation for taking a protected action would be impossible, as an employer would need only give another reason which had some plausibility. DOL has not been burdened with a plethora of complaints by workers utilizing the current provisions, nor has DOL cited an employer for discharging a worker in retaliation for asserting his right to protected activity when an employer had some other compelling reason to discharge the worker.

DOL has no good reason to truncate workers' right to be free from retaliation. Indeed, since many of the protected activities – filing a complaint, instituting an investigation, testifying at a proceeding – impinge upon the effectiveness of any Wage-Hour investigation, it is baffling why the Department would want to undermine its own staff's work unless its desire is simply to ensure that the anti-retaliation regulations are weakened so as to be impotent.

## **7. Confiscation of Passports**

The Department missed an opportunity to include an attestation and a worker protection that actually would be quite meaningful. Legal services programs all over the country have discovered many H-2A workers, from various countries whose employers confiscated their passports upon their arrival as a means of control.<sup>14</sup> Control of a worker's documents is indicia of human trafficking. 18 U.S.C. § 1852. But all too often, H-2A employers feel they have the right to hold workers' passports since "they paid" for the workers. Requiring employers to attest that they will not take workers' passports for safekeeping or any other reason would put employers on notice that this is improper and might at least prevent some employers from confiscating their workers' documents.

## **8. Contract Forbidding Foreign Recruiters From Seeking or Receiving Fees**

In the supplemental information, DOL touts its "prohibition on cost-shifting" as allowing the Department to "better protect the integrity of the process, as well as protect the wages of the H-2A worker from deterioration by disallowable deductions." 73 Fed. Reg. 8548 (February 13, 2008). At §655.105(o), the proposed regulations would require an employer to enter into a contract with a foreign labor contractor forbidding payments from prospective employees. While it is highly desirable to abolish the practice of workers having to pay recruiting fees in order to get H-2A jobs, we doubt that this provision will affect the practice at all. In fact, this provision appears to be only a way for an employer to set up a legal defense to a charge that a worker did, in fact, have to pay a recruiter to get the job.

DOL should improve its plans for regulating international labor contracting by examining the provisions of the Indentured Servitude Abolition Act of 2007, H.R. 1763, which would actually prohibit the widespread practice of charging H-2A workers for the privilege of obtaining their jobs because it would hold employers liable for violations committed by foreign labor contractors "to the same extent as if the employer had committed the violation." H.R. 1763

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<sup>14</sup> See Section VIII on Farm Labor Contractors for a full recounting of numerous farm labor contractors' seizing of workers' passports. See also Exhibits LC2-18 and LC2-19 re farmers who took and kept workers' passports.

would give U.S. employers an incentive to only delegate foreign recruitment to entities that they can trust or that they set up themselves and could significantly impact the practice of charging workers for fees. The lessons that informed the drafting of that bill are relevant to drafting the H-2A program regulations.

Recruitment fees are a part of the system in the developing countries from which H-2A workers come, and these proposed regulations do not affect that system. Change will require making the parties over whom DOL has control, i.e. the employers, responsible for the actions of their agents if they charge recruitment fees. A first step in that regard would be to embrace the court's decision in *Arriaga v. Fla. Pac. Farms LLC* 305 F. 3d 1228 (11<sup>th</sup> Cir 2002) and its progeny regarding the Fair Labor Standards Act and passport, visa and transportation costs, a step DOL has refused to take.<sup>15</sup>

Until DOL decides to take effective action against the practice of recruiting fees, the evils of the current system will continue to have an adverse effect on U.S. workers. So long as H-2A workers are paying recruitment fees (and their visa and transportation costs) H-2A workers will arrive in the U.S. seriously in debt and especially vulnerable to exploitation. Employers presently have a "hear no evil, see no evil" approach regarding contracting activity in other countries, and foreign workers are paying a heavy price. H-2A workers are loathe to complain or assert their rights, knowing that engaging in such practices will ensure blacklisting the following season. The DOL proposed changes to the H-2A regulations have failed to address any of these issues.

Even if a worker did have the temerity to complain of having to pay an exorbitant fee to get the job, and the employer discriminated against him, the DOL could only fine the employer a maximum of \$5,000 if it found a "willful" violation. Roy Raynor, a principal of Million Express Manpower, Inc., in contrast, went to Thailand and obtained \$18,000 from the recruiting company there as **only a part** of the compensation due to him as **one** of the principals of Million Express Manpower<sup>16</sup>. Thus, the financial benefits of allowing foreign labor recruiters to charge what the market will bear for H-2A jobs greatly outweigh any potential risk of being caught. In fact, given the amount of control that Global Horizons, Million Express Manpower, and GTN Employment Agency<sup>17</sup> exercised over their H-2A employees in the absence of a regulation requiring a contract with foreign recruiters prohibiting the charging of a fee, it is likely that had this regulation been law at the time, those employers would have kept their employees even more isolated and incommunicado to prevent exposure.

In sum, the Department's proposed regulations regarding foreign labor contractor recruiting fees will do nothing to change some of the most pressing abuses of workers. They will merely aid in insulating complicit employers from liability. To propose an unprecedented

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<sup>15</sup> Even if a worker pays nothing in a recruitment fee to a foreign recruiter, his or her costs of obtaining a visa and travelling to the U.S. are still often quite prohibitive, given the fees charged by the Department of State for the visas, the costs of obtaining a passport, and the transportation costs to the U.S. relative to a foreign worker's annual income. Although a number of courts have followed the *Arriaga* court's reasoning, DOL still allows H-2A employers to pass those costs on to their H-2A employees.

<sup>16</sup> Exhibit LC2-20, Deposition of Roy Raynor, *Bracero et al v. New Tree Personnel Services, et al.*, 3:05-CV-02074 (E.D.N.C. 2005) October 26, 2006, pp. 304-305

<sup>17</sup> See Section VIII on Farm Labor Contractors which details the abuses of these H-2A employers.

expansion and relaxation of the H-2A program regulations without addressing these inherent problems is a failure to follow the Department's mission to protect workers.

### **9. Issuing A Notice of Deficiencies on Doubtful Information**

The proposed regulations appear to curtail the CO's scope of review and authority to issue a notice of deficiencies to the application itself, with its attestation and assurances. §655.107(a)(3). The regulations should be clear that if the CO has reason to doubt the accuracy of any of the attestations or assurances, s/he has the authority to request additional information and, without receiving such information as establishes the accuracy of the representations to his or her satisfaction, has the authority to deny the certification. The regulation should be clear that the CO can also consider extrinsic evidence, as noted in (a) above, when making a determination.

### **10. Conclusion**

The attestation process, with its emphasis on ensuring that all the paper requirements are met is ill suited to deal with the inherent disparities in bargaining power between U.S. agricultural employers and impoverished workers from the developing world in the U.S. on H-2A visas. It ignores the recent examples of farm labor contractors that have led to such terrible abuses of H-2A workers. It relies on an attestation when those who are least likely to comply with program requirements are the most likely to lie on an attestation. The attestation process would be ill-suited to the H-2A program even if DOL were authorized to adapt attestation, but the Immigration and Nationality Act prohibits the DOL from imposing a labor attestation process and requires DOL to retain the labor certification process.

## **III. RECRUITMENT**

### **A. Proposed Changes to the Recruitment Requirements Will Dramatically Decrease Jobs and Protections for U.S. Workers.**

#### **1. Introduction**

##### **a. The Agency's Statutory Obligations Regarding Recruitment**

The DOL's proposal contravenes the H-2A statutory requirements regarding recruitment and fails to offer a reasonable modification of the recruitment system. Under the H-2A statute employers that seek agricultural guestworker visas bear the burden of demonstrating to the Department of Labor that they face a true labor shortage and are not offering job terms that are so inadequate that they deter U.S. employers from applying for, accepting or remaining at employment with H-2A workers. 8 U.S.C. § 1188(a)(1). The labor certification must confirm that:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

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

The statute prohibits the Department of Labor from issuing a labor certification to an employer if the “conditions described under [the paragraphs quoted above] are not met. . . .” §1188(b).

The statute, in addition, specifically prohibits the Department of Labor from issuing an H-2A labor certification if the employer has failed to engage in recruitment of U.S. farmworkers (defined as U.S. citizens and lawful resident immigrants). § 1188(b)(4). To demonstrate a labor shortage, the employer must recruit U.S. workers using two mechanisms. First, the employer must use the Employment Service operated by state workforce agencies (SWAs). *Id.* Second, the statute imposes on H-2A employers an independent “obligation to engage in positive recruitment.” 8 U.S.C. § 1188(b)(4)). The law states: “Positive recruitment under this paragraph is in addition to . . . the circulation through the interstate employment service system of the employer’s job offer.” *Id.*

“Positive recruitment” means private-market activities by the employer itself to find and hire job applicants. In the current H-2A regulations, the Department of Labor defines the phrase “positive recruitment” as meaning “the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer’s establishment is located in an effort to fill specific job openings with U.S. workers.” 20 C.F.R. § 655.100(b).

Congress recognized that many employers prefer to hire vulnerable foreign citizens on temporary work permits and therefore would lack an economic incentive to devise effective recruitment mechanisms inside the United States.<sup>18</sup> Congress also understood that in a market economy, the job referrals from the government-run Employment Service must be supplemented by the private –market efforts of employers. The statute, therefore, imposes on the DOL an obligation to determine the particular mechanisms and geographic scope of “positive recruitment” that must be adopted by the H-2A employer.

The statute establishes the geographic scope for the positive recruitment as “**a multi-state region of traditional or expected labor supply** where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” 8 U.S.C. § 1188(b)(4). The statute imposes on the Department of Labor an obligation to determine – in a reasoned manner – the “multi-state region of traditional or expected labor supply.”

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<sup>18</sup> H-2A employers save money because they do not pay Social Security or unemployment tax for H-2A guestworkers. Temporary foreign workers also lack the same bargaining power as U.S. workers because they hold a restrictive non-immigrant status that deprives them of the right to switch employers and prevents them from obtaining a job in a future season unless the employer requests a visa for the worker. 8 C.F.R. § 214.2(h)(5)(iii)-(x). Unionization of an H-2A employer can be difficult because of the fact that workers live and are recruited outside the United States and are housed in remote locations during the contract period. Additionally, in general, the H-2A employer, by law, need only offer the minimum wages and benefits required by the H-2A program to establish the existence of a labor shortage. 20 C.F.R. § 655.102(a),(b). H-2A workers are also specifically exempted from the protection of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1802(8)(b)(ii).

The DOL itself has historically recognized its statutory responsibility to require positive recruitment for H-2A jobs that is distinct from and in addition to the use of the Employment Service system. In DOL's H-2A program Handbook, 53 Fed. Reg. 22076, 22087 (June 13, 1988), the agency said: "The active recruitment of U.S. workers is an integral part of the labor certification process. This requires **positive action on the part of the employer and** coordination and cooperation through the Employment Service system." Handbook, p. I-60, Chap. I, § D (emphasis added). "The positive recruitment requirement is one of the major changes IRCA [the 1986 immigration law] has made to the temporary agricultural labor certification program. . . ." Handbook, p. I-46, Chap. I, § B.2.f. Consistent with this long-standing interpretation, the H-2A regulations issued by DOL say, "The employer **shall** independently engage in positive recruitment . . . **and** shall cooperate with the ES System in the active recruitment of U.S. workers. . . ." 20 C.F.R. § 655.103(d) (emphasis added). As explained further below, the regulations addressing recruitment of U.S. workers were written with the recognition that the statute requires positive recruitment which is effective and in a broad geographic area.

**b. DOL Proposes Changes That Would Violate the H-2A Statute Regarding Recruitment of United States Workers and Would Establish an Irrational, Ineffective Recruitment System That Would Deprive U.S. Workers of the Job Preference and Jobs to Which They are Entitled.**

As detailed below, the proposed changes to the recruitment obligations are inconsistent with explicit mandates of the H-2A provisions of the Immigration and Nationality Act and portions of the Wagner-Peyser Act and Migrant and Seasonal Agricultural Worker Act (AWPA). They contravene statutory requirements that DOL is obligated to apply to employers that receive approval to hire H-2A temporary foreign workers, promote the displacement of U.S. workers, and revoke protections that benefit both U.S. and H-2A workers. Adoption of the regulations, as drafted, also would be arbitrary and capricious, in that they are not based on any factual information that supports the need for the regulations, or provides a basis for finding that they would promote the purpose of the H-2A Act. Indeed, these comments and DOL's own information compel conclusions opposite many of those drawn by the agency.

Specifically with respect to recruitment, the regulations must be revised to:

- Eliminate the extended recruitment period and require that positive recruitment take place 45-60 days before the date of need through the date that the H-2A workers leave their country or origin;
- Preserve the 50 Percent Rule;
- Preserve the burden on the employer (under DOL's review) to identify and positively recruit in locations with potential sources of labor, and its obligation to work with the SWA to do so;

- Retain current regulation provisions requiring that employers engage in the same kind and degree of recruitment for U.S. workers as it utilizes for foreign workers, and requiring adequate compensation of farm labor contractors to find U.S. workers;
- Preserve the role of the SWA's contained in the current regulations, and detailed in the H-2A Program Handbook, including those that:
  - Require that the SWA receive, review, and provide input into the H-2A application at the same time it is filed with U.S. DOL, including review of the prevailing practices to ensure conformance with local conditions;
  - Require that the SWA help develop and monitor the positive recruitment plan, including identification of potential intra- and inter-state labor sources;
  - Require that the SWA monitor and report to DOL all U.S. worker referrals for the entire positive recruitment period, and for the duration of the hiring period under the 50 Percent Rule
  - Require that all SWAs in multi-state orders receive copies of the H-2A applications and attachments for use in recruitment
  - Eliminate any restriction on recruiting in areas where other employers are actively recruiting for the same type of labor (and affirmatively require recruiting in known areas of farm labor supply, regardless of whether other employers are located or recruiting there)
  - Eliminate any other restrictions on referring U.S. workers to H-2A jobs being processed by SWAs
  - Preserve the mandate that the number of certified H-2A workers be reduced one-for-one by any outstanding U.S. worker referrals for which the employer has failed to demonstrate a lawful job related reason for rejecting
  - Eliminate the mandate that SWAs verify work authorization (immigration status) prior to referral of U.S. workers to H-2A employers and prior to hiring.

Additionally, the current regulations are inadequate in a variety of ways that should have been addressed by the proposed regulations, but were not. If DOL proceeds with regulatory action, it must address the following issues as well:

- H-2A applications and accompanying documents should be posted online immediately and otherwise available for public inspection upon commencement of the positive recruitment period to ensure that organizations and individuals with knowledge about available sources of labor can alert U.S. workers of the jobs, inform U.S. workers and their organizations regarding the job terms, inform the employers and the government of any job terms or other aspects of the application that fail to comply with the law, and inform employers of available supplies of labor.
- The Job Orders and Job Offers approved must comply with the disclosure requirements of the AWPAs.
- Regulations should be developed to ensure that multi-site orders submitted by farm labor contractors or others will only be approved if they contain assurances that appropriate pools

of labor will be identified for each site; that positive recruitment for each site is designed to access those labor pools at appropriate times, no less than 45 to 60 days before work begins in those areas; and that the 50 Percent Rule will be applicable at each site.

Further, DOL should clearly state that it recognizes the statutory obligation to require H-2A employers to recruit diligently and effectively so that U.S. workers are not displaced and that U.S. workers' wages and working conditions are not undermined by the hiring of temporary foreign workers. DOL's assertions in the proposed regulations regarding the presence of undocumented workers have given the impression that it is not serious about requiring employers to recruit and compete in the marketplace for the hundreds of thousands of U.S. workers who currently perform farm work, nor the many others who have done farm work or would do farm work, including former farmworkers who face uncertain employment opportunities in construction and other industries due to the economic downturn. DOL in word and deed should demonstrate its commitment to encouraging the recruitment and hiring of U.S. workers at wages and working conditions that will reduce poverty and stabilize the work force.

## **2. The Proposed Revisions to the Time Frame for Recruitment Would Make It Less Likely That U.S. Workers Will Have Access to H-2A Jobs**

The Department of Labor, under the H-2A system, currently allows an inadequate recruitment system that deprives many U.S. workers of job opportunities to which they are entitled, and this proposal would make the system worse. The H-2A system, as administered, creates a farm labor recruiting process that often is not consistent with traditional recruitment and hiring in agriculture. In general, recruitment occurs at or near the beginning of the work period and is by word of mouth; direct contact from crew leaders or other employer representatives, including farm labor contractors; and through referrals from the state workforce agencies (SWAs). Additionally, many farmworkers still get work by directly applying at the work site during the beginning days of the work period.

In order to allow for the processing of the H-2A application, positive recruitment requirements been extended out to a period far in advance of traditional recruitment and hiring methods for many jobs. However, since the purpose of the H-2A program is to ensure adequate labor without displacing U.S. workers, this bureaucratic necessity must not and need not circumvent traditional recruitment and hiring of U.S. workers. The proposed regulations do exactly that and abandon the limited requirements included in the current regulations that address this issue.

Current regulations require an intensive period of positive recruitment closer in time to the actual start of work: 60 days prior to the estimated date of need. This provides sufficient time to allow the SWA to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system. Current regulations also place an affirmative obligation on employers to recruit in areas of potential labor supply at the time the application. Further, the 50 Percent Rule ensures that U.S. workers that report on or after the first day of work – a practice common in U.S. farm labor – will be still be hired. While these requirements alone do not create a recruitment and hiring system that offers adequate opportunities to U.S.

workers, even those minimal requirements are eliminated from the proposed regulation. This is done without any empirical support for the need for or efficacy of the proposed changes.

DOL points to the extended period of positive recruitment for domestic workers, and increased fines and penalties as meaningful alternatives to the current system. However, as discussed below in greater detail, this extended recruitment period will actually reduce the pool of available U.S. workers. For example, allowing recruitment to begin 120 days in advance means that a Washington cherry grower could advertise for June harvest work starting in February. Farmworkers are not looking for cherry harvest work in February. The same can be said for almost all other harvest-type activity. The impact of increased fines and penalties must be weighed in light of DOL's abysmal record of enforcing current mandates.

Similarly, while DOL in the Supplementary Information sections makes much ado about undocumented labor, the proposed changes to recruitment will more negatively impact U.S. citizens and other documented U.S. labor that are more likely to use state job service agencies than undocumented labor who use more informal means of obtaining employment.

### **3. DOL Fails to Address Pervasive Recruitment Violations and Other Evidence Demonstrating That H-2A Employers Actively Avoid Hiring U.S. Workers.**

H-2A growers often prefer foreign labor over U.S. labor for reasons set forth below. DOL has failed to respond to growers' avoidance of U.S. workers and has proposed changes that will deprive additional U.S. workers of jobs they deserve.

#### **a. Financial Incentives to Hiring Guest Workers**

Many farm operators now rely on labor intermediaries to supply them with labor (often with the goal of attempting to shift liability for immigration and labor law violations). Various H-2A businesses (associations, persons who make their living filing applications as agents, and farm labor contractor operations started for the purpose of employing H-2A workers) are present throughout the United States whose main business purpose is to provide H-2A labor. For them, each U.S. worker referred results in decreased profits. These businesses specializing in providing H-2A labor are only needed if domestic workers are unavailable. It is therefore in their interest to limit or discourage available U.S. workers.

The recent cases against Global Horizons, as well as cases involving various farm labor contractors in North Carolina have shown that FLC's make the bulk of their income from the exorbitant recruitment fees paid by foreign labor (which can exceed \$10,000 per worker paid up front).<sup>19</sup> However, these FLC's can only expect the traditional "override" while employing U.S.

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<sup>19</sup> Exhibit R-2, Receipt showing a Thai H-2A worker paid 400,000 baht to Tsai Rong Fa, president of the recruitment company used in Thailand by Million Express Manpower, Inc, the North Carolina FLC. In his statement to Wage and Hour, dated 6/22/05, Seo Homsombath, president of Million Express Manpower, Inc. states that "the recruitment companies each gave me some money to help me start the business. See Exhibit R-3. Million Express Manpower, Ltd. gave something like \$15,000 or \$17,000 and Chanoksuda gave \$10,000." However, Roy Raynor, a partner in Million Express Manpower, Ltd. also testified at deposition that he had received \$18,000 from the recruiter in Thailand, which was only a part of what he was owed so it is apparent that recruitment for the international labor market can be highly lucrative. See Exhibit R-4, Raynor Deposition Transcript.

workers. A typical override is \$1.00 per worker per hour worked.<sup>20</sup> Given the difference in profit, FLC's have a strong financial incentive to prefer foreign labor.<sup>21</sup>

Additionally, the increase in H-2A workers from Asian and African nations means that if their H-2A employers were following the law and paying these workers' transportation costs, they would have made a huge investment they would need to protect. A former National Monitor Advocate for Migrant and Seasonal Workers within the Department of Labor, Erik Lang, described the situation as follows:

"I cannot fathom how allowing FLC's to bring workers in from Thailand can do anything other than have an adverse affect on domestic workers. There is such an incredible travel cost involved, I can only imagine that after making such an investment the FLC has a tremendous disincentive to hire domestic workers."<sup>22</sup>

Moreover, the employers of H-2A guestworkers are exempt from paying Social Security taxes or unemployment taxes on the H-2A workers' wages. In this way, hiring U.S. workers is more expensive.

**b. A Specially-Selected, Non-Representative Workforce:**

Another reason employers prefer foreign labor is the uniformity of the H-2A workforce that they have been permitted to create. The H-2A employers mostly hire young men who are not accompanied by their families. As one Georgia grower noted,

If we had a bunch of American workers, we would have to hire someone like a personnel director to deal with all the problems...The [migrants] we have now, they come and work. They do not have kids to pick up from school or take to the doctor. They do not have child support issues. They do not ask to leave early for this and that. They do not call in sick. If you say to them, today we need to work ten hours, they do not say anything. The problems with American workers are endless.

Georgia Vidalia onion grower.<sup>23</sup> As the Georgia grower made clear, growers have expressed their satisfaction with a workforce that has no daily family responsibilities. However, existing within a family is the bedrock of any real society. To the extent our government seeks to enable employers to create an "ideal" workforce of men separated from family, and to the extent that American workers must compete with this "ideal," our government is undermining the very core of our society.

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<sup>20</sup> Exhibit R-5, Deposition of Randy Bailey.

<sup>21</sup> The proposed regulations, at 655.105(n), include a prohibition on cost-shifting from the employer to the worker through high recruitment or attorney's fees. Unfortunately, employers can meet this obligation simply by attesting that they won't shift costs, which is unlikely to deter the more unscrupulous employers and likely to encourage U.S. H-2A employers to erect barriers to gaining knowledge of the recruitment fees charged by their agents abroad.

<sup>22</sup> Exhibit R-6, Correspondence between Erik Lang and Dorie Faye.

<sup>23</sup> Exhibit R-1, *Chicago Tribune*, "Immigration Clash Leaves Vidalia Onion Farmers Bitter," May 28, 1998.

Aside from no daily family responsibilities, H-2A workers have no ties to the local community outside of work and return at the end of the day to a barracks shared by other male workers. As one grower stated, “[H-2A workers] are here with one thing on their mind --- to work. They don’t have vehicles. It’s perfect.”<sup>24</sup>

This isolated existence facilitates exploitation.

“[D]iscrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system.”<sup>25</sup> Virtually all H-2A workers engaged in field crop production are male. Women, who once worked side-by-side with male counterparts, are absent from the H-2A workforce. Evidence shows this is not happenstance but the direct result of foreign worker recruitment efforts. In fact, FLC employer GTN Employment Agency, Inc. entered into a contract with its Indonesian recruiters to employ only males of a specified age.<sup>26</sup>

Women are a largely untapped resource for the farm labor market that H-2A employers should be expected to affirmatively recruit. H-2A employers almost universally hire only men when recruiting in foreign countries, which may be consistent with a bias against hiring U.S. workers who are women. Women are often viewed as less productive, regardless of the contrary reality; and, perhaps, as more demanding than men regarding compliance with health and safety obligations, including field sanitation. The 2005 NAWS report found that farmworkers were predominantly male: still, women constituted 21% of all crop workers. In the H-2A program the ratio is virtually zero. In some instances, farmers could make their jobs more hospitable to women. Sex discrimination in hiring is illegal and employers that claim a labor shortage should be required to recruit women workers effectively.

When employers can discriminate in favor of young workers by recruiting in foreign countries under the H-2A program, their discriminatory intent may carry over to their recruitment in the U.S. Many U.S. agricultural workers were legalized as a result of the Special Agricultural Worker (“SAW”) provisions of the Immigration Reform and Control Act of 1986. While there has been some transition to non-farm work, many of the approximately 1.1 million workers legalized under the SAW program are still in farm work. They are older, and more likely to be looking for better paying jobs. They are also more likely to be discriminated against in favor of younger workers. In a recent survey conducted in Calexico, California, an area where there has been recent H-2A activity, 75% of the workers who responded were over the age of 40.<sup>27</sup> DOL has taken no steps to remedy this discrimination.

The H-2A employer controls the race and ethnicity of his foreign workforce and has used this control to ugly ends. Racial and ethnic stereotypes are common, and the impact falls harshly on U.S. workers. Some employers, for example, have shown a preference for Asian labor. Employer Roy Raynor testified as follows:<sup>28</sup>

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<sup>24</sup> Exhibit R-7, *The Atlanta Journal Constitution*, “Debate Over Illegals Roils Onion Country,” Apr. 6, 2006.

<sup>25</sup> Exhibit R-8, Southern Poverty Law Center, “Close to Slavery,” (2007), p. 34.

<sup>26</sup> Exhibit R-9, GTN Employment Agency, Inc. directive to Indonesian recruiters.

<sup>27</sup> Exhibit R-10.

<sup>28</sup> Exhibit R-4 at 320.

- Q. Why do you think that growers are going to need a labor pool from somewhere else?
- R. Well, this is just my opinion from past experience of seeing what's happening to the Hispanic population.
- Q. And what do you think is happening the Hispanic population?
- R. They're Americanizing.
- Q. And what do you mean by that?
- R. They are getting lazy.

Mr. Raynor went on to complain that Hispanic workers "damage the vine"<sup>29</sup> while picking pickles and so he decided to hire Asian H-2A workers "just to try a new breed."<sup>30</sup>

U.S. citizen workers from Puerto Rico face discrimination when seeking employment in agriculture, and H-2A employers have repeatedly demonstrated an overt disdain for Puerto Ricans.

"Friday I received a voice mail message from Herbie Velez, Ag. Supervisor in Puerto Rico, who told me that the NCGA has refused their referrals this year. I attempted to call him this morning but he was not available. I called the NCGA and Lee Wicker read me a prepared statement from their attorneys basically stating that due to the recent court decision in Puerto Rico, the NCGA would be violating MSPA by accepting referrals from PR."

NC SWA official email to ETA<sup>31</sup>

H-2A employer Dennis Smith declared, in a written sworn statement to DOL, said the following:

"None of us farmers wanted the Puerto Rican workers to work anyway."<sup>32</sup>

The nation's largest H-2A employer, the North Carolina Growers' Association, had the following generalization to say about Puerto Rican workers:

"Most of the workers sent from Puerto Rico were troublemakers."<sup>33</sup>

When workers from Puerto Rico sought employment with FLC New Tree Personnel Services, the FLC was not pleased. New Tree office worker William Weeks described the FLC's reaction as follows:

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<sup>29</sup> Exhibit R-4 at p. 225.

<sup>30</sup> Exhibit R-4 at p. 226.

<sup>31</sup> Exhibit R-11, March 2003 email from William "Bubba" Grant, NCESC to Dorie Faye, ETA. The ETA, as per usual, failed to act until the recruiting season had ended. NCGA's frivolous argument deterred its having to accept Puerto Ricans that year.

<sup>32</sup> Exhibit R-12, Statement of Dennis Smith to the USDOL Wage and Hour.

<sup>33</sup> Exhibit R-13, NCGA 2000 employee handbook, at page 12.

“...but the next thing (SWA officer) Bubba double-crosses (New Tree) by sending him Puerto Ricans when he wanted Orientals.”<sup>34</sup>

Unfortunately, the unjustified, prejudiced presumption that all Puerto Ricans are poor workers has been adopted by some at DOL. The foreign labor certification officer in 2004 responded to information that Puerto Rican referrals to an H-2A employer were being paid in “rubber checks” as follows:

The employer has had trouble with the workers from the day they arrived. ... We are having the same problem with some here in GA and they have filed suit against the grower, Larry Booth. He says he is going to fight it since he is tired of these workers coming here for a vacation and then a big payoff. I have reported to you and to New York of the attitude of the workers referred as if they were never screened about the job and that they think they are coming here for a vacation with no intention or ability to do farm work.

DOL official Dorie Faye<sup>35</sup>

Similarly, FLC Million Express Manpower, Inc.’s president emailed the SWA to express the grower’s displeasure at being referred Puerto Rican workers.<sup>36</sup>

Puerto Ricans are not the only American citizens subject to discrimination at the hands of H-2A employers. The largest single H-2A employer in Georgia, Delbert Bland of Bland Farms in Reidsville, GA, has admitted that he intentionally discriminated against Mexican-American and African-American workers in switching his workforce to H-2A.<sup>37</sup> Employers will no doubt claim that they do not discriminate against Puerto Ricans or other American workers, but history shows they do so as to those who seek H-2A employment.

Employers have utilized the H-2A program in order to have their pick of ethnicity, age, gender, and race when it comes to labor. DOL does virtually nothing to confront H-2A employers about this discrimination.

### **c. Working Hard and Scared**

DOL and agricultural representatives often claim that U.S. workers are not interested in agricultural employment because the work is physically demanding and they don’t want to work hard. However, it is not the U.S. workers’ unwillingness to work hard, but the desire of agricultural employers to work the H-2A workers under terms and conditions that are no longer viable in the U.S. labor market that makes U.S. workers unwelcome. Hiring a crew of isolated H-2A workers from impoverished areas of poor nations on restricted, temporary work visas eliminates complaints and can assure high productivity levels.

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<sup>34</sup> Exhibit R-14, Deposition of William Weeks (former employee of New Tree Personnel Services, Inc.).

<sup>35</sup> Exhibit R-15, email from Dorie Faye to Charlene Giles.

<sup>36</sup> Exhibit R-16, email from Dorie Faye to William “Bubba” Grant.

<sup>37</sup> Exhibit R-17, Settlement agreement in *Leach v. Bland Farms* (“Respondent admits liability for intentional violations of the Complainants’ civil rights under 8 U.S.C. 1324b”)

On at least one occasion, a FLC pitched the H-2A workers to growers by arguing that because they arrive in debt, they will work hard and scared.

**A:** . . . . But he did say at one time, you know, everybody had to sign – this is with the Asians – before they left their country, they would have to sign a contract with their government and all that. They had property, you know, they had to put it up and when they got here, they had to work to save their property.

**Q:** So they had to work to save their property?

**A:** Yeah, that was what Aaron [Aaron Louangxonikone, president of New Tree Personnel Services, Inc.] was saying. That was one of his sales pitch. . .

Exhibit R-14, deposition of William Weeks.

H-2A employers also enjoy the luxury of not needing to compete with other U.S. employers for labor, because the visa is good only for the certified employer. 8 CFR § 214.2(h)(v). This attitude is set forth on farm labor contractor Mas Labor’s website:

MAS Differences: MAS H2 Workers ...

No matter what the workers’ home country, MAS puts you ahead by providing you with qualified employees who want to work. The only legal solution to tough seasonal labor needs is H2 visas. MAS H2 workers are workers, not young people taking a break from their studies on J work-travel visas...

All H2 visas specify the employer’s name, and the only thing an H2 worker can do legally in the U.S. is work for their specified employer.”<sup>38</sup>

Employer preference for foreign labor is not limited to the H-2A program. Media attention exposed a Pittsburgh law firm that catered to its clients’ preference for foreign labor, at the exclusion of U.S. labor, through use of the H-1B program. “*City Law Firm’s Immigration Video Sparks and Internet Firestorm*,” 06-22-07, Pittsburgh Post-Gazette. The firm was nationally exposed for giving a training for employers seeking foreign labor in which an attorney stated “Our goal is clearly not to find a qualified and interested U.S. worker” and gave guidelines on how to reject U.S. worker applicants.

Employers have various tools used to deter U.S. workers. One is to make the job description as unattractive as possible. The Snake River Farmer’s Association, Inc., created a preliminary application and data sheet for use in attracting employers.<sup>39</sup> This document goes into detail on how to create a job description least likely to attract U.S. workers, as follows:

Irrigators or Pipe Movers is a great job description because no one wants to move pipe.... Potato Irrigators: Now this is a term with great possibilities! In talking

<sup>38</sup> From the MasLabor Website: <http://www.maslabor.com/pages/h2Workers.html>, last visited 4/9/08.

<sup>39</sup> Exhibit R-18, Snake River Farmer’s Association Preliminary Application and Data Form.

with Dr. Holt<sup>40</sup>, we felt he could do great things with this description. First, he would start out by going on the pipe moving description that would discourage U.S. workers. But it would also include slicing and planting seed as well as the harvest.<sup>41</sup>

Within the H-2A program, numerous other examples of improper behavior by H-2A employers toward domestic applicants are recorded on the USDOL ETA Forms 795 that are completed by the state workforce agency during an attempted referral.<sup>42</sup> A small sample of the many examples include:

- FLC Million Express Manpower turned away U.S. workers based on non-authorized experience requirements, requiring resumes and wanting workers to travel to state headquarters for interview;
- Grower Greg Rouse turns away U.S. referral “because he had already gotten his H-2A workers and did not want anyone else.”
- 07/20/07 letter to H-2A employer Harris Farms warned that the farm had “a very low rate of US hires... despite a number of referrals.”
- NCGA refused to hire Puerto Ricans outright in 2003.<sup>43</sup>

The proposed regulations give unscrupulous employers what they have shown they desire, the ability to employ a captive workforce.

#### **d. Maintaining an Uninformed and Fearful Workforce**

Over the course of the history of the H-2A program there have been persistent and systemic violations of the H-2A regulations and the terms and conditions of the H-2A contracts.<sup>44</sup> Workers generally come forward only after they have been injured, or terminated for other reasons and are no longer able to work. Other workers, subjected to the same violations, but still employed, are hesitant to come forward, and sometimes remain unaware of the fact that their employer is saving hundreds if not thousands of dollars by failing to honor the terms of their contracts. They return to their country of origin, underpaid and without any recourse for enforcing their rights from afar.

In states with laws that provide greater labor protections than in the H-2A program, the H-2A workers often do not know that they are covered by the state law and that an H-2A

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<sup>40</sup> Significantly, the “Dr. Holt” mentioned here refers to James Holt with the law firm of Siff & Lake, LLP. In a recent NCAE Field Report, this law firm discusses how Mr. Holt had “a series of meetings with high level officials at the White House and all the relevant agencies” regarding the proposed changes to the H-2A regulations. Exhibit R-19, NCAE Field Report. It is also the same Dr. Holt relied upon by DOL for estimates of the number of undocumented workers in U.S. agriculture. [73 FR 8541, n. 10]

<sup>41</sup> Exhibit R-18

<sup>42</sup> Exhibit R-20, collection of ETA Form 795’s.

<sup>43</sup> Id.

<sup>44</sup> Exhibit R-21, Erlenborn Commission report to the Legal Services Corporation. In 1998, the Erlenborn Commission issued a report to the Legal Services Corporation addressing the scope of representation that could be provided to H-2A workers by LSC funded legal services programs. The Commission received extensive documentation of abuses suffered by H-2A workers which served as the basis for a finding that H-2A workers should have the broadest access possible to legal assistance. .

employer, as a matter of federal law, must comply with state law. H-2A workers provide an opportunity for employers to avoid compliance with costly wage and working conditions requirements that are not disclosed in the job order. In California, H-2A workers hired by growers and farm labor contractors learned that their rights under state law had been violated only after they had been terminated before the end of the contract period for not meeting excessive production requirements.<sup>45</sup> While they had enough information to know that their rights to the three-quarter guarantee had been violated, they had no way of knowing about their right under California state law to compensation for certain travel time and pay for missed meal and rest periods. Recruiting U.S. workers can mean obtaining job applicants who know their rights and, because they can switch employers, are less reluctant to enforce those rights.

H-2A workers are also particularly susceptible to retaliation in the form of blacklisting. H-2A workers often do not press their legal complaints against the growers or labor contractors who employ them for fear that they will not be called back the next year. Agricultural associations, as well as growers and labor contractors use the same recruiters in Mexico and other countries. Reporting a labor violation against one employer becomes the basis for being rejected for future H-2A employment, so workers don't complain. The presence of U.S. workers, who have the capacity to vote with their feet and leave an abusive employer, forces the H-2A employer to compete with other employers. This is a core tenet of the free market system. H-2A workers are constrained to work for the employer who is named on their visa, and unable to work elsewhere without a potentially costly return to their home nation.

Additionally, H-2A workers face very real threats in their home towns where "complainers" and their families suffer from intimidation, threats and even physical violence at the hands of recruiters and crew leaders still connected to the H-2A employers in the states. Communities and entire nations fear that U.S. employers may choose workers from other geographic areas if they assert themselves.

The presence of U.S. workers willing to challenge H-2A employers can expose problem employers. This sentiment was set forth by the former National Monitor Advocate:

"...I wanted to advise (the ETA) of what is happening out there with unreliable and potentially unscrupulous farm labor contractors. ... we do no service to domestic workers by not referring them on these orders or at least advising them of the full array of job opportunities available to them. *Likewise, we never really find out if the FLC is cognizant of its job responsibilities and law abiding if we make no referrals.*"

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<sup>45</sup> 10 workers from Mexico sought legal assistance after their employer SAMCO, a FLC operating out of California, terminated them for not meeting production standards prior to the end of the ¾ guarantee period. Upon review, it was discovered that they had not been provided meal and rest periods as mandated under state law and were not paid for travel hours compensable under the California Wage Orders. Since these requirements were not disclosed at the time of recruitment or included in the job order, there was little risk that these workers would have otherwise learned that they had not been properly paid. The workers filed litigation, and the matter was settled, with SAMCO admitting no liability. See Exhibit X-1-60 (Correa, et al. v. SAMCO, et al). Similarly, in the matter of Sierra Cascade, workers complained about early terminations, and only found out about their right to pay for waiting and travel time and meal and rest periods when they sought assistance from legal aid attorneys. See Exhibit X-1-38 (Salinas de Valle, et al. v. Sierra Cascade Nursery, Inc., et al.)

National Monitor Advocate Erik Lang.<sup>46</sup> DOL knows that many agricultural businesses that enter the H-2A program quickly develop a preference for guest workers and an antipathy to hiring U.S. workers, but offers no solutions in the proposed regulations to the discrimination faced by U.S. workers or the exploitation of the vulnerable guest workers.

**4. The Proposed Regulations Fail To Recognize That U.S. Workers Are Actively Seeking Work In Agriculture.**

**a. The U.S. Continues to Have a Significant Number of Employment Eligible Farm Workers.**

DOL attempts to cast all available workers as undocumented. This is patently false. Numerous documented U.S. workers still seek employment in agriculture. An estimated 2.5 million farmworkers are employed on the nation's farms and ranches, performing tasks related to crops and livestock. While studies, including DOL's National Agricultural Workers Survey (NAWS) and other sources estimate that from 50% to 70% of crop workers lack authorized immigration status, a substantial number of farmworkers are U.S. citizens and lawful resident immigrants authorized to work and currently relying upon agricultural employment for their livelihood. Even if only 30% of farmworkers possess authorization to work in the U.S., then there are at least 750,000 farmworkers who lawfully reside and perform work in the U.S. and are eligible for H-2A jobs. A significant percentage of such workers are migrating to find a job. These numbers are conservative and do not include former farmworkers who could return to farmwork if jobs in other occupations, such as construction, disappear or if for other reasons agricultural jobs become more attractive.<sup>47</sup>

Attached as an exhibit are the resumes of numerous U.S. workers seeking employment in field crop production.<sup>48</sup> The North Carolina SWA still reports high number of U.S. workers that seek positions in field crops. Cases brought against H-2A employers in the past have challenged H-2A employers who rejected U.S. workers in favor of H-2A workers. In one example, a California employer Harry Singh & Sons was certified for 400 H-2A workers in the 2004 tomato season. In documents produced in litigation it was revealed that over 700 U.S. workers applied for or were referred to Harry Singh & Sons during the recruitment period. Nine were rejected because they were "not eligible" and, while there are a number of no-shows on the list, there are a significant number of entries that show neither a hire date nor a reason for rejection. Additionally, there are many workers who were hired, but after a few days "voted with their feet" and left their employment. Patterns like these suggest that it is not the unavailability of work, but the conditions and circumstances of recruitment that result in an inadequate supply of U.S. labor.<sup>49</sup>

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<sup>46</sup> Exhibit R-6, Erik Lang email correspondence with Dorie Faye.

<sup>47</sup> Prof. Philip Martin of the University of California at Davis suggests there may be 2.7 million farm workers, including 1.7 million crop workers and 972,000 livestock workers, but acknowledges uncertainty in the data. "COA: Jobs to Workers," Rural Migration News Vol. 13 No. 3, July 2006.

<sup>48</sup> Exhibit R-22, Resumes of U.S. workers

<sup>49</sup> Exhibit R-23. See also Exhibit X-1-59, Lozano, et al, v. Harry Singh & Sons, complaint and settlement agreement.

Recent applications submitted in California illustrate that U.S. workers are available, but H-2A employers do not want to compete for them. In one H-2A application submitted in December 2007, Sunrise Orchards states that: "... when harvest approaches in June, due to a shortage of workers, other farmers offer higher wages because they don't need the workers for an extended period of time, and the workers disappear, leaving me when I need them most."<sup>50</sup> In effect, this employer is conceding that he doesn't want to pay competitive wages in order to keep his U.S. workers, and needs a certification under the H-2A program so that he can continue to avoid doing so.

**b. More U.S. Workers Would Be Referred to H-2A Employers if SWA's Made Such Referrals a Priority.**

DOL relies on inaccurate data to conclude that there are few U.S. referrals. DOL concentrates on the number of referrals previously made under the 50% rule without questioning whether that number is accurate. It is not. Far more workers are referred by SWA's to field crop production generally than are referred to H-2A employers.<sup>51</sup> U.S. workers are far more likely to be referred to non-H-2A employers despite the fact that wages and working conditions at H-2A employers can be more advantageous in some circumstances.

**i. Lack of training makes SWA's reluctant to refer U.S. workers to H-2A employers.**

DOL fails to acknowledge its own failure to properly train and encourage SWA's to refer field crop workers to H-2A positions where those positions may be preferable due to location, length of contract, crop, the availability of housing, or wage rate. In fact, most field crop workers in North Carolina continue to be referred to non-H-2A employers, undermining the growers' argument that U.S. workers are not available.<sup>52</sup> U.S. workers are available, but the SWA's are directing them elsewhere.

For example, in late summer of 2005, two U.S. citizen workers left an abusive farm labor contractor. Since they had been dependent on that farm labor contractor for housing, they now found themselves homeless. For this reason, an H-2A job offer seemed to provide an ideal solution – work and housing. However, when they visited the local SWA, they were informed: "I don't do H-2A, it's too complicated." SWA official.<sup>53</sup>

This attitude may explain why the vast majority of agricultural referrals made by the North Carolina SWA's go to non-H-2A employers.<sup>54</sup> This is partly due to a lack of SWA training on how to make H-2A referrals. In a settlement between two U.S. workers and the NCESC, the NCESC agreed to increase the number of referrals to H-2A employers by advising more workers

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<sup>50</sup> Exhibit R-24, Sunrise Orchards cover letter, December 2007.

<sup>51</sup> Exhibit R-25, Review of Job Services to Migrant and Seasonal Farmworkers (MSFWs), Review Dates May 16-20, 2005, p.5.

<sup>52</sup> Exhibit R-26, North Carolina Monitor Advocate Annual Report, pp. 4-5.

<sup>53</sup> Exhibit R-27, Job Service Complaint submitted by Dawn Mullens and David Howell, 2005.

<sup>54</sup> Exhibit R-28, NC Monitor Advocate Quarterly Reports.

of these employment opportunities. Training was provided for the SWA employees to ensure appropriate referrals.<sup>55</sup>

Low referral rates may also stem from the SWA official's knowledge that the H-2A employer is more likely to give the worker a hard time in getting the employment. The "it's too complicated" problem will almost certainly be heightened due to the recent TEGL (and the proposed regulations) requiring extra paperwork (employment eligibility verification) just when U.S. workers are seeking referrals to H-2A employers. The clear result of the TEGL (and the proposed regulations) will be for SWA employees to avoid the hassle associated with H-2A referrals, and direct U.S. workers to possibly less desirable non-H-2A employers.

**ii. SWAs Who Attempt to Refer U.S. Workers to H-2A Employers Have Been Met with Hostility Not Just from the Employer, but from DOL.**

DOL has also impacted the number of U.S. referrals by being lax in requiring that H-2A employers give equal treatment to U.S. workers. More U.S. workers would seek H-2A employment if they were actually provided the wages and working conditions promised on the job order.

For example, Gerald Coggins submitted a criteria clearance order for H-2A labor through a farm labor contractor (hereinafter FLC) (Million Express Manpower, Inc) and on his own submitted a duplicative local order. The local SWA found a domestic crew based on the local order and referred the crew to Coggins. Coggins then claimed to "cancel" the H-2A order. Despite the outstanding H-2A order, DOL did not require Coggins to provide the benefits of the H-2A job contract, such as free housing. DOL reasoned that the FLC, and not Coggins, was the employer.<sup>56</sup> This interpretation is not supported by current regulations, but is anticipated by the proposed regulations which expressly recognize FLCs as possible H-2A employers, include no requirement that FLCs not displace current U.S. workers employed by someone else, and do not require that the FLC provide notice to the former employees of the growers for whom they are working. [DOL proposed regulations 73 F.R. 8567, 8572 §§ 655.102(h); 655.106].

**c. There Would Be Greater Numbers of U.S. Workers Referred if H-2A Employers Were Held Accountable for Failing to Accept U.S. Referrals.**

DOL has the means *and the mandate* to discontinue services to H-2A employers who engage in a pattern and practice of substantial violations – including the failure to hire U.S. workers. (*See* 8 U.S.C. § 1188(g)(2); 20 C.F.R. § 655.110) DOL, however, has failed to follow this mandate. With the exception of taking action against Global Horizons, DOL has not taken steps to enforce protections for U.S. or H-2A workers, and complaints from advocates regarding inappropriate certifications have fallen on deaf ears. As a result of the consolidation and reliance upon the National Processing Centers, which began in 2004, DOL has virtually eliminated the opportunity for its in-house experts on local labor and recruitment practices to have an impact on the terms and conditions that are approved in a labor certification. Instead H-2A certifications for the West Coast are now processed in Chicago, where staff, understandably, lack information

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<sup>55</sup> Exhibit R-29, Settlement agreement in *Matos v. NCESC*.

<sup>56</sup> Exhibit R-6, Correspondence between Erik Lang and Dorie Faye.

about more protective state laws and prevailing practices regarding piece rates, production quotas and housing. Some SWA's have been more responsive, and some have initiated complaints against employers, however, DOL has been equally unresponsive to those complaints.

The proposed regulations set forth an enforcement procedure allegedly to protect U.S. workers against discrimination in recruitment:

Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations alleging the same, shall be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.<sup>57</sup>

Unfortunately, this alleged protection rings hollow. The Office of Special Counsel for Unfair Immigration Related Employment Practices was established to enforce the Immigration Reform and Control Act's provisions regarding particular kinds of discrimination in hiring based on citizenship status, but was not established to regulate or enforce the protections in the H-2A program. As a practical matter, due to the OSC's small size and mission, it cannot protect U.S. workers under the H-2A program in the manner that Congress intended when it granted enforcement authority to the DOL to enforce the H-2A program obligations. Even if there is concurrent jurisdiction and referral of complaints is appropriate, DOL should not rely on the OSC for enforcement. The OSC procedure and the OCAHO administrative court have failed to protect U.S. workers fired and replaced by "faster" foreign workers. The OCAHO and the Eleventh Circuit found that a business justification, *e.g.* the need for faster workers, justified displacing American workers in preference for H-2A workers. Employers can always claim the foreign workers are faster because guest workers in a restricted, temporary non-immigrant status can be exploited. The OCAHO ruled that the INA provision it enforces "allows, but does not require, that an employer give preference to citizens and then only if they are equally qualified." OCAHO Order at 5. Clearly, that ruling is at odds with the intent and purpose of the INA provisions under the H-2A program that "U.S. workers be employed wherever possible" as repeatedly recognized by the courts and current DOL regulations.<sup>58</sup> DOL itself should fulfill its obligation to enforce the H-2A program requirements but has failed to do so and is now indicating an interest in shifting this responsibility at least in part to an agency that cannot and will not adequately protect US workers.

Given this history, employers have had little disincentive to discriminate against U.S. workers. However, rather than increasing monitoring and debarment activity, DOL's proposed regulations "address" this enforcement failure by eliminating worker protections.

Under current regulations there are explicit mandates as well as oversight mechanisms that allow SWA's and U.S. workers to identify and challenge these practices. These regulations

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<sup>57</sup> Exhibit R-30, *Ojeda-Ojeda v. Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, et al.*, DOJ No. OCAHO-05B00028 (11<sup>th</sup> Cir. 2007),

<sup>58</sup> See, *e.g.*, *Elton Orchards, Inc. v. Brennan*, *supra*, 508 F. 2d 493, 500; *Flecha v. Quiros*, *supra*, 567 F.2d 1154, 1156; and 20 C.F.R. 655.90(d), which is stricken from DOL's proposed regulations.

are not adequate, and should be strengthened to allow for more effective oversight and enforcement. Instead, as demonstrated, DOL’s proposed regulations gut the protections afforded U.S. workers by eliminating and blurring express regulatory mandates; diminishing the role of the SWAs and relying upon a national, or at best, regional DOL staff to ascertain and enforce prevailing practices that are necessarily local.

**5. The Extended Pre-Start Date Recruitment Period Will Not Improve Recruitment of U.S. Workers.**

**a. The Farther Away from the Start Date the Order, the Less Likely U.S. Referrals Will Be Made.**

DOL justifies the reduction of SWA oversight and elimination of the 50% rule by arguing it has extended the timetable for recruitment. Employers can now begin recruitment 120 days prior to the job order start date. DOL claims that this extended recruitment in advance of filing the job application has been successful in its permanent labor program.<sup>59</sup>

In making such a comparison, DOL reveals either a woeful ignorance of agricultural labor, or its lack of concern for actually ensuring that U.S. workers will hear about and have the opportunity to accept jobs in their local areas or in the migrant stream. It may be commonplace for those with advanced degrees to prepare their *curriculum vitae* several months in advance of a job opportunity, but that is not the case with agricultural labor. U.S. referrals to agricultural work opportunities typically desire immediate work. They are not graduate students awaiting graduation prior to the start of work. On the contrary, they are more likely to be in need of immediate work and income and possibly housing.

As pointed out by the Georgia Fruit and Vegetable Growers Association in their comments submitted to the U.S. Department of Labor, dated March 12, 2008, “An increase in the length of time between the hire and the work start date will exacerbate an already ineffective situation. This change does nothing to improve the program, provide jobs for domestic farmworkers or encourage growers to use it.” *Id.* at p. 6.

To illustrate, we examined the results of a 2003 request for information under the state Public Records Act that yielded ETA Form 795’s for all U.S. referrals in North Carolina that year. A review of those records shows overwhelmingly that U.S. workers request a referral just before or after the job order is open.<sup>60</sup> The referrals can be broken down as follows:

More than 45 days before start date:	0
31 to 45 days before start date:	20
21 to 30 days before start date:	21
11 to 20 days before start date:	34
1 through 10 days before start date:	112

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<sup>59</sup> DOL proposed regulations, Supplementary Information, [73 FR 8542; 655.100(a)(1)(ii), FR 8562; 655.102(g), FR 8567; 655.102(e), FR 8566.]

<sup>60</sup> Exhibit R-31a-d., 2003 U.S. referral chart with affidavit.

**b. The Proposed Regulation Reduces and in Some Circumstances Eliminates the Employers' Affirmative Obligation to Seek Out U.S. Workers for H-2A Jobs**

Current regulations establish a standard for positive recruitment that is based on comparable efforts of other employers and the H-2A applicant employer itself. 20 C.F.R. § 655.105(a) provides that recruitment efforts "... shall be no less than 1) the recruitment efforts of non-H2A employers of comparable or smaller size in the area of employment." This standard provides protection for U.S. workers as well as for other agricultural employers who are expending resources to actively, and effectively, recruit U.S. workers locally and in other locations, using the SWA, farm labor contractors and direct recruitment methods.<sup>61</sup>

Additionally, current regulations require that "[w]hen it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers." 20 C.F.R. § 655.102(f). This provision not only ensures a broad base of recruitment, it ensures that U.S. workers employed by farm labor contractors will not be replaced by H-2A workers in subsequent seasons when an agricultural employer decides to utilize the H-2A program.

These references and protections are eliminated in DOL's proposed regulations. The H-2A employer is no longer required to use the same recruitment methods undertaken in prior years, and may avoid traditional areas and means of recruitment that other agricultural employers must still use and pay for.

Similarly, the current regulations require that an employer's recruitment of U.S. workers "...shall be no less than. . . 2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers." 20 C.F.R. § 655.105(a). This objective standard for determining whether the H-2A employer is making meaningful efforts to procure U.S. workers is critical to effectuate the mandate of IRCA that a petition not be granted if there "are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed." 8 U.S.C. § 1188(b)(4).

DOL's proposed regulations eliminate this standard, and will allow employers to expend extraordinary efforts and resources to recruit workers from other countries, while eliminating the mandate that they take comparable steps in the U.S. This provision not only reduces opportunities for U.S. workers, it promotes the kind of foreign recruitment that has been demonstrated to result in the exploitation of H-2A workers.<sup>62</sup>

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<sup>61</sup> Greater, not less, enforcement of these requirements is appropriate given the abuses demonstrated in recent H-2A applications. In the case of Harry Singh & Sons, CET, a local non-profit employment services agency referred dozens of workers for employment at Harry Singh & Sons, only to have them rejected. Some of those workers sued Harry Singh & Sons and reached a settlement. (Exhibit X-1-51). See also Exhibit X-1-10a, the recent complaint filed on behalf of U.S. workers who were available for work in Arizona but were passed over for jobs in favor of a crew of exclusively H-2A workers.

<sup>62</sup> See Exhibit R-32 Global Horizons in Washington state farm labor contractor and H-2A activity 2004, regarding

DOL's proposed regulations eliminate the employer's affirmative obligation to identify potential U.S. workers and replace it with a job order, three newspaper advertisements, mail contact with former U.S. workers; and recruitment in only those states identified by DOL based on labor availability as many as 18 months before the date of need.

DOL's proposed regulations change the definition of positive recruitment from "locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located" 20 C.F.R. 655.100(b), to "recruiting and interviewing qualified and eligible individuals in the area where the employer's establishment is located and any other area designated by the Secretary as a multistate area of traditional or expected labor supply..." [DOL proposed regulations 655.100(b), 73 FR 8565].

Despite the statutory obligation contained in 8 U.S.C. § 1188(b)(4) -- which mandates that DOL require active ("positive") recruitment of U.S. workers in known or expected areas of labor supply outside the local area -- DOL plans to stop requiring such recruitment if there are other agricultural employers in the areas of labor supply. "The Secretary shall not designate a State as a State of traditional or expected labor supply with respect for any other State if the State has a significant number of local employers that are recruiting for U.S. workers for the same types of occupations." [DOL proposed regulations 655.102(i)(1), FR 8567]. In other words, employers need not compete with one another for migrant workers, and workers have no right to receive job information even though a particular job may offer a longer season, a higher wage, or better work environment. (It is ironic that this new provision curtailing recruitment is in a subsection entitled "Additional positive recruitment."). While current regulations make such referrals inappropriate if they would be futile<sup>63</sup>, here there is a clear intent to eliminate any competition at all between H-2A employers and other employers. Under the proposed regulation, workers in Calexico, who have worked for years in Yuma harvesting lettuce, would not be recruited for, and would not be referred to these jobs by the California SWA because other lettuce and broccoli growers are actively recruiting in Calexico. This is true even though on a daily basis workers appear at these recruiting sites to seek and accept day labor. Clearly the intent of the H-2A Act is not to displace these workers, but, in fact, to ensure that they are affirmatively offered these positions.

**c. The Proposed Regulations Reduce Requirements Regarding the Nature and Scope of Recruitment**

In place of positive recruitment requirements coordinated with the SWAs and the 50 percent rule, DOL has identified four steps that an H-2A employer must engage in for a single site application.

An employer filing an application must:

- (1) Post a job order with the SWA serving the area of intended employment,
- (2) Run three print advertisements (one of which must be on a Sunday);

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the recruitment of Thai workers at pages 6-8.

<sup>63</sup> 20 C.F.R. § 655.105(a).

- (3) Contact former U.S. employees who were employed by the employer within the last year (except those who were dismissed for cause or who abandoned the worksite); and
- (4) Based on an annual determination made by the Secretary recruit in any States currently designated as States of traditional or expected labor supply with respect to the State in which the employer's work is to be performed.

[DOL proposed regulations § 655.102(d), 73 FR 8566]

**i. The Required Print Advertisements Will Not Reach Most Farmworkers**

The print advertisements must be run 120 to 75 days before employment begins, in a local daily paper. One publication must be in a Sunday edition of that – presumably English language -- paper, and the remaining two may, but need not be, published in a professional, trade or ethnic publication if it “is the most likely source to bring responses from able, willing, qualified, and available U.S. workers...” [DOL proposed regulations § 655.102(g), 73 FR 8567]

DOL has given employers the option of NOT advertising in the print media that is the most effective means of communicating with potential workers and has made no provision for advertisement via radio. This is not only inconsistent with data readily available to DOL,<sup>64</sup> it is inconsistent with the actions of DOL's own certifying officers who have increasingly required that H-2A advertisements be included as part of the positive recruitment plan.<sup>65</sup>

In the event DOL does require an employer to engage in positive recruitment outside the local area, the only recruitment that would be needed is “of one newspaper advertisement in each State so designated.” [DOL proposed regulation 655.102(i)(2), 73 FR 8567] As discussed above, the current regulations require more extensive recruitment efforts, including the “same kind and degree” of effort made to find the job applicants in the foreign country. 20 C.F.R. § 655.105(a).

**ii. There Is No Longer an Obligation to Contact and Access Other Sources of Labor.**

DOL's proposed regulations also eliminate the current requirement that employers look to other sources for available workers including “Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers.” 20 C.F.R § 655.103(d)(4). There is no equivalent mandate under the current regulations, and, as the regulations eliminate the active involvement of SWAs, it is unlikely that these sources of labor will be accessed.

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<sup>64</sup> See 2005 NAWS report, noting low levels of education and, literacy and limited English skills in farmworker population.

<sup>65</sup> The H-2A Handbook provides that the RA may require publication in a language other than English (53 FR 22089) and this has been made a condition of certification in some orders. See, Exhibit R-33, Correspondence to Harry Singh & Sons August 16, 2002.

DOL provides no justification for the elimination of these explicit requirements. Rather it appears to be one more way to avoid “burdening” H-2A employers with the task of considering U.S. workers for these jobs, and eliminating any risk of liability for failing to seek them out and hire them.

**iii. The Regulation Fails to Require any Effective Method of Ensuring All Former Employees Are Contacted and Offered Work Before Being Displaced By H-2A Workers**

The proposed regulations require that the employer contact former U.S. workers by mail. [DOL proposed regulation 655.102(h), 73 FR 8567] Again, if DOL had intended to come up with the least effective way of contacting former employees, it could not have selected a better method than by mail. It is well documented that the majority of farm workers are not literate in English or their primary language.<sup>66</sup> The regulation does not require that the written communication be in any language other than English, although most farmworkers do not read or speak English. The most effective means of communication is through telephone, or by contact through crew leader or foreman. There is no requirement that these more effective methods be used.

Additionally, the proposed regulation expressly limits the requirement to contacting former workers “employed by the employer in the occupation at the place of employment, during the previous year.” [DOL proposed regulation 655.102(g), 73 FR 8567]. This will eliminate any requirement to contact workers of a grower who switches to a FLC. Under the proposed regulation, the FLC has no obligation to contact the growers’ former workers and may replace them with H-2A workers without providing any notice or opportunity to apply. If those workers come to the fields and apply for work on the day work begins, they are NOT entitled to work if the H-2A workers “...have depar[ted] for the place of work, or [it is less than] three days prior to the first date the employer requires the services of the H-2A workers...” [DOL proposed regulations 655.101(a)(1)(ii), 655.105(d), 655.109(d), 73 FR, 8562, 8571, 8574]. The definition of what constitutes contacting former workers also allows the FLC to avoid contacting members of its own crews from prior years if those workers did not work at the same location for which the FLC seeks H-2A workers in the application. This is completely inconsistent with the practices of FLCs and promotes the displacement of U.S. workers and segregation of U.S. and H-2A crews.

**d. The Annual Survey of Labor Availability Will Not Provide Adequate Information to Determine Whether There Are U.S. Workers Available and Willing to Accept the H-2A Jobs.**

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<sup>66</sup> According to the 2005 NAWS Survey Report “Among all crop workers interviewed in 2001-2002, 44 percent responded that they could not speak English ‘at all,’ 26 percent said that they could speak it ‘a little’ six percent said ‘some’ and only 24 percent said that they spoke English ‘well.’ The responses were similar regarding the ability to read English: 53 percent could not read it ‘at all,’ 20 percent could read English ‘a little’ six percent could read “some,” and only 22 percent said that they could read English ‘well’” Education levels varied but “Among all workers in 2001-2002, the mean highest grade completed was seventh and the median was sixth.” [http://www.doleta.gov/agworker/report9/chapter3.cfm#english\\_language](http://www.doleta.gov/agworker/report9/chapter3.cfm#english_language)

The proposed regulation eliminates explicit sources of available labor that an employer must consider and replaces them with a requirement that the employer “...engage in recruitment in traditional labor supply States, when required, based on an annual determination from the Secretary.” [DOL’s Proposed Regulations 655.100(a)(1)( *ii*), 73 FR 8562, emphasis supplied]. It sweeps away the specific employer and SWA requirements for identifying interstate sources of labor and replaces it with the following date source:

(1) Each year, the Secretary shall make a determination with respect to each State whether there are other States in which there are located a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. Such determination shall be based on information provided by State agencies or by other sources within the 120 days preceding the determination, and shall take into account the success of recent efforts by out-of-state employers to recruit in that State.

[DOL proposed regulations 655.102.1(i)(1), 73 FR 8567] The annual survey is flawed in many respects and not designed to identify sources of labor at the time of need:

- The survey is not occupation, crop, season or activity specific;
- It may be conducted as much as a year before the application is submitted;
- It can be based on information provided to the FCLS up to 120 days prior to the date the survey is published;
- There is no methodology identified;
- It does not identify the type of information provided by State agencies or other sources that may be relied upon

Thus a recruitment plan for hundreds of skilled grape workers can be based on labor availability information regarding general farm work that is more than 16 months old. [See DOL’s Proposed Regulations 655.102(i)(1), 73 FR 8567.]

Additionally, the regulation prohibits the Secretary from including a state where other employers – as much as 16 months before the date of need – had recruited for the “same types of occupations.” *Id.* This change virtually eliminates any real-time identification of potential recruitment locations outside the intended area of employment. The impact will necessarily be to eliminate opportunities for local U.S. workers as well as those who have traditionally migrated within the U.S.<sup>67</sup>

**e. DOL Has Failed to Provide Legal or Factual Support for This Dramatic Change in Recruitment Requirements**

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<sup>67</sup> Again, while the 2005 NAWS survey results suggest that migration has decreased, the 2005 report indicated that 27% of the domestic agricultural workforce were still “shuttle” or “follow the crop migrants” during the data collection period.

There is no justification for replacing these explicit – if inadequate – directives regarding recruitment with the very general standards included in DOL’s proposed regulations. Comments made by DOL in the supplementary information section, instead lament that:

One unfortunate reality of modern American agriculture is that the majority of the foreign workers assisting with the year’s harvest are undocumented. In fact, the share of the agricultural workforce that is not work authorized has increased dramatically in recent years while the number of U.S. workers engaged in agriculture has dropped steadily.

[DOL proposed regulation, 73 FR 8540.] There is no indication that DOL has analyzed the most comprehensive and recent information available to it, the data sets included in the NAWS study that would show intra-state and interstate migration patterns and the transition of workers in and out of farm work.<sup>68</sup> Additionally, there is no evidence that DOL has made any attempt to determine the actual interest of U.S. workers in agricultural jobs, particularly given increased unemployment rates in many agricultural communities.<sup>69</sup> Finally, even the selective sections of the NAWS study sources identify 47% of the workforce as being comprised of documented U.S. workers and other, lower estimates still concluded that there are at least three-fourths of a million U.S. workers doing farm work presently.<sup>70</sup> This is a significant population that deserves the rigorous enforcement of the Congressional directive that the H-2A program NOT result in the displacement of U.S. workers.

Indeed, there are legitimate concerns that in states like California, Washington, Oregon and Arizona, where the H-2A program is not highly utilized, lessening the restrictions on the program will result in the shift from the employment of U.S. workers to the nearly exclusive use of H-2A workers. Often, H-2A use becomes concentrated in local areas due to the business interests of the H-2A labor contractors, regardless of the actual need for H-2A workers. An increase in H-2A applications in western states has been accompanied by the increased exploitation of workers.<sup>71</sup> It has also resulted in the denial of jobs to U.S. workers.<sup>72</sup>

## **6. The Proposed Regulations Replace State Agencies That Have Real-Life Experience with Farmers and Workers with Out-Of-Touch National Certification Officers Who Are Removed from Reality**

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<sup>68</sup> Worker advocates, through Farmworker Justice, sought an extension of the comment period by 45 days which would have allowed time to have additional data sets in the NAWS study analyzed, either by a DOL contractor, or through release of the data to another expert. However, only a 15 day extension was granted.

<sup>69</sup> See “Briefing Rooms -Rural Labor and Education: Farm Labor,” Economic Research Service, U.S. Dept. of Agriculture, <http://www.ers.usda.gov/briefing/laborandeducation/farmlabor.htm#Employment>; last viewed April 11, 2008.

<sup>70</sup> This includes 25% U.S. citizens, 21% Legal Permanent Residents and 1% other work authorized non-citizens, NAWA study at <http://www.doleta.gov/agworker/report9/chapter1.cfm#eligibility>.

<sup>71</sup> See Exhibit R-32, regarding Global Horizons and Correa, et al. v. SAMCO, Exhibit X-1-69 and Salinas de Valle v. Sierra Cascade, Exhibit X-1-39.

<sup>72</sup> See Exhibit G-1-59, Complaint resulting in TRO against Harry Singh & Sons for failing to offer already employed U.S. workers their own jobs, instead filling them with H-2A workers; *see also* Exhibit X-1-10a, the recent complaint in federal court in Arizona filed by more than 200 U.S. workers (all citizens and lawful permanent residents), many of them long-term employees, who were displaced, wholesale, by their employer who decided to hire H-2A guestworkers instead. Many of the U.S. workers stood watching, from the parking lot where they used to board the buses to the fields, as the H-2A workers crossed the border with their luggage, taking their jobs.

**a. SWAs Currently Play a Critical Role in Ensuring that U.S. Workers Are Not Displaced as a Result of H-2A Applications by Assisting with Local and Interstate Recruitment.**

The H-2A Act expressly requires affirmative recruitment by the agricultural employer independently and through the SWA and makes clear that employer recruitment "... is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer." 8 U.S.C. § 1188(b)(4). This reference means that the employment service requirements and restrictions which are applicable to the recruitment of U.S. Migrant and Seasonal Agricultural workers, govern the recruitment of U.S. workers for H-2A jobs. Because the interstate employment service system is administered by the states, this mandate provides a mechanism for states to further their interests in having unemployed workers in their states placed locally, or in jobs in other areas that offer compensation and benefits that are at a level that will make it economically feasible for U.S. workers to travel to and accept available work. Thus the states have a statutorily recognized role in ensuring that H-2A workers are not favored over or provided greater pay and benefits than unemployed workers in their states.

**i. The SWA is removed from the Application Review and Approval Process.**

Currently, an employer must submit a copy of the H-2A application to the SWA at the same time it is filed with the FLCS, and the SWA is required to commence local recruitment for the jobs immediately. Any modification of the application must also be submitted to the SWA. See 20 CFR § 655.101(c)(2).

The SWA prepares both the local job order and the interstate agricultural clearance order from information contained in the application. This creates the opportunity for the SWA to fulfill its obligation to ensure that the job orders comply with state wage and hour laws, the H-2A Act and regulations, the Migrant and Seasonal Worker Protection Act and the Wagner-Peyser Act. It also provides the opportunity for the SWA to locate and prepare for inspection of the proposed housing. Because this activity occurs immediately after filing and before the application is approved, the SWA can identify deficiencies and defects in the job offer before it is communicated to U.S. workers or H-2A workers and provide critical information to DOL. SWAs have required changes to piece-rates, production standards, housing proposals and other terms of employment that were inconsistent with state law before preparing and posting the job orders. These corrections are in turn incorporated into the job offer and application, and control recruitment and employment of both H-2A and U.S. workers, ensuring that terms and conditions of the H-2A jobs will not adversely affect local workers.

This statutory recognition of the SWA's critical role in identifying areas of recruitment and monitoring compliance with recruitment and disclosure requirements is completely undermined by the proposed regulations.

Under the proposed regulations the SWA will no longer receive a copy of the H-2A application. Instead the employer need only place an active job order with the SWA serving the area of intended employment 75 to 120 days before the date of need. This could be before the application is ever submitted, and since the SWA will not receive the application, it must take on faith that the job offer supplied by the employer is consistent with the terms of the H-2A application, and will have no way to scrutinize the application for undisclosed terms that may conflict with state law.<sup>73</sup> [DOL's proposed regulations 655.102(e), 73 FR 8566]

**ii. SWA Role in Developing the Positive Recruitment Plan Is Eliminated.**

Under current regulations and practice, the SWA, as well as the employer, begin positive local recruitment upon the submission of the application, *see* 20 CFR § 655.101(c)(4), and the SWA provides information to the FLCS which is used to create the positive recruitment plan. 20 CFR § 655.105(a) currently requires that the FLCS consider “current information provided by a State agency and such information as may be offered and provided by other sources, when determining whether the recruitment plan is adequate. *Id.* SWA staff, unlike the FLCS or Secretary, are uniquely qualified to assess both intrastate and interstate sources of workers and to determine whether the job will be attractive to workers in other states. Job Service staff from the SWAs are also knowledgeable about when those activities will be the most fruitful and in what form such activities should be, and can provide that information to both the employer and the FLCS. Indeed SWA staff are charged with developing this expertise and providing assistance to migrant and seasonal farmworkers under the provisions of the Wagner Peyser Act and its implementing regulations. *See, e.g.*, 20 C.F.R. § 653.107.

Referrals from the SWAs can be a significant source of other U.S. workers who are outside of the immediate area of employment. For example, in Michigan, where unemployment is very high, the SWA has been increasing efforts to refer workers to H-2A work. According to data provided by the SWA, in connection with one H-2A job order, the SWA referred 104 U.S. workers to Vreba Hoff Farms between March 1, 2006 and June 29, 2006, for the 20 available H-2A positions. Eighty percent of the initial referrals (between March 1, 2006, and May 19, 2006) were of workers who had not performed farmwork, but were seeking any available employment.<sup>74</sup>

Relegating the SWAs to a role of merely processing the job order – prepared and submitted without oversight of the employer – will eliminate SWA involvement in developing an effective recruitment plan designed to tap into available intra- and interstate workers.

**b. The Proposed Regulations Diminish, Not Expand, the Documented Positive Recruitment Period and Eliminate Effective Interstate Referral of Job Orders.**

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<sup>73</sup> The H-2A Program Handbook, published at Federal Register, Vol. 53, No. 113, Monday June 13, 1988, pages 22076, *et. seq.* anticipates the role of the SWA to help identify inconsistencies between federal and state laws and ensure that appropriate standards are brought to the attention of DOL certifying officer. *Id.* at 22084.

<sup>74</sup> Exhibit R-34.

### **i. The Number of SWAs Actively Working the Job Order Will Decrease.**

Under current regulations, once the application is approved, it is entered into the interstate job clearance system for all states. The current regulations require “circulation through the interstate clearance system of an agricultural clearance order.” 20 C.F.R. § 655.105(a). With the interstate circulation, SWAs in other state have access to the order and can refer their workers for employment. In states like Michigan and Puerto Rico, chronically unemployed workers are anxious for the opportunity to accept jobs in other locations, provided they have the same financial incentives to do so that H-2A workers have.

Under the proposed regulations the employer need only submit the job order to the SWA having jurisdiction over the place where the work is contemplated to begin. [DOL’s proposed regulations 20 CFR § 655.102(e), 73 FR 8566]. The SWA – not the employer— is then required to transmit “a copy of its active job order to all States listed in the application as anticipated worksites,” who then prepare intrastate orders for circulation only in their state.<sup>75</sup> In the event that the anticipated worksites are all located in one state, the SWA is, instead, required to distribute the job order to at least three other states for intrastate recruitment, including those designated by the Secretary pursuant to the DOL Annual Survey. Inexplicably there is no comparable requirement for multistate orders. For example, if an H-2A employer has anticipated worksites in Oregon and Idaho the proposed regulations only require SWA recruitment in Oregon and Idaho. No SWA recruitment is required in any other state. Under the proposed regulations, U.S. workers in traditional labor supply states, such as Texas and Puerto Rico, would not be recruited for H-2A job orders large enough to have worksites in more than one state. This recruitment scheme, limited to states that have worksites, is inconsistent with 8 USC §1188(b)(4) that requires "circulation through the interstate employment service system of the employer's job offer."

None of the SWAs will have the actual H-2A application and the SWAs outside of the originating SWA jurisdiction would only have job order information that meets proposed regulations 20 CFR § 655.103 and the assurances required under 20 CFR § 655.104. [DOL’s proposed regulations 20 CFR § 655.102, 73 FR 8567.]

In particular, the proposed regulations for the content of agricultural association job orders are extremely lax. The proposed regulations instruct SWAs to place agricultural association job orders into intrastate and interstate clearance with a "range of applicable wage offers" and a statement that "the rate applicable to each member can be obtained from the SWA". [DOL’s proposed regulations 20 CFR § 655.103 (a) and (d), FR 8568]. This instruction is inconsistent with 20 C.F.R. 653.501(d)(2)(vi) which requires that all job orders placed into intrastate or interstate clearance include the hourly wage and does not include all of the information required for the worker checklist required by 20 C.F.R. 653.501(f)(2)(D)(ii).<sup>76</sup>

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<sup>75</sup> DOL’s proposed regulations § 655.102(f), 73 FR 8567 (emphasis added). Although the regulations note that the employer should give the job order to the SWA for placement in the interstate clearance system, the SWA is only required to transmit the job order to those states described in § 655.102(f). *See* DOL proposed regulations 20 CFR § 655.102(e), 73 FR 8566, 67.

<sup>76</sup> In the Supplementary Materials DOL asserts that “[t]he employer’s application will contain information related to the job opportunity, which shall comply with the requirements of §§ 655.104 and 653.501 of this chapter and the assurances required by § 655.105.” [73 FR 8566] However this claim is not borne out by the specific requirements

**ii. The Proposed Regulations Would Allow Certification Based on 15 Days of Monitored Recruitment.**

Under DOL's proposed regulations, the employer must submit the job order no earlier than 120 calendar days and no later than 75 calendar days before the date of need. [DOL proposed regulations 20 CFR § 655.102(c)(1), FR 8566]. The minimum recruitment requirements for U.S. workers are triggered by the submission of the job order. The employer is required to document those recruitment efforts by preparing a recruitment report which can be completed "no earlier than 60 days prior to the date of need. [Id. § 655.102(k)(1), FR 8567] The H-2A application may be submitted as little as 45 days before the date of need. [Id. § 655.102(a)(1), FR 8566]. The recruitment report is the sole basis for the FLC's determination of whether the employer has complied with the regulations, and is submitted with the application. [Id. § 655.102(k)(1), FR 8568] As a result of this timeline there can be as little as 15 days of positive recruitment efforts between the date an H-2A employer must place a job order with the local SWA and the date an H-2A employer can submit his recruitment report. Thus under the regulations the FLC can make a determination that there are not "...a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed." (8 U.S.C. § 1188(b)(4)) based on a 15 day period of recruitment that takes place 60 to 75 days before the work begins!<sup>77</sup>

If this is not ridiculous enough, consider the fact that the proposed regulations do not provide any timeframe for how long the local SWA can wait to place the local H-2A job order into intrastate clearance. Nothing in the regulations would prevent the local SWA from waiting 15 days to place the H-2A job order into intrastate clearance. Upon placing a job order into intrastate clearance, whenever that may occur, the local SWA shall "promptly transmit" a copy of the job order to all states listed as anticipated worksites. [DOL proposed regulations 655.102(f)(1), 73 FR 8567] The proposed regulations do not define "promptly." Given the lack of specific timeframes for the SWA to place a job order into intrastate and interstate clearance, an H-2A employer's "recruitment report" could easily be completed before the job order was ever placed into intrastate or interstate clearance. This directly contravenes the requirement that the job offer be circulated through the interstate employment service system. 8 USC § 1188(b)(4).

The regulations lack specific definitions and create the opportunity for calculated abuse, particularly for orders with multiple work locations. They state that if the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one state the employer shall place the job order with the SWA having jurisdiction over the place where the work is contemplated to begin. [DOL proposed regulations 20 § 655.102(e)(1), 73 FR 8566.] This proposed regulation will allow large employers with multistate orders, including agricultural associations, to choose where they want

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placed on the employer regarding information to be provided to the SWA and FLC; and this is, in fact, the only reference to that section in DOL's proposed regulations.

<sup>77</sup> As noted below, the Recruitment Report replaces the SWA oversight and reporting. It is not signed under penalty of perjury. Although it must be supplemented within 48 hours of departure of H2A workers, the supplement does not have to be submitted to DOL, but merely retained for purposes of an audit. [DOL proposed regulations 655.102(k)(5), 73 FR 8568.]

to locally recruit U.S. workers. An agricultural employer could "contemplate" to begin work in a remote or affluent SWA jurisdiction that has few U.S. workers interested in farm jobs.<sup>78</sup> For instance, in California this year H-2A applications were submitted by agricultural employers seeking workers for the area around Yuma, Arizona and Holtville, California. These jobs have been filled by workers recruited from Calexico, California for many years as the jobs are located in extremely remote areas without significant surrounding population. Yet, the employer could "contemplate" that work would begin in Yuma, place the job order with the Arizona office and delay if not avoid any meaningful recruitment of workers through the California SWA.<sup>79</sup>

**c. The Proposed Regulations Eliminate a Mechanism for Ensuring that Employers Do Not Reject U.S. Workers Who Apply for or Are Referred for Work**

The current system provides the structure to monitor referrals to the H-2A employer to ensure that eligible U.S. workers are not rejected in favor of H-2A workers. During the certification and positive recruitment periods, the DOL staff receives documentation from the SWA's regarding referrals of eligible workers. Additionally, employers are required, as part of the assurances, to notify the SWA of all terminations and rejections of U.S. workers. 20 C.F.R. § 655.103(c). The burden is on the employer to establish a "lawful job-related reason" for terminating or rejecting a U.S. worker. 20 C.F.R. § 655.106(b)(1). Under current regulations, unless the employer can demonstrate a lawful reason for not accepting a referral, the number of H-2A workers authorized must be reduced by the reported number of eligible U.S. workers referred, but not hired by the employer. 20 C.F.R. § 655.106(b)(1). This is a codification of the previously "long-standing" practice of deducting "outstanding" referrals from the total number of H-2A workers certified. (See H-2A Handbook at FR Vol. 53, No. 113, June 13, 1988, page 22089.) States, through their SWA's, have a mandated mechanism for ensuring that employers to whom they refer workers may not ignore them and fill the position with H-2A workers.

These protections have not always been enforced by DOL nor aggressively pursued by the SWAs, and regulatory language should be strengthened to make reporting requirements more explicit, and codify the reporting relationship between the SWA's and DOL. However, states have demonstrated an interest in protecting their local workers by advising DOL of referrals and DOL has reduced the number of workers or even denied the application based upon such information.

The proposed regulations not only diminish the SWA role in vigorous positive recruitment, they replace the SWA monitoring and reports to DOL with the "Recruitment Report" to be completed by the employer and submitted with the application, which is to be "updated" within 48 hours of the date the H-2A workers depart for the place of work, or 3 days prior to the date the employer requires the services. [DOL proposed regulations 655.102(k), 73

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<sup>78</sup> Although it is implied that the employer would have to choose a SWA jurisdiction within the "area of intended employment" it is not expressly stated. This leaves open the possibility of having large employers with multistate orders, including agricultural associations, choosing to recruit locally in an SWA jurisdiction that is not even near the "area of intended employment".

<sup>79</sup> In a January 2008 survey conducted of 79 worker in the Calexico area, more than half reported that they had worked in the Yuma/Holtville/Bard area and were interested in work in the Yuma area this year. Exhibit R-10.

FR 8568]. These reports are not made under penalty of perjury. As pointed out earlier, the Recruitment Report can be completed as many as 60 days before the date of intended employment and must be completed at least 45 days before the first day of work. DOL proposed regulations 655.102(a), FR 8566] The updated report is never submitted to DOL or any other agency, unless the employer is audited! Thus DOL will approve applications without having received any information about recruiting efforts conducted in the period of time when most U.S. workers would normally be looking for and receiving offers of employment. It is likely that the only circumstance under which DOL will even see the supplemental report will be long after U.S. workers are unlawfully rejected and pursue legal or administrative remedies.

**d. No Automatic Sanction Is Imposed if Employers Fail to Accept SWA Referrals or Otherwise Reject Eligible U.S. Workers for Employment**

This lack of real-time information about the employers' recruiting efforts provides ample opportunity for an employer to avoid its obligations to hire U.S. workers. However, DOL saw fit to even further undermine the rights of U.S. workers by eliminating the mandate that the number of H-2A workers approved be reduced by the number of U.S. workers referred.

In order to ensure that U.S. workers are not displaced by H-2A workers, in contravention of the 8 U.S.C. § 1188, current regulations provide that:

....the OFLC Administrator shall grant the temporary alien agricultural labor certification request for enough H-2A workers to fill the employer's job opportunities for which U.S. workers are not available. In making the temporary alien agricultural labor certification determination, the OFLC Administrator shall consider as available any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads.

20 C.F.R. § 655.106(b)(1). The H-2A handbook also notes that "The RA should also consider as available not only those workers whom the employer has rejected for other than lawful, job related reasons, but also those workers for whom the employer has provided no reason for rejection. The regulations, therefore, now codify the longstanding practice of DOL to deduct "outstanding" referrals from the employer's certification request. 53 FR 22089.

DOL abandons this approach in the proposed regulations, and, instead of mandating a worker-for-worker reduction, provides that the certifying officer "...may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise." [DOL proposed regulation 655.109, 73 FR 8574.] DOL proposes replacing an explicit, non-discretionary standard with the complete, undefined and unfettered discretion to ignore the fact that an employer received referrals of qualified, available workers but refused to hire them. Thus, even in the unlikely event that an employer admits to having rejected U.S. workers, it will not necessarily mean that the number of requested H-2A workers will be reduced or denied.

This dramatic change in policy is not supported by any evidence that suggests greater discretion is necessary to protect the interests of U.S. workers. Indeed, it appears, once again, to be aimed at reducing oversight requirements and eliminating tangible standards that interfere with an employer's desire to employ H-2A workers instead of U.S. workers.

**e. Employment Eligibility Verification Requirements Are Imposed on H-2A Referrals That Are Not Required for Referral of Other Workers.**

In an apparent effort to even further insulate H-2A employers from pesky referrals of U.S. workers, DOL is proposing to formally add a requirement that has already been used by DOL as a basis for refusing to reduce the number of H2-A workers certified. In DOL's Supplemental Information section of the proposed regulations, DOL includes the admonition that "[t]o simplify the recruiting process and avoid unnecessary duplication of functions, SWAs are directed to provide all referred employees with adequate documentation that verification of their employment eligibility has taken place." [DOL proposed regulations 73 FR 8547] Section 655.102(j) provides that "SWAs shall refer for employment only those individuals whom they have verified are eligible U.S. workers." [DOL proposed regulations, 73 FR 8568]. The Supplementary Information section discusses this requirement at length and construes it to mean that the SWA must determine that an individual is authorized to work in the U.S. before a referral is made to a H-2A employer. [DOL Proposed regulations, Supplementary Information, 73 FR 8547].

This proposed regulatory change codifies the position taken by DOL in its Foreign Labor Certification Training and Employment Guidance Letter, No. 11-07, Change 1, Dated November 14, 2007 (hereafter "TEGL"). Despite the fact that farmworker advocates objected to this change in policy on legal and practical grounds,<sup>80</sup> DOL has already implemented it in practice, with negative impact on U.S. workers.

Earlier this year, ten local Washington agricultural workers applied for, and were referred to, jobs at MacKenzie Farms based on an H-2A job posting at the Yakima Employment Security office. Although they were denied employment, DOL certified the job order for the full number of workers requested stating the workers were "unavailable" because the Washington state SWA refused to verify the workers' employment status. DOL made this determination without any evidence from the employer (or from any other source) that the workers' were ineligible for work. To date, the workers have never been advised that their right to the jobs was denied, the legal basis for the denial, nor their right to seek redress.<sup>81</sup>

The TEGL has already been used as a bar to hiring Puerto Ricans, and the DOL is complicit. On March 17, 2008, the Pennsylvania SWA was harassed by USDOL Wage and Hour for attempting referrals of Puerto Rican workers and "hassling their H-2A applicants" with Americans. The TEGL was cited as pretext for not making the referrals. One SWA officer cited his concern to a fellow officer allegedly stating the following:z

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<sup>80</sup> See January 8, 2008 letter to Secretary Elaine Chao, at pages 15-19 and relevant exhibits.

<sup>81</sup> See Exhibit R-35.

“If you don’t want Puerto Rican workers, just write them up three times, fire them, and then bring in the foreign workers.”<sup>82</sup>

No regulation or statute requires that states verify work authorization under U.S. immigration law. Most SWAs require only that a worker seeking employment “demonstrate” that he or she is eligible to work in the United States. This process is accomplished in a variety of ways designed to ensure that SWAs will refer only workers who, once hired, can present the evidence necessary for an employer to comply with the I-9 requirements of the INA. DOL has not provided any evidence that H-2A job orders have been plagued by wholesale referrals of workers who were not eligible to work.

The additional verification will impose a financial burden upon SWAs for which no additional funding has been designated. In the Supplemental Information section, DOL opines that the drafters do not “believe” that this verification process “has resulted or will result in a significant workload increase or administrative burden...” [DOL proposed regulation, 73 FR 8547]. However, there is no evidence that DOL evaluated the cost or burden of this additional obligation. At least one state – Washington, has declined to implement the program because of cost concerns and other states have objected to the requirement for a variety of reasons, including cost.<sup>83</sup> DOL states that “...the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.” [DOL proposed regulations, 73 FR 8559] However, there is no commitment to additional funding and the new requirement will severely tax the already limited resources of the SWAs. In fact, DOL is proposing that SWAs be required to demonstrate implementation of verification procedures – which are not statutorily mandated – prior to the 2009 fiscal year, as a condition of receiving ALS funding. [DOL proposed regulations, 73 FR 8547]. However, there is no phase-in period included in the regulation. It is also clear that this requirement is already being imposed on SWAs under the TEGL. Accordingly, DOL has not only failed to adequately assess the financial impact of this regulatory change as required by 2 U.S.C. 1531, *et seq*; it has implemented a significant change in policy prior to formal notice and the opportunity for comment in violation of the 5 U.S.C. § 706.

DOL’s proposed regulations impose a more burdensome set of requirements on U.S. workers seeking H-2A jobs than on workers seeking other jobs. This requirement goes against statutory and regulatory obligations to ensure that U.S. workers obtain jobs at H-2A employers wherever possible. *See* 8 U.S.C. § 1188.

The H-2A program’s wages and labor protections include some provisions that are designed to be attractive to U.S. workers as they include the adverse effect wage rate, free housing, transportation cost reimbursement and other benefits. In the absence of a compelling need, U.S. workers should not suffer impediments in their quest for jobs at H-2A employers.

The arbitrary requirement that SWAs engage in employment eligibility verification also raises serious questions regarding discrimination against these U.S. workers. The large majority

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<sup>82</sup> Exhibit R-36, SWA email correspondence.

<sup>83</sup> Exhibit R-37, Letters from the states of Washington, Oregon, Michigan, Massachusetts and Idaho objecting to the implementation of the TEGL eligibility verification requirement

of agricultural workers who would normally be seeking these jobs are Latino. Those workers as a class will now be subjected to the inconvenience and delay of this verification process and may be denied referrals erroneously with little opportunity to correct the mistake before losing the work opportunity. Far from furthering the purposes of the INA, the policy directly violates provisions that prohibit discrimination. *See* 8 U.S.C. § 1324e, 42 U.S.C. § 2000d, 29 C.F.R. § 31.3(b)(2).

DOL's proposed regulation arbitrarily imposes this requirement only on applicants for H-2A jobs sought by agricultural workers, who, as explained more fully below, are more likely to be foreign-born, and therefore more likely to have errors come up in the verification process. If this policy were to be applied in a manner consistent with the INA and the Workforce Investment Act, it should be imposed on all job seekers processed by SWAs. SWAs are understaffed and have inadequate resources which will be taxed further by mandatory employment verification requirements. As a result of the discriminatory application of this policy, SWA staff, if faced with the choice of engaging in what could be a time-consuming verification process or referring a job seeker to a non-H-2A job, are likely to opt for the latter. This is particularly true since SWA staff often have had personal experience with the errors generated by the E-Verify system and other cooperative agreements between state and federal agencies designed to provide verification of employment authorization or eligibility.

Additionally, DOL's proposed regulation conflicts with the regulations implementing the Workforce Investment Act (WIA), particularly those requiring "universal access to services." The WIA states that "[l]abor exchange services must be available to all employers and job seekers, including unemployment insurance (UI) claimants, veterans, migrant and seasonal farmworkers and individuals with seasonal disabilities." *See* 20 C.F.R. § 653.100 et seq. (requiring fair treatment of migrant and seasonal farmworkers in the Employment Service.). Under DOL's proposed regulation, however, contrary to the mandate of these regulations, U.S. farmworkers seeking H-2A jobs would face greater burdens to obtain these jobs than any other workers. 20 C.F.R. § 652.207(b)(1).

DOL suggests in the Supplementary Information section that SWAs use the E-Verify system, a web-based system administered by the U.S. Citizenship and Immigration Services (USCIS). However, there is a statutory prohibition on the use of the E-Verify program to prescreen workers, which provides that the "[e]mployment eligibility confirmation system... shall be designed and operated-- (4) to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including--...(B) the use of the system prior to an offer of employment..."<sup>84</sup> This activity is prohibited by statute at least in part due to a concern that the employers would fail to hire employees receiving erroneous tentative nonconfirmations, thereby discriminating against foreign born employees."<sup>85</sup>

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<sup>84</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, Div. C, Title IV, Subtitle A, 110 Stat. 3009-655 through 3009-665 (codified, as amended, in a note to 8 U.S.C. § 1324a, Sec. 404. Employment eligibility confirmation system.).

<sup>85</sup> "Findings of the Web Basic Pilot Evaluation, September 2007" Westat Corp., ("Westat Report"), <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>

The 2007 Westat report provides ample evidence that use of the E-Verify system will severely impact referrals of U.S. workers. The evaluation found that "work-authorized foreign-born employees are more likely than U.S.-born employees to receive tentative nonconfirmation erroneously..." *id.* at .xxii. The Westat study concludes that use of E-Verify "can result in discrimination against foreign-born persons during the period that the verification is ongoing..." *id.* at .xxi. Closer analysis of the critique shows that this disparity results in part from the Social Security database not being updated when aliens become naturalized citizens. A GAO report on Employment Verification also confirmed this weakness in the E-Verify system, stating that "SSA does not update records unless an individual requests the update in person and submits the required evidence to support the change in its records."<sup>86</sup> The pool of migrant and seasonal farmworkers is estimated to be as high as 78% foreign-born.<sup>87</sup> Therefore, the use of the E-Verify system to prescreen farmworkers referred to H-2A job orders would violate federal statutes.

The Social Security Administration's flawed records were also a significant factor in a recent decision by the United States District Court in Northern California in the context of a lawsuit challenging a new "No-Match Letter" policy. The Court issued a preliminary injunction prohibiting the Department of Homeland Security from sending out No-Match letters that suggested that employers terminate employees who could not establish their identity and right to work after a no-match had been generated by a cross check of employment and social security records. The injunction was based in part upon a showing that the errors generated by the No-Match system would impact "'many legally authorized workers who cannot resolve a mismatched earnings report' by the deadline imposed by the new rule."<sup>88</sup> Pre-screening workers with the E-Verify system prior to making referrals to H-2A jobs will result in even greater harm to authorized workers than in the No-Match context because they will be denied access to these jobs in the first place. By the time the authorized workers clear up their status, most of these seasonal jobs will no longer be available. DOL attempts to address this issue in the Supplementary Information by directing SWAs not to fail to refer a worker solely on the basis of an E-Verify tentative non-confirmation unless the worker decides not to contest it. [DOL proposed regulations 73 FR 8547] However, once a SWA implements this system, it will be in violation of the regulations if it refers a worker who has not been verified as eligible! This catch-22 means that SWAs will likely steer workers away from the H-2A job orders altogether.

DOL's proposed employment verification regulation are, once again, designed not to protect U.S. workers, nor to ensure the integrity of the H-2A program, but to create more impediments to U.S. workers seeking employment in agriculture.

## **B. The Elimination of the 50 Percent Rule Equates to Elimination of U.S Worker Employment**

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<sup>86</sup> U.S. GAO Testimony before the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, Statement of Richard M. Stana, Director Homeland Security and Justice Issues, June 7, 2007. 10. [www.gao.gov/new.items/do7924t.pdf](http://www.gao.gov/new.items/do7924t.pdf).

<sup>87</sup> Findings from the National Agricultural Workers Survey (NAWS) 2001 - 2002. A Demographic and Employment Profile of United States Farm Workers. U.S. Department of Labor, Office of the Assistant Secretary for Policy, Office of Programmatic Policy, Research Report No. 9. March 2005.

<sup>88</sup> Exhibit R-38.

The 50 Percent Rule existed as part of the H-2A program prior to the 1986 amendments and was preserved in the INA as amended by IRCA, which currently provides that

For a period of 3 years subsequent to the effective date of this section, labor certifications shall remain effective only if, from the time the foreign worker departs for the employer's place of employment, the employer will provide employment to any qualified United States worker who applies to the employer until 50 percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide benefits, wages and working conditions required pursuant to this section and regulations.

8 U.S.C. § 1188(c)(3)(B)(i)

In the 1986 legislation, however, Congress directed the Secretary of Labor to take steps to evaluate whether the 50% rule should be continued. Congress set forth the process and criteria for this analysis and directed the Secretary to consider evidence of a formal study as well as evidence of the benefits to United States workers and costs to employers.<sup>89</sup> Congress then reiterated the charge of the Secretary to make its determination

...in furtherance of the Congressional policy that aliens not be admitted under this section unless there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or service needed and that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(c)(3)(B)(iii).

The Secretary of Labor issued regulations July 19, 1990 based upon what was characterized as an internal review and analysis of the 50 Percent Rule and its impact on workers and employers; and concluded that:

It is apparent from the data that U.S. workers referred to H-2A employers by SESAs under the rule constitute a significant percentage of the total number of workers referred, although less than a majority. This suggests to DOL that, in some instances at least, the requirement in the statute that certification determinations be made twenty days before an employer's date of need might tend to foreclose legitimate employment opportunities for some U.S. workers who would otherwise be eligible for them absent a fifty-percent rule provision.

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<sup>89</sup> “(iii) Six months before the end of the 3-year period described in clause (i), the Secretary of Labor shall consider the findings of the report mandated by section 403(a)(4)(D) of the Immigration Reform and Control Act of 1986 [note to this section] as well as other relevant materials, including evidence of benefits to United States workers and costs to employers, addressing the advisability of continuing a policy which requires an employer, as a condition for certification under this section, to continue to accept qualified, eligible United States workers for employment after the date the H-2A workers depart for work with the employer.” 8 U.S.C. § 1188(c) (3)(B)(iii).

At the same time, the fact that the number of U.S. workers referred under the rule constitutes a very small percentage of the total number of jobs certified (and theoretically filled by alien H-2A visaholders) suggests that the implementation of the rule does not affect a significant number of employers who utilize the program. DOL also is not aware of any circumstances wherein application of the rule has resulted in any significant burden, financial or otherwise, being placed on employers or workers.

For these reasons, and because the rule has been a provision of the temporary alien agricultural labor certification program for years prior to IRCA, with no significant problems associated with its implementation, DOL has concluded that there are no reasons to undertake rulemaking efforts to alter the continuation of the present rule or otherwise amend it.

29 FR 29356, July 19, 1990.

The study commissioned by the Secretary of Labor, based upon survey evidence as well as some economic analysis, likewise concluded that “[i]n comparing the tangible benefits and costs alone, the benefits of the 50 Percent Rule outweigh the costs.” Bateman, Rudolph, Dain, “The Benefits and Costs of the ’50 Percent Rule” Prepared for the U.S. Department of Labor, Employment and Training Administration, under Contract No. 99-9-4700-75-059-01, at viii, October 25, 1990. “Based on the surveys conducted in this study, it appears that the costs of the 50 Percent Rule have been minimal and that the Rule has not had any particular negative impacts on either growers or U.S. workers.” *Id.* at ix. Farmworker Justice and others at the time supported continuation of the 50% rule but critiqued the DOL’s study for underestimating the benefits of the rule to U.S. workers and overstating the costs of the rule to employers. That contemporaneous analysis has been supplied to DOL in a previous letter and is incorporated by reference here.

DOL, in the “Supplementary Materials,” now criticizes the methodology of the study, including the fact that “[t]he study did not take into consideration the 131 growers in the two States who received referrals under the 50 percent rule but did not hire any of the referred workers.” [75 FR 8553]; and “...did not investigate why so few growers were using the H–2A program, and therefore did not take into account the overwhelming number of growers who were not using the program.” In effect, DOL is questioning the validity of the conclusion based on the fact it did not take into consideration the views of growers who – at least arguably – engaged in practices that violated the law or chose not to use the program at all. Curiously, the Secretary further questions the validity of the study based on the fact that -- “The study sought only to determine the costs to employers that hire referred 50 percent rule workers and the concomitant benefits to the U.S. workers hired under the rule.” – two factors explicitly identified by Congress when directing her to evaluate the impact of the Rule.

The real thrust of DOL’s concern about the 50 Percent Rule is not whether it protects workers, or even whether it imposes excessive costs on growers, but on whether growers like it. This is exemplified by the reliance on the 1990 Study for the proposition that “Even with this narrow focus, the study made it clear that the H–2A program was not regarded as desirable by growers.” The Rule is further criticized because “No other temporary foreign labor program

administered by the Department includes such a requirement...” However, DOL’s charge is not to determine whether or not the H-2A program is a desirable program for growers; rather, it is to determine whether regulatory change is warranted in order to “ensure that aliens not be admitted under this section unless there are not sufficient workers in the United States who are able, willing, and qualified to perform the labor or service needed and that the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.”

DOL cites to what is little more than anecdotal evidence to suggest that there is support for the conclusion that the regulation should be eliminated.<sup>90</sup>

The Department has heard complaints that the 50 percent rule creates substantial uncertainty for the employer in terms of managing their labor supply and labor costs during the life of the contract. In many situations, it appears the employer does not substitute the U.S. worker arriving under the 50 percent rule for the existing H-2A worker, but rather retains both workers and incurs the added expense in order to prevent further disruption to work flow resulting from dismissing an H-2A worker and sending that worker home.

[DOL proposed regulations, 73 FR 8553.] There is no empirical support for this evidence and it is contradicted by experience of U.S. workers represented by the undersigned.

DOL does not quantify the number of “complaints” or indicate the number of growers or contracts relied upon for this statement. However, in the first few weeks of any agricultural employment there is significant turnover and crew sizes increase and decrease over the course of any normal growing or harvest season. Growers are given the right to dismiss the H-2A workers.

DOL reports that “Anecdotally, employers report that the majority of the U.S. workers who are hired under the 50 percent rule remain on the job for less than the term of the H-2A contract.” [DOL proposed regulations, 73 FR 8553.] Again, there is no way to know how many employers complained about worker turnover or whether that turnover is higher or lower than that experienced in agriculture generally. However, labor studies and industry publications recognize that as worker satisfaction increases, turnover decreases.<sup>91</sup> The solution then is for growers to offer competitive wages and working conditions that are designed to make workers want to stay. The H-2A program is NOT designed to allow growers the right to avoid the burdens of the free market system when competing for workers. Maintaining this incentive to create an attractive working environment is critical to the integrity of the program. It prevents growers from engaging in practices that are tolerated by H-2A workers only because of their

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<sup>90</sup>The 50 Percent Rule is currently implemented through the assurances which must be made by employers pursuant to 20 C.F.R. § 655.103(e) and 20 C.F.R. 655.203(f) and cross-referenced in 20 C.F.R. § 655.102(b)(6)(iv); 20 C.F.R. § 655.106 (c)(3)(2) and 20 C.F.R. § 655.106(e)(2). While the Supplementary Information indicates that the “The Department would like more information about the impact of the 50 percent rule before it makes a final decision...” [DOL proposed regulations, FR 8553], all of these references to the 50 Percent Rule have been eliminated from the proposed regulations.

<sup>91</sup> See, eg. University of Vermont, Agricultural Labor Management, Bob Parsons, [http://www.uvm.edu/~farmlabr/?Page=recruitment/retention.html&SM=recruitment/submenu\\_recruitment.html](http://www.uvm.edu/~farmlabr/?Page=recruitment/retention.html&SM=recruitment/submenu_recruitment.html) ; Richard Stup Penn State Dairy Alliance

greater vulnerability and economic need. This in turn ensures that labor standards generally are not driven down by the fact that U.S. workers have to compete with H-2A workers who have no choice but to endure such conditions.

The presence of U.S. workers, who have the capacity to influence labor practices by voting with their feet and leaving an abusive employer, forces the H-2A employer to compete with other employers. This is a core tenet of the free market system. The presence of U.S. workers normalizes an otherwise artificial H-2A employment site in that U.S. workers are more likely to expose problem employers. This sentiment was set forth by the former National Monitor Advocate:

...I wanted to advise (the ETA) of what is happening out there with unreliable and potentially unscrupulous farm labor contractors. ... we do no service to domestic workers by not referring them on these orders or at least advising them of the full array of job opportunities available to them. *Likewise, we never really find out if the FLC is cognizant of its job responsibilities and law abiding if we make no referrals.*

National Monitor Advocate Erik Lang (emphasis supplied).<sup>92</sup>

The 50 Percent Rule is one of the few means of reducing the risk to workers due to crop loss. Growers frequently refer to the uncertainty of agriculture. It is not rare for weather conditions to ruin a crop. Growers obtain insurance, seek government financial assistance, or hedge their investment in the market. Crop failure affects not just growers but the workers who have lost their jobs. By eliminating the 50 Percent Rule, the displaced workers will have fewer alternative options and will bear the risk of crop loss without recourse.

DOL nonetheless asserts that it is not in the best interest of U.S. workers to be referred to these jobs.

Given the ready availability of jobs in the agricultural sector to authorized workers, there is also reason to believe that U.S. workers would generally be best served by referrals to jobs that have not yet begun, rather than being thrust into job opportunities that have already partly elapsed.

[DOL proposed regulations, 73 FR 8553].

This sentiment is not only unsupported, it is a paternalistic conclusion about U.S. workers preferences, and assumes a U.S. worker would give up higher pay and housing rather than begin work a few days after the season has begun. While DOL has ample statistical data at its disposal, it makes no effort to support the proposition that agricultural jobs are readily available to unemployed or underemployed U.S. workers. States like Michigan and Texas have workers willing to relocate to accept H-2A jobs because of the dramatic unemployment rates in some counties. Workers in Arizona and California traditionally migrate back and forth during peak

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<sup>92</sup> Exhibit R-6, Erik Lang email correspondence with Dorie Faye.

seasons<sup>93</sup> Puerto Rico has been supplying H-2A workers for jobs in North Carolina for decades. One of the most disturbing elements of the dramatic changes proposed by DOL is the effect of the double whammy of eliminating the 50 Percent Rule and at the same time reducing pre-certification recruitment requirements. Placing the job order only with the State of the intended place of employment will mean that these workers will not be recruited, and will have no effective notice of the availability of these jobs before work begins. Eliminating the 50 Percent Rule means that when they start looking for work within the first few weeks of harvest they will have no right to employment.

DOL also fails to factor in the very fluid nature of what constitutes the beginning of the work period in agriculture. In areas where migration is typical, crews are called to work in stages. An operation might begin with 2 to 4 crews and then increase at season peak to 15 or 20 crews which are then gradually reduced until harvest is over. Workers who have reported for and worked in these jobs for years will be displaced under a program that allows a grower to hire his whole complement of workers from outside the country, and then reject U.S. workers who report to work on the exact date they had begun work the year before.

The impact of this dramatic change will be amplified by the amendments which encourage the use of the program by farm labor contractors and other employers for multiple locations. Consider the following example:

A farm labor contractor submits an application for 450 workers for a period of 11 months, commencing February 1, 2009 and ending October 30, 2009, including work in the lettuce in Yuma, Arizona, melons in the Imperial Valley of California, raisins in Fresno and wine grapes in the Napa valley.

Under the proposed regulations the recruitment for this entire work period could take place in the 120 days before the date work begins and will be based on a job order in Yuma, Arizona. Workers who are employed in Fresno and Napa for the raisin and wine grape harvests in July and September of this year need to anticipate that they want to return to work the next year and apply for their July 2009 grape harvesting job sometime between October of 2008 and February of 2009 by locating a job order placed in Yuma, Arizona.

The 50 Percent Rule provides some amelioration to this ridiculous scenario by ensuring that – at least for the first 2 disparate job locations – qualified U.S. workers who present themselves for work must be hired. DOL would do away with even this limited protection based merely on anecdotes that growers are not happy with the burden.

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<sup>93</sup> In January of 2008 Michigan had 24 counties with unemployment rates of over 10% ranging up to 21.6%. For 2007 in Yuma County, Arizona unemployment rates ranged from a low of 9.4% in February, a peak agricultural month, to a high of 20.3% in August. Monterey County, California suffers its highest rate of unemployment in December through March when unemployment rates are the lowest and work is available in the Yuma area. See data sets posted at:

<http://data.bls.gov/map/servlet/map.servlet.MapToolServlet?state=06&datatype=unemployment&year=2007&period=M04&survey=la&map=county&seasonal=u>

DOL's justifies this serious abrogation of U.S. workers rights by asserting that more effective notice to workers will be afforded U.S. workers as a result of "expanded" recruitment requirements:

Employers will begin advertising for job opportunities no earlier than 120 days and no later than 75 days before the date on which the foreign worker will begin. This is a significant expansion of the period of required recruitment in the current rule and would enable more U.S. workers to be apprised of the job opportunities in a timely manner before the job begins.

These expanded time frames for recruitment will ensure that U.S. workers have substantially better and more effective notice about opportunities to obtain full term employment than is currently afforded by the 50 percent rule.

[DOL proposed regulations, Supplementary Information, FR 8553]. As discussed above, these conclusions are not only completely unsupported by any empirical or even anecdotal evidence, they are patently absurd. This ridiculous conclusion is rejected even by the grower community.<sup>94</sup>

Farmworker advocates encounter persistent and pervasive violation of the 50 Percent Rule. In the last several years dozens of cases have been successfully litigated that included alleged violations of the 50 Percent Rule.<sup>95</sup>

In receiving states such as Michigan, SWAs make many U.S. worker referrals to H-2A employers after the H-2A workers have already departed for the job site. According to data provided by the SWA in Michigan, 104 domestic U.S. workers were referred to Vreba Hoff Farms between March 1, 2006, and June 29, 2006, for the 20 H-2A positions available. The SWA referred 68 of the 104 domestic U.S. workers after April 15, 2006, the date H-2A workers began their employment at Vreba Hoff Farms.<sup>96</sup>

These cases demonstrate how the 50 Percent Rule protects U.S. workers from the inefficiencies of the job service recruiting system as well as employers' desire to avoid their responsibility to hire U.S. workers. DOL has provided no evidence to suggest that the rule change will decrease the likelihood that U.S. workers are displaced by H-2A workers. To the contrary, there is every reason to believe that this regulatory change will insulate growers who engage in recruitment practices that favor H-2A workers.

The net effect of the elimination of some express recruitment requirements; elimination of the SWA in the approval and oversight of the H-2A application; and the elimination of the 50 Percent Rule results in the elimination of any meaningful job opportunity for U.S. workers seeking employment with H-2A employers. The DOL's arguments demonstrate a determination

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<sup>94</sup> Georgia Fruit and Vegetable Growers Association comments submitted to the U.S. Department of Labor, dated March 12, 2008, at p. 6.

<sup>95</sup> See Exhibit X-1, including the cases of *Orea v. Singh*, *Arriaga-Zacarias, et al. v. Lewis Taylor Farms*; *Flores Mendez, et al. v. Edmondson*; *Resendiz-Ramirez, et al v. P&H Forestry*; *Mercado Garcia, et al. v. Thorn Custom Harvesting*, to name a few.

<sup>96</sup> See discussion, *supra*, at pp. 24-25.

to remove the 50% rule from the H-2A regulations that is resulting in a biased analysis that has no place in the consideration of this important provision.

### **C. The Elimination Or Reduction of These Protection Is Inconsistent with the AWP**

Ostensibly the purpose of the implementing regulations is to protect U.S. workers. However, the proposed regulations do not mention the AWP, 29 U.S.C. §1801, *et seq.*, and the provisions for advertising and the contents of job offers do not conform to the AWP protections that should be afforded to U.S. workers. Whether this omission is due to ETA's abysmal ignorance of AWP or ETA's presumption that the ultimate end will be that only H-2A workers, who are excluded from AWP, will be employed, the effect is the same – a regulatory scheme in which ETA ignores workers' rights under AWP. At least one court has been clear that a US worker does not waive his AWP rights simply by taking employment alongside H-2A workers.

Aside from the logic of conforming employer's obligations to U.S. workers under the AWP with the steps they must take in complying with their recruitment obligations to U.S. workers when applying for H-2A workers, compliance with AWP would enhance recruitment of U.S. workers, especially in situations involving itineraries and multiple employers because U.S. workers might actually receive meaningful disclosures that offer real choices. This directly promotes the purpose of the INA to ensure that U.S. workers are not displaced by H-2A workers.

Migrant agricultural workers are entitled to written recruitment disclosures under AWP without making a request. 29 U.S.C. § 1821(a). "Migrant agricultural workers" in the H-2A context could be both in-state U.S. workers and U.S. workers from other states or Puerto Rico.

Seasonal agricultural workers must request a written disclosure. 29 U.S.C. § 1831(a). In the H-2A context, "seasonal" workers would be the local workers responding to the job order. However, if seasonal workers are given a disclosure with or without a request, it must comply with §1831(a).

The simplest way for an H-2A employer to comply with the AWP disclosure requirements would be to use the WH-516 form. Although H-2B employers in forestry regularly attach a WH-516 to their applications, and we have seen clients who received these forms, we have yet to see any workers on farms with H-2A workers who have received a WH-516. In our experience, H-2A growers usually post the WH-516 at the workplace or labor camp and disclose the terms and conditions pertinent to their particular farm. The WH-516 has limited space and might lead to inadequate disclosures, especially if the work was to be with a FLC on a long itinerary with multiple jobs. At least one case holds that in the context of a grower association, the U.S. worker should receive a disclosure about the particular farm to which he will be assigned.

In the main, the proposed regulations do not make compliance with AWP disclosure substantially worse. Rather, an opportunity to ensure that the process complies with the primary protective statute for migrant farmworkers was missed and, as discussed below, the failure to do

so for “master” or itinerary orders will perpetuate a system with jobs attractive only to H-2A workers.

### **1. Disclosure at the time of recruitment**

AWPA requires disclosure at the time of recruitment. The new H-2A regulations, like the old, only require that the worker be provided a copy of the work contract on the first day of work. §655.104(q).

All the provisions in the new regulations which appear to limit the role of the SWA and, especially, the employer’s responsibility to disclose job information to a SWA interfere with and undermine the employer’s AWPA duties.

### **2. Disclosure in a language common to the worker**

The old H-2A regulations did not require that disclosures be made in a language common to the workers, but AWPA does. Rather than rectify this inconsistency, DOL proposes regulations that provide even greater discretion for the employer and the FLCS when crafting advertisements and disclosures.

As discussed above, the new regulations tend to limit recruitment of U.S. workers to 3 means: contacting former workers, advertising in newspapers, and through one or more State Workforce Agencies (SWAs) using the criteria clearance order. The regulations do not require that any these methods of recruitment take place in a language common to the worker, as AWPA does. (§655.102(g)(4) allows an “ethnic publication”, but does not require it.)

Generally employers seeking H-2A workers take no responsibility for providing disclosures to U.S. workers in a language other than English, instead placing this on the shoulders of the SWAs where the orders are sent. The SWAs in turn, generally do not translate the entire clearance order but instead prepare a “checklist” in Spanish on an ETA form used by all SWAs. Some SWAs now use the WH-516. Like the old regulations, the new ones provide that the employer may have a separate employment contract, but if he does not, the clearance order is construed to be the work contract. §655.104(q); §501.10(d). The new H-2A regulations, like the old ones, are silent about recruitment disclosures and the duty to have them in the language common to the workers. However, the employer is not absolved of its AWPA recruitment disclosure responsibilities either because the work is the subject of an application for H-2A workers, or because the SWA has translated the clearance order or checklist for purposes of recruitment in the clearance order system. *See Villalobos v. North Carolina Growers’ Ass’n*, Inc. 42 F. Supp. 2d. 131, 137 (D.P.R. 1999). At the outset, one has to question whether it would not be better for DOL to require that employers provide a written disclosure, like a WH-516, rather than have a SWA try to synthesize a clearance order on some sort of “checklist.” especially since the employer cannot rely upon the SWA to meet his/her recruitment disclosures obligation under the AWPA.

### **3. Disclosure as to Workers Compensation**

The new regulations appear to only require that the employer attest that s/he has workers compensation and do not require that DOL be provided with other proof. However, even providing DOL with proof of coverage, as is currently required under the H-2A regulations (which was helpful to advocates in locating the appropriate carrier for an injured worker's claim) did not comport with the AWPAs regulations. ESA has determined that knowing the name of the workers compensation insurance carrier, the policy holder, and the phone number of the person to whom to report injury or death is important information that a worker should know before beginning the job and the WH-516 does contain adequate space for these disclosures. At the very least, requiring an employer to provide this information regarding workers compensation on his/her clearance order and the disclosures given to workers might induce more truthfulness – we have unfortunately seen instances in which employers let workers comp policies lapse before or during the period of employment, leading to greater difficulties for injured workers in collecting their compensation.

#### **4. Issues Particularly Affecting FLC Itineraries or Association Orders**

In the H-2A Program Handbook, DOL provided limits on multiple occupation and services orders by providing that:

*c. Separate Submittal for Each Job/Occupation and Date of Need.* More than one alien may be requested on an H-2A application if the aliens are to perform the same type of services in the same occupation in the same area of employment. However, separate applications must be submitted for each distinct occupation for which labor certification is sought. A separate application is also required for each distinct date of need in the same occupation and activity, unless a master application is involved or the Regional Office believes the dates are so close together that separate applications would place an unreasonable burden on the employer.

53 FR. 22076 . Consistent with this approach the manual goes on to recognize that:

The H-2A program and the implementing regulations are primarily constructed for the use of employers who own and/or operate a fixed-site establishment and who are seeking workers from out of the area to come to that fixed site. However, there is nothing in the statute or the regulations to preclude an employer who does not fit into this category from utilizing the program. Therefore, bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification.

Given the extent of the employer's responsibility under these regulations, it is doubtful that many farm labor contractors would apply for certification. Farm labor contractors would be required, as employers, to provide all the minimum benefits specified by the H-2A regulations, including the three-fourths guarantee and the offer of employment to U.S. workers who apply until fifty percent of the contract period has elapsed.

*Id.*

The proposed regulations specifically recognize FLCs as employers, but fail to either limit applications to same occupation or locations, or provide other protections necessary to

ensure that FLCs do not use the existence of an H-2A application as a reason for avoiding other statutory responsibilities.

Simply because of the varying locations of the work and the down-time between sites or states, disclosures for orders with FLC itineraries could be very problematic. Those difficulties would be magnified if the itinerary contained multiple crops and activities, especially if, as with large FLC operations, there were several different crews engaged in different work. Unless all conditions (work, tasks, housing, piece rates, pay periods, production standards, tools, etc) are quite similar, particularized disclosures would be required by AWPAs (and would not be under the ETA regulations). In these circumstances, even a conscientious state agency, attempting to use a WH-516 or a similar instrument, would not be able to give a worker an adequate written disclosure because, invariably, the employer is the only party with information about the *actual* job to which s/he will assign the worker, so only the employer can give the specific disclosures AWPAs require.

In North Carolina issues arising from the use of “master orders” – when an association applies as a joint employer for a large number of growers with many different crops and the same period of employment – foreshadow problems that will result if FLC use of the H-2A program increases. In *Villalobos*, 70 clients were migrant agricultural workers from Puerto Rico who came to North Carolina on a master H-2A order and were assigned to 50 different farms. They were not given any specific information at the time of recruitment about the farm where they would be employed. The master order said the crops would be tobacco and vegetables and listed one period of employment from mid April to early November. In reality, some farms had only tobacco and little or no work in April and May and because of climate and topography differences, even availability work in tobacco varied widely from one part of the state to another.

The defendants moved for summary judgment, arguing that the clearance order in English and the SWA checklist provided in Spanish by the Puerto Rico Department of Labor met the disclosure requirements of AWPAs. The court disagreed and found that each worker should have received clear disclosures as to 1) the place of employment to which he would be assigned; 2) the type of work he would be doing; 3) the piece rates he would receive for those tasks, and 4) the period of employment, including the hours of work, for those specific crops and tasks. *Villalobos*, 252 F. Supp. 2d. 1 (D.P.R. 2002) The Court noted that had the defendants used particularized WH-516 forms for the farms to which they intended to assign the plaintiffs, they could have met their disclosure obligations.

The decision relies extensively upon the reasoning in *Washington v. Miller*, 721 F.2d 797 (M.D. Fla 1983), which held that confusing, inaccurate, or misleading information did not meet the AWPAs disclosure requirements. “Defendants could not have satisfied the disclosure requirement by simply disseminating a directory of employers and then leaving the worker to guess which one he would be finally assigned to.” *Villalobos*, 252 F. Supp 2d.. at 41. The defendants argued that disclosing the AEW was sufficient, since no worker would be paid less than the AEW on a piece rate basis. The Court disagreed, noting that there were at least 25 different piece rates on different crops. Citing *Escobar v. Baker*, 814 F. Supp 1491 (W.D. Wa. 1993), the Court found the workers had a right to determine the rate at which they would be paid; i.e. to select the sort of work they wanted to do. “NCGA disregarded plaintiffs’ obvious

economic needs and their right to meaningfully and effectively choose where to work, in which crops, performing which tasks, and for whom.” *Villalobos*, 252 F. Supp. 2d at 46. Based on state agriculture statistics and grower testimony about their typical practices, the Court found that the one period of employment, with uniform anticipated hours of work was an inadequate disclosure. *Id* at 52.

However, we have been unable to secure changes in the orders or in NCGA’s U.S. worker assignment practices since the 2002 *Villalobos* decision. For U.S. workers to be treated fairly regarding master orders, they must have specific information about the actual jobs to which they will be assigned. Associations with many different job opportunities may use their joint employer status as a way to make the aggregate jobs untenable for a U.S. worker, just as an FLC may use the itinerary for the same purpose. If a U.S. worker must be available for all the jobs or the entire itinerary, the employer may try to assign the U.S. workers to the least desirable jobs or conditions. Because U.S. workers do have other options, they especially need accurate, specific information about job opportunities in order to make a wise selection. And, for employers who are relatively new to H-2A, clear AWPAs disclosures on a WH-516 for a single place of employment may help to bring into sharp focus for that employer his/her job offer.

The new regulations appear to favor these longer periods of employment with multiple jobs, which will, of itself, negatively affect U.S. worker recruitment unless specific disclosures for particular job opportunities are required (*i.e.*, a WH-516 for each farm in an association or for each stop on an itinerary).

H-2A employers (and FLC’s using H-2A workers) have an incentive to have clearance orders of long duration, to maximize their investment. A well-documented ESA failure to enforce the three-quarter guarantee has allowed growers to get away with false periods of employment. In our experience, if the H-2A workers have to bear the cost of recruitment or transportation, they also have an interest in long orders, sufficient to recoup their investment. Unfortunately, fewer but longer orders are also less work for ETA. But shorter orders, with enforcement of workers’ rights under *Arriaga* are actually more desirable for both U.S. and H-2A workers, so long as H-2A workers on very short contracts have options to renew or transfer to other employers.

## 5. “Arrangements” issues

29 C.F.R. §500.75 (b) (4) provides that the employer must also disclose, at the time of recruitment:

the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer or the agricultural association is to receive a commission or any other benefits resulting from any sales by such establishment to the workers.

The WH-516 provides a space for this information, which in the H-2A context should include transportation services as well as providers of meals or housing. The regulations do not

require the disclosure of this information, which, again, may be important for U.S. workers in choosing which offer to accept.

#### **D. Conclusion**

DOL has before it ample evidence that the recruitment requirements in the H-2A program should be enforced more vigorously to reverse widespread violations of U.S. workers' rights to be recruited effectively for jobs by H-2A employers. The information available to DOL has demonstrated that recruitment requirements need to be stronger. U.S. workers who seek jobs at H-2A program employers frequently are unsuccessful even when they do learn about the job openings. More importantly, far more effective use of U.S. workers should be made. Employers in the H-2A program rarely engage in "best practices" that benefit the employer by providing a productive, satisfied work force, and DOL has done virtually nothing to encourage or force H-2A employers to meet the standards of the more business-minded, effective employers that are succeeding in recruitment. Despite these failings, DOL has proposed changes to the H-2A regulations that would wipe away the modest requirements that require employers who claim a labor shortage to engage in the kind and degree of recruitment that any employers would use if they were serious about hiring U.S. workers. DOL's proposal would eliminate the opportunities for employment of potentially hundreds of thousands of U.S. farmworkers who want to work. In doing so, DOL proposes policies that violate the statute and are arbitrary and capricious.

### **IV. WAGES: THE PROPOSED ADVERSE EFFECT WAGE RATE METHODOLOGY SHOULD NOT BE ADOPTED BECAUSE IT WOULD RESULT IN INACCURATE RESULTS AND ADVERSE EFFECT ON U.S. WORKERS, AND DOL SHOULD INCREASE H-2A WAGE RATES TO OVERCOME DEPRESSION CAUSED BY HIRING UNDOCUMENTED WORKERS AND GUEST WORKERS**

#### **A. Introduction**

The Department of Labor is obligated by statute to ensure that the wage levels it approves under the H-2A program will not "adversely affect" the wages of similarly employed U.S. workers. 8 U.S.C. § 1188. To accomplish the statutory goals, DOL must determine current market wage levels and establish a methodology to set appropriate wage levels to protect U.S. workers' wages against adverse effects caused by foreign workers. Its methodology must be based on reliable data, rational analysis, and reasonable conclusions.

The proposed regulation regarding wage rates and DOL's rationale satisfy none of these goals. The DOL's policy proposal and explanation fundamentally fail to recognize the meaning of the statutory obligation. DOL's planned changes and rationale contravene understandings gained during more than 60 years of experience with guest worker programs.

The current regulations require that employers pay the highest of the federal or state minimum wage, the "prevailing wage" (as defined by DOL specifically for the H-2A program based on local wage rates and particular tasks), and the Adverse Effect Wage Rate. DOL proposes to continue this requirement, which it should do, but proposes to change substantially the methodology to determine the Adverse Effect Wage Rate. In reaching its proposed policy

choices, DOL does not adequately consider several critically important factors, including the high concentration of undocumented workers in the farm labor force, the lack of bargaining power of guest workers, the wage-depressing impact of guest workers, the stagnation in wage rates at companies that use piece rates, employers' inappropriate increase in productivity requirements to avoid complying with H-2A wage-rate increases, and the history of H-2A employers' violations of wage requirements. In addition, the proposed policy changes contravene years of recommendations to improve farmworkers' wages and working conditions and modernize agricultural labor practices in order to stabilize the farm labor force.

DOL proposes to rely on results from a Bureau of Labor Statistics wage survey, the Occupational Employment Survey (OES), which is inaccurate regarding farmworkers' wages. DOL would stop using the U.S. Department of Agriculture Farm Labor Supply, which, for decades, has been widely viewed as an accurate survey. The chief advantage of using the inaccurate OES survey appears to be the lowering of wages without any valid justification for harming farmworkers' economic interests. The OES does not study farms. It focuses instead on wages paid by a subgroup of businesses that support farm production, primarily farm labor contractors, a non-representative subset of agricultural businesses that are known for paying low wage rates, employing disproportionately high numbers of undocumented workers and violating employment laws.

Further, DOL proposes to apply to those data an inadequately explained arithmetical formula devised for non-agricultural wages in the Foreign Labor Certification Data Center that is unconnected to the labor market's wage-setting process, will markedly reduce H-2A wage rates without justification, is not transparent, and will allow employers to manipulate the H-2A wage levels at the expense of workers. The proposed system would amount to an unworkable bureaucratic system involving several thousand individual wage rates. Even so, DOL would provide an exemption for employers from this weak protection. Reversing decades of understanding regarding the concept of adverse effect, DOL would allow employers to pay guestworkers more than U.S. workers, as long as they claimed that the U.S. workers had been hired before the company applied for permission to hire guestworkers. The likely result will be a guestworker program that supplies an unending list of job applicants from poor foreign nations and allow employers to push wages down to the federal or state minimum wage rate.

DOL's policy is illegal but even if it were legal it would be unsound.

## **B. Factors the DOL Must Consider in Establishing H-2A Wage System**

### **1. Introduction**

The Department of Labor should consider numerous factors in determining an appropriate wage system under the H-2A program. Some of the major considerations that should guide the agency are discussed in this section. DOL has ignored or contradicted them.

### **2. The Statutory Protection Exists Due to the Established Evidence That Employment of Temporary Foreign Agricultural Workers As Guest Workers and As Undocumented Workers Causes Wage Depression**

The statutory obligation to prevent adverse effect has existed under agricultural guestworker programs for decades and has been renewed repeatedly due to experiences under guestworker programs since World War I, the Foran Act of 1885 (regarding *padrone* who recruited temporary laborers from Italy and other labor contractors), other efforts to regulate foreign labor contracting, and immigration laws that regulate migration and employment.

The Bracero Program, which began during World War II to alleviate alleged labor shortages primarily in agriculture, contained important protections and demonstrated certain realities about guest worker programs. The law and the related U.S.-Mexico agreement prohibited employment of temporary foreign workers under conditions that would cause adverse effects to domestic workers similarly employed. The mechanism to prevent adverse effect evolved over time as the earlier protections failed to achieve the statutory goal. Dellon, Howard N., "Foreign Agricultural Workers and the Prevention of Adverse Effect, 17 Labor Law Journal 739 (1966) (Dellon was a DOL economist). Throughout this section (including in subsection 4 below), we will cite to evidence demonstrating that guest worker programs in agriculture cause adverse effect on U.S. workers' wages and that strong protections are needed to minimize and compensate for those effects.

DOL's refusal to acknowledge the reality of this history contributes to the invalidity of its analysis and proposed policy.

### **3. The Nature of the H-2A Program Inherently Depresses Wage Rates**

The long history of the Bracero and H-2A programs has demonstrated that their very nature results in wage depression that must be overcome through regulation. DOL's proposal utterly (both implicitly and explicitly) ignores the inherent restrictions on the guest workers' legal status and economic bargaining power which lead to depression in wage rates and other job terms. DOL needs to confront this 60-year history with policy choices that comply with the law and are rational but has not done so in this proposal.

First, the H-2A program employers recruit workers almost exclusively from poor nations and from populations within those nations whose earnings are substantially less than those of farmworkers in the United States. Almost any wage in the U.S. can be attractive to the foreign citizens recruited for these jobs due to the imbalance between the economies of the United States and the foreign nations, including Mexico, Jamaica, and Thailand. U.S. farmworkers' wages, which are about one-half those of the average worker in this nation, are often 10 or more times a Mexican workers' wages, but US workers must pay the cost of living in the U.S. A wage rate that is mediocre in the U.S. may not only be attractive but can induce high productivity among impoverished citizens of poor countries because their earnings opportunities and cost of living in the foreign countries are so low. The H-2A program allows U.S. employers to exploit international wage discrepancies.

Second, the legal restrictions on the status of an H-2A visa worker contribute to workers' inability to cause improvements in wages and working conditions at H-2A employers. The guest workers lack the economic freedom that workers in this country ordinarily hold. Under the

Immigration Service regulations, generally an H-2A worker may only work for the one employer that obtained the visa and must leave the country when the job ends. 8 CFR § 214.2(h)(5)(viii). The worker is dependent on the employer for the visa; if the worker wishes to return the following season, the worker must hope that the employer applies for a visa for that person. In these circumstances, few workers find it in their interest to make demands for better wages or working conditions. Fear of lost jobs is a powerful force not only for the individual workers but for the foreign workers' governments, which believe they are competing with other developing nations for the valuable economic opportunity to send their citizens to the United States. In these circumstances, the foreign workers and their governments do not exert pressure on the market for improved wages and working conditions. Their presence in the marketplace often dilutes the economic power of the already low-paid U.S. farmworkers, who strive to meet the increasing cost of living in the United States. U.S. workers at an H-2A employer have difficulty making demands for higher wages when their foreign co-workers are fearful of losing job opportunities.

Third, the legal framework regulating the H-2A job terms causes harm to U.S. workers. An H-2A employer must offer at least the required wage rates under the H-2A program, 20 CFR § 655.102(b)(9), but need not offer more than the minimum required wage or other job terms required by the H-2A program even when there are U.S. workers available to accept the job if the wage rates were higher. A worker who asks for a higher wage rate can be deemed to be "unavailable for work" and the available job can be filled with a guest worker at the minimum required wage. *Hernandez Flecha v. Quiros*, 567 F.2d 1154 (1<sup>st</sup> Cir. 1977). The depressing effect of guest worker programs extends beyond wages to other job terms. H-2A employers need not offer paid sick leave, paid vacation, health care insurance, or other fringe benefits because they are not common in agriculture and H-2A workers rarely have bargaining power to win them.

Fourth, H-2A employers also favor H-2A workers over U.S. workers because they need not pay Social Security contributions or unemployment tax on the guestworkers' wages. 26 USC §§ 3121(b)(1), 3306(c)(1)(B). Hiring a U.S. worker is often by seen by H-2A employers as increasing payroll costs and motivates employers to place more downward pressure on U.S. workers' wages or to avoid hiring them at all.

For these and other reasons, the "minimum" standards under the H-2A program often become the maximum that the workers at an H-2A employer can hope to be paid. Because there is an endless supply of citizens of foreign countries willing to work in the United States, and these jobs are generally classified as unskilled (or at times semi-skilled), the employers' access to that foreign labor supply means that employers have little or no economic incentive to meet the economic demands of a U.S. worker (or a courageous guest worker) who demands a better wage. Workers have little bargaining power when they can so easily be replaced as a matter of law. Union organizing and collective bargaining are made extremely difficult in these circumstances. One would think that the existence of a perpetual claimed "labor shortage" in agriculture would suggest that agricultural employers should begin offering basic fringe benefits to attract and retain workers. But that hasn't happened on a broad scale. Frequently, the best workers can hope for under guest worker programs is employers' compliance with the H-2A obligations to provide housing, transportation costs and a minimum work guarantee, all of which DOL is proposing to eliminate either partially or entirely.

DOL ignores these fundamental problems in guest worker programs and proposes a policy that maximizes the adverse effect resulting from them.

#### **4. “Prevailing Wage” Requirements Are Insufficient to Prevent Adverse Effect Because Employment of Guest Workers and Undocumented Workers Causes Wages to Stagnate and Become Depressed**

To prevent adverse effect, the Department of Labor under the Bracero program began to require employers to offer at least the “prevailing wage rate paid to domestic workers,” and that prevailing wage was to be determined in a manner that avoided wage depression caused by adding certified alien workers to the farm labor supply. Ernesto Galarza, *Merchants of Labor* (1964) at 135.

The prevailing wage requirement failed to achieve the stated goal. The President’s Commission on Migratory Labor reported in *Migratory Labor in American Agriculture* (1951) that the hiring of temporary foreign workers under the Bracero program “depressed farm wages and, therefore, has been detrimental to domestic labor.” *Id.* at 59. The Commission’s study was particularly informative because it separated out the wage-depressing impact of lawfully-hired temporary foreign workers from that of undocumented workers (whom the study referred to with the commonly-used term “Wetbacks” because they supposedly crossed the Rio Grande River).

The methodology for determining the adverse effect and finding the “prevailing wage” evolved during the 1950’s. Despite some reforms, U.S. workers continued to suffer adverse effects on wages. High concentrations of Braceros in crops led to wage stagnation and depression in wages, with variations depending on the crop and location. Galarza, p. 209.

For example, the USDA determined that the average hourly wage rate for farm work in California in 1960 was \$1.22 per hour. Of the 212 wage surveys done in the Bracero program within California at the same time, 161 reported rates of \$1.00 or less. The foreign workers would accept lower wages and government policy made them available to farmers. “From the moment. . . the work contracts were approved, months in advance of actual harvesting, the psychological conditions of a free labor market disappeared. Farm employers knew therefore that they could obtain Mexicans and exactly under what conditions.” *Id.* at 146.

A recent analysis made these observations about guestworker programs and wages:

Historical evidence demonstrating that the presence of male-only guestworkers discouraged growers from raising wages. Taking, for example, four California crops that were largely worked by *braceros* and reviewing the wage changes from 1950 to 1974, a clear correlation between the presence of *braceros* and stagnant wages is seen. In the period 1961-1964, *braceros* harvested 79% of the tomatoes, 74% of the strawberries, 71% of the lettuce and 49% of the asparagus harvested in California (Holt, 1985). Table 4.5 shows that during the 1950-1964 period, wages were absolutely flat or declined in real terms. . . . This occurred during a period of relative increases in real wages for production workers nationwide. However,

starting in 1965 with the end of the Bracero Program, wages began to increase. . . . Under current circumstances, the institution of a large guestworker programme would likely have a similar effect to the 1942-1964 Bracero Program. It would tend to perpetuate a low-wage, high-turnover system and increase the stock of unauthorized workers in the USA.

Richard Mines, “Family Settlement and Technological Change in Labour-Intensive US Agriculture,” in Findeis, Vandeman, Larson & Runyan, *The Dynamics of Farm Labour* (CAB International 2002) at p. 45.

More recently, the concentration of H-2A guest workers in a geographic area also has led to wage stagnation and wage depression. We note an example in the south Florida sugar cane industry, which used the H-2A program for 50 years until the early 1990’s when the harvest was mechanized. See generally, Alec Wilkinson, *Big Sugar* (Knopf 1989). Some workers harvested “seed cane,” which was cut down to re-plant and grow a new crop of sugar cane (rather than to be refined into sugar). A group of Florida employers that did not hire guest workers were found to pay their U.S. workers a piece rate of 7 cents for cutting one linear foot of seed cane a crop row. The H-2A program employers, however, paid a special “task rate.” The U.S. workers at the non-H-2A employers earned substantially more from the 7 cents per foot piece rate than did employees at the H-2A employers. In 1990, the task rate workers earned an average of only \$8.32 per hour while the piece rate workers at 7 cents per foot averaged \$13.58 per hour. Committee on Education and Labor, House of Representatives, Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry, at 17, 215, 224 (Serial No. 102-J) (1991). In 1991, after much controversy and publicity over these rates, the gap narrowed but the wage depression persisted: U.S. workers earning a piece rate of 7 cents per foot averaged \$9.47 per hour, while the H-2A employers’ task rate workers earned only \$8.68 per hour. For the most part, the lower-paying companies were much larger than the small companies that hired U.S. workers and paid by the piece. Moreover, the H-2A program employers’ wage system itself – the so-called “task rate” – was an abusive mechanism imposed on guestworkers to avoid disclosing the true method of paying workers, making it difficult for workers to contend that they had been underpaid.

DOL is aware of these and other experiences that demonstrate the depressing effect of guest workers, particularly when they become concentrated in a local area, but does nothing to acknowledge or address the problem. If the agency is correct that the H-2A program will grow substantially, the Bracero experience will be replicated.

## **5. Piece Rates and Wage Depression: The Need for Meaningful Policy**

- a. The Methodology Must Recognize That Piece Rate Systems Have Depressed Wages and that H-2A Employers Must Be Prevented from Adversely Affecting U.S. Workers Through Use of Piece Rates

The adverse effect wage rate has been expressed in terms of an hourly rate in part to reduce the adverse impact on U.S. workers of employers’ use of piece rates. The inability of workers affected by guest worker programs to demand decent wage improvements leads to

anomalies, particularly in piece rates. A substantial minority of farmworkers are paid by the piece, particularly in the fruit and vegetable harvesting jobs that are among the most common in the H-2A program. Many H-2A employers offer such low piece rates that their workers' earnings must be supplemented with "build-up" or "make-up" pay, so that they are paid at least the H-2A program's adverse effect wage rate, which is an hourly rate.

Piece rates are generally lawful but they are known for being associated with labor abuses. The concept of a piece rate system is an economic incentive that induces workers to higher levels of productivity for the benefit of the employer based on the opportunity to earn more than the worker would earn on an hourly rate. The H-2A system undermines the concept of the piece rate concept. The guest workers cannot command significant improvements in the piece rates, for the reasons identified above, and usually are willing to work at high productivity levels for piece rates that are perceived by U.S. workers to be low. The U.S. workers often must accept the low wage or face displacement by the foreign workers.

An example of absurdly low piece rates in the H-2A program occurs in the citrus industry. A study in 2001 by the University of Florida noted that productivity had reached a stable point in citrus. Referring to a 1996 study, the authors, said, "Recent Florida labor studies indicate that harvesters pick an average of one field tub (equivalent of eight to ten 90-pound field boxes) of processed oranges per hour." During a six-year period, average hourly earnings of citrus workers did not change: **"For the past six years, hourly wages of harvesters have averaged \$7, and under extraordinary conditions a productive harvester can earn more than \$10 per hour. Most harvesters expect to earn between \$50 and \$70 during an eight- to ten-hour workday (Polopolus, et. al., 1996; Roka and Emerson, 1999)." Roka and Longworth, "Labor Requirements in Florida Citrus," University of Florida, Institute of Food and Agricultural Sciences (UF/IFAS) (2001), p. 2.**

More recently, a Florida labor contractor that provided a crew of U.S. and H-2A workers to harvest citrus for the largest citrus company, Consolidated, paid various piece rates, for example \$7.50 for picking Valencia oranges and filling up a 43,500 cubic inch tub. The low piece rates meant that many workers routinely could not earn the minimum H-2A wage rate of \$8.56 per hour during 2007. The employer therefore paid "build-up" to dozens of workers totaling \$150,000. Some workers received build-up pay almost every week; Mr. Arredondo Ceja, for example, received build-up in 22 weeks during a 6-month season, totaling \$1485. (Exh. W-1, p. 5). Others received build-up in fewer weeks; Edward Cumplido received build-up pay in 11 weeks, totaling \$200.45 (id., p. 11). Thus, in the stated average work week of 36 hours, the employer reported the obligation to add an average of 51 cents per hour to bring the workers up to the H-2A minimum wage. DOL does virtually nothing to prevent employers from offering low, "prevailing," piece rates that yield sub-minimum earnings with the important exception of requiring a minimum wage expressed in terms of an hourly rate.

H-2A employers frequently use piece-rates to stagnate wage levels when wages in the farm labor market are increasing. Bentley Farms, a peach grower in central Alabama that hired H-2A workers, offers piece rates for harvesting that were unchanged from 2005-2007 even though the H-2A program's adverse effect wage rate, which is based on the USDA's Farm Labor Survey, increased from \$8.07 to \$8.51 during that time, a 6.3% increase. Exh. W-2. Bimbo's

Best Produce, a strawberry grower in Amite, Louisiana continued to pay an unchanging piece rate for harvesting from 2004-2008, as the average farmworker wage, and the AEW, increased from \$7.38 to \$8.41 per hour, a rise of \$1.03 per hour, or 14%. Ex. W-3. Jones & Church Farms and its competitor Scott Strawberry and Tomato Farms in Tennessee offered piece rates for harvesting green tomatoes that went up once, from \$.40 to \$.45 per 5/8 bushel, between 1997 and 2006, an increase of 12.5% over 9 years or 1.2% per year. Inflation rose much faster. More importantly, the AEW in Tennessee increased during that time from \$5.68 per hour to \$8.24 per hour, or 45%, an average of 5% per year. Exh. W-4, W-5.

### **b. Piece-Rate Abuses: Cheating on Hours**

The piece-rate problems discussed above are not only related to low earnings levels but also to violations of the required wage rates and inappropriate increases in productivity standards. DOL needs to address these problems substantively and in its explanation of its policy decisions.

The failure to require proper piece rates leads to cheating. An employer that pays by a low prevailing piece rate which yields substandard wages has an incentive to lie. The employer will illegally understate the number of hours worked by its employees to give the appearance of a higher hourly average wage. There are numerous lawsuits aimed at these abuses and far too few DOL enforcement actions to remedy or deter violations. In the citrus case mentioned above, the labor contractor is being sued for allegedly forcing the workers to give back the build-up pay they received. (Consolidated Citrus used time keeping machines that helped demonstrate the illegality committed by its labor contractor, but many employers keep more informal records.)

Such cheating is often used to keep the piece rate – and actual payments to workers – constant when the H-2A required hourly wage (the AEW) is increasing. There are numerous cases in which this has been happening and there is a long history to it, and DOL should end its history of ignoring such abuses.

The House Education and Labor Committee reported on a Wage and Hour Division investigation that resulted in findings of minimum-wage violations for “all 2,250 H-2 workers employed by Okeelanta Corporation” during the 1986-87 Florida sugar cane cutting season. Committee on Education and Labor, House of Representatives, Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry, Serial No. 102-J (July 1991) at p. 18. DOL also interviewed about 3 dozen workers who reported that they “worked an average of 9.3 hours” per day, and sometimes as much as 12 hours in a day, but the company’s payroll records “indicated only 4-6 hours worked daily.” DOL found other company records showing that the sugar cane crews usually began work each day at about 7:00 am and ended between 3:30 pm and 5:30 pm. Paid by the “task rate,” they actually averaged \$3.11 per hour instead of the adverse effect wage rate of \$5.30 per hour, and even less than the minimum wage of \$3.35 per hour. (Id at p.18 and App. 10, p. 75, 78-79).

DOL needs to respond to rampant piece rate abuses through regulatory protections, greater oversight, and more and higher quality labor law enforcement. Its proposed policy changes call for less regulation of wages, less oversight, weakened enforcement and no

meaningful indication that the quality or quantity of enforcement of the weaker protections will be enforced.

### **c. Uncompensated Increases in Productivity Standards**

The stagnation in piece rates when average wage rates and legal minimum wage rates are rising also results in escalating productivity standards without compensation. As the productivity demands get harder and harder without a real pay increase, U.S. workers are less likely to accept the jobs that desperate guest workers will reluctantly accept. H-2A employers in unguarded moments have admitted that H-2A workers will work without challenging their conditions and are therefore favored over U.S. citizens and permanent resident immigrants. By the time the foreign workers' human endurance has been reached, the growers have eliminated U.S. workers from the applicant pool.

Consider an employer where workers are paid a piece rate of \$7.50 for picking a tub of oranges, the work day is 8 hours and the adverse effect wage rate is \$7.00 per hour (amounting to \$56.00 per day). The citrus harvester must pick at least 7.57 tubs per day to earn the minimum (\$56). If wages in agriculture are increasing, and the AEWR increases to \$8.00 per hour (or \$64 per day), but the employer's piece rate remains the same (\$7.50 per tub), then workers must pick at least 8.53 tubs per day to earn the minimum. In this example, the worker did not receive a real pay raise; he was forced to increase his productivity by about one tub a day (12.6%), and probably runs the risk of being fired for not picking fast enough to earn the minimum hourly wage. Meanwhile, because the employer is still paying the same \$7.50 per tub it always paid, it has avoided any increase in its wage rates or its payroll. In fact, the faster-than-average workers got no pay increase and would need to worry about picking even faster to avoid being fired for not earning at least the new, higher minimum wage.

DOL now has years of experience with such irrational, backward and inappropriate piece-rate systems. The agency should adopt the requirement it had until mid-1987 mandating that as the Adverse Effect Wage Rate (which is an hourly rate) increases, employers must increase their piece rates proportionally.

The former provisions stated at 20 CFR 655.202(b)(9)(ii) and 655.207(c) (1987), respectively:

- If the worker will be paid on a piece rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the piece rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the workers' pay will be supplemented . . .
- "In any year in which the applicable adverse effect rate increases to the point where the employer's previous year's piece rate in a crop activity will not enable the average U.S. worker's hourly earnings to equal or exceed the new applicable adverse effect rate without requiring the average U.S. worker to increase productivity over the previous year, the employer shall increase the piece rate to a level at which the average U.S. worker would earn at least the adverse effect wage rate."

These provisions, adopted in 1978 (43 Fed Reg. 10306, 10308-09), revised earlier provisions under the Bracero and H-2 programs which required employers to adjust piece rates as AEW's changed so that they were "designed to yield" earnings that would avoid stagnation and adverse effect. Dellon at 744-45, 747. These provisions, DOL recognized, responded to the concern that employers would increase productivity demands in a piece-rate-paid occupation rather than provide wage increases required by law. With its long history on this topic, DOL now has the evidence to know that guestworker programs in agriculture require such protections.

The DOL also should be investigating virtually every piece rate system under the H-2A program and massively increasing its enforcement to remedy and deter abuses.

## **6. DOL Must Address the Impact on Measures of Average Wages Caused by the Rampant Hiring of Undocumented Workers**

### **a. DOL Must Set H-2A Wage Rates at Levels That Prevent Adverse Effects from the Hiring of Undocumented Workers**

The Department of Labor and the courts have long understood the statutory prohibition against adverse effect to U.S. workers wages to require a methodology that prevents the presence of undocumented workers, as well as guest workers, from depressing the wage rates paid by H-2A program employers to U.S. workers. *AFL-CIO v. Brock*, 835 F.2d 912, 914, 918-919 (D.C. Cir. 1987), review after remand, *AFL-CIO v. Dole*, 923 F.2d 182 (1991). For example, in establishing an adverse effect wage rate for Texas, DOL relied in part on an analysis of farmworkers' wages in that state, saying, "11. Use of undocumented workers and other non-immigrant aliens clearly results in depressed wages for U.S. workers. . . ." 44 Fed Reg. 32,209, 32210 (June 5, 1979).

A few years later DOL concluded that undocumented workers in Montana had depressed wages, necessitating an AEW for that state, 50 Fed. Reg. 50,311, 50,312 (Dec. 10, 1985). The following year DOL set AEW's in Idaho and Oregon because "The employment of undocumented alien workers in agriculture in Idaho and Oregon, including employment at or below the statutory \$3.35/hour minimum wage, is substantiated by the records of INS." 51 Fed Reg 11,942, 11,943-944 (Apr. 8, 1986).

When DOL adopted the current methodology for the AEW it recognized its obligation to confront the negative impact of wage rates from the presence of undocumented workers. 54 Fed. Reg. 28,037, 28041, 28043 (July 5, 1989). In fact, DOL argued in favor of its current AEW methodology by stating that "because of the nature of *the illegal alien workforce*, and because of the concentration of that workforce in particular localities and crops, such adverse effects as may exist are not reflected, to any substantial extent, if at all, in USDA average wage data." *Id.* at 28043 (emphasis added).

Thus, DOL has long, at least until now, acknowledged the law's requirement to consider the hiring of undocumented workers when setting the adverse effect wage rate.

## **b. Widespread Hiring of Undocumented Workers Depresses Wages**

Times have changed since 1987. By virtually everyone's agreement, undocumented workers now dominate in the agricultural sector throughout the nation. They constitute a majority of farmworkers in the United States and they are spread throughout the nation. DOL may not legally ignore this fact.

At the broader economic level, unauthorized immigrants are only a small share of the total population and labor force, amounting to about 4 percent of the U.S. population and 5 percent of the workforce. Caps, Fortuny & Fix, "Trends in the Low-Wage Immigrant Labor Force," Urban Institute, March 2007, p. 3. The impact on wage rates of the hiring of undocumented workers at the broad, national level is under dispute.

But agriculture is different. The National Agricultural Workers Survey conducted by DOL reports that slightly over 50% of seasonal crop workers lack authorized immigration status. Dairy workers and other livestock workers may be somewhat less likely to be undocumented but there is insufficient data to determine the amount. Many employers report that they believe 70% of farmworkers are undocumented. Paul Vitello, "Immigration Issues End a Pennsylvania Grower's Season," *New York Times*, April 2, 2008 (large agricultural employer suggesting that nationally, 70% of farmworkers are undocumented).

The undocumented workers in agriculture are spread throughout the nation:

- In California, where 36% of the nation's farmworkers are employed, 57% of farmworkers were undocumented as of 2003-05. Mason, Bert and Philip L. Martin, California's Farm Labor Market (2007) at p. 13: [http://migration.ucdavis.edu/cf/files/BertJune\\_2007.pdf](http://migration.ucdavis.edu/cf/files/BertJune_2007.pdf) .
- In Florida, as of 2004, 50% of farmworkers were unauthorized immigrants and the percentage was increasing. Lurleen M. Walters, Robert D. Emerson, Nobuyuki Iwai & Jammie Palacios, "The Florida Farm Labor Market," 2007 <http://migration.ucdavis.edu/cf/files/Walters-Emerson.pdf>, p. 5.
- "More than 60 percent of agricultural workers in Washington are believed to be undocumented, according to some industry estimates." Turnbull, "New State Import: Thai farmworkers," *Seattle Times*, Feb. 20, 2005.
- Reportedly, "45 percent of the Mountain region's farmworkers report they were working illegally in the U.S. while only 28 percent are U.S. citizens." Dawn Thilmany, "Agricultural Worker Trends and Issues in the Mountain West," *Journal of the AFSMRA* (2004) p. 54. The Mountain states include Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.
- In April 2007, 13 undocumented workers at a North Dakota dairy were arrested by the immigration service. "Can aging N.D. resist change amid immigration debate?," *USA Today*, Nov. 25, 2007.

- An increasing percentage of Wisconsin dairy employees are Latino, and the large majority of the Latino “newcomers” are undocumented. Jane Fyksen, “Latino Labor Key to Preserving Dairy Culture?,” *Agriview*, Oct. 4, 2007 (quoting Prof. Paul Kaldjian, of University of Wisconsin-Eau Claire geographer).
- In southwest Michigan, farmer Fred Leitz employs 180 seasonal migrant workers. “Leitz says he can only assume that as many as 70 percent are undocumented.” Jennifer Ludden, “Farmers Worry About Immigration Crackdown,” *National Public Radio*, Sept. 18, 2007, <http://www.npr.org/templates/story/story.php?storyId=14509724> .
- According to the director of the Farmworker Program at the Cornell University College of Agricultural and Life Sciences, in New York State approximately 70% of farmworkers are undocumented. Alex Berg, “City Talks Immigration,” *Cornell Daily Sun* (NY), March 26, 2007, <http://cornellsun.com/node/22226>. New York State employs from 40,000 to 80,000 farmworkers in migrant, seasonal, and year-round agriculture, the vast majority of which are immigrants from Mexico and Central America. <http://www.cals.cornell.edu/cals/public/impact/cornell-farmworker-program.cfm> .

As explained in the subsection below, undocumented workers are paid less than authorized immigrants and citizens; the presence of undocumented workers does depress wage rates.

DOL has a statutory obligation to require H-2A employers to offer wage rates that have not been depressed by the presence of H-2A workers and undocumented workers. DOL offers no method to do so. It acknowledges, as does any rational analysis, that undocumented workers depress wages, but it offers no action. Instead, as explained further below, it proposes to choose a wage paid by non-farm establishments that are known for hiring undocumented workers and paying low wages, and, in addition, would allow employers to choose a wage from the low end of the wage scale paid by such establishments. DOL’s proposal violates its statutory obligation and its rationale is fundamentally flawed.

## **7. Enforcement of Labor and Immigration Laws and DOL’s Flawed Rationale**

The H-2A programs wages and benefits are affected by the effectiveness of enforcement of labor and immigration laws and DOL should include in its proposal a strategically-designed plan to improve employment law enforcement generally and under the H-2A program. Our immigration system is severely broken. The Administration should be working with Congress to address these problems in sensible ways rather than offering harsh, counterproductive proposals to change the H-2A guestworker program. Many farmworkers would benefit by the Government’s enforcement of its labor laws and immigration laws. Many employers hire undocumented workers because these workers are often unwilling to take the risk of deportation to report illegal labor practices by their employers. Indeed, recent reports in the face of immigration enforcement note that undocumented workers are reluctant to seek out needed medical care, shop at stores identified with the Latino community or engage in other activities that would draw attention to themselves. Filing a lawsuit or an administrative complaint is often perceived as akin to self-deportation. The Government should be more vigorously enforcing the labor and employment laws to reduce the incentive employers have to hire undocumented

workers. Yet, wage-hour enforcement has declined substantially over the past twenty years and resources that should be applied to enforcement instead have gone to “compliance assistance,” educating employers about legal requirements that they already know and violate. Employers do not fear wage-hour enforcement because it rarely occurs and when it does the penalties are not severe enough to deter violations. A similar problem arises under the H-2A program due to the vulnerability of guest workers, as described above.

DOL relies on previous court decisions that have permitted the agency’s wage-setting analysis to consider the impact of H-2A rules on immigration law enforcement, but DOL’s proposal is extremely inappropriate. DOL’s principal goal and the net effect of its latest proposal are anathema to the statutory scheme. In the name of promoting hiring of only legally authorized workers, DOL seeks to encourage agricultural employers to hire guest workers by lowering wage rates below prevailing levels to the federal or state minimum wage. The agency’s rationale for the lowering of H-2A wage rates is that agricultural employers will violate the immigration laws by hiring undocumented workers unless the wages are set as low as possible. Neither federal law nor common sense justifies this approach even if immigration enforcement is one factor that the law allows DOL to consider in setting H-2A wages. If taken to its logical conclusion, DOL’s proposal means that every occupation in the United States should be required to offer wage rates that are so low, and productivity requirements that are so high, that employers will feel no need to or interest in hiring undocumented workers. In other words, DOL would set wage rates and benefits at the level acceptable to the foreign workers who are employed in unauthorized status to encourage employers to hire those foreign workers and their cohorts under a lawful guest worker process. Only through the most convoluted argument can DOL reach the conclusion that it helps U.S. workers’ wages if the H-2A program lowers U.S. workers’ wages.

### **C. Objections to Proposed Methodology**

#### **1. DOL’s Proposal to Permit H-2A Employers to Pay U.S. Workers Less Than Temporary Foreign Workers Contravenes the Statute, Is Arbitrary and Capricious, and Is Inappropriate Policy**

Through a series of changes, the DOL will deny US workers the right to wages and benefits that the employer is required to offer to H-2A workers. (pp. 71-72). The entire statutory concept of “adverse effect” on US workers would be eroded. The law has always been understood to require certain wage rates of US and foreign workers because both groups’ wage rates must be regulated to prevent employers from using guestworkers to undermine US workers’ wage rates. It has always been understood that US workers will suffer either displacement or wage loss if the employer can pay US workers’ less than the guestworkers with whom they work; the H-2A program has required employers to pay US workers at least as much as the foreign workers.

- **The definition of the adverse effect wage rate (AEWR) would change to mean the minimum wage rate that must be paid to H-2A workers, rather than the current definition’s language requiring wages paid to “every H-2A worker and every U.S. worker”). §655.100(b).**

- The concept of a “Job offer,” which is central to the H-2A program, will be re-defined to mean an offer to an H-2A worker, not a US worker. 655.100(b), and 501.10(w).
- The H-2A enforcement regulations at 29 CFR Part 501 would limit enforcement of H-2A wages and other protections only to US workers who are “newly hired” during the period of the recruitment on the H-2A application. Pp. 71-72. The definition of “newly hired” is so vague as to be even broader in its implications for US workers than it first appears. 29 CFR 501.0.
- The proposal’s requirements for job offers excludes the reference to US workers (in brackets below) that appear in the current regulation, apparently to allow employers to make a job offer to H-2A workers that is better than that made to US workers
  - The employer's job offer [to U.S. workers] shall offer [the U.S. workers] no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H-2A workers. [655.104(a)]. **Except where otherwise permitted under this section,** no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section. [655.104(c)].

This is a major break from longstanding policy that cannot be justified in law or policy. DOL should withdraw each of these proposed changes. In addition, DOL should state clearly that U.S. workers’ wage rates will be protected, H-2A employers must offer the required minimum wages and benefits to U.S. workers, that U.S. workers must receive the minimum benefits required by the law and regulations, that U.S. workers may not be discriminated against by H-2A employers in favor of H-2A workers, that the H-2A employers’ contracts with workers must provide that U.S. workers will receive the wages and benefits required by law and will not be discriminated against, that it will not exclude from these protections U.S. workers who were previously or “already” hired,” and that DOL will vigorously enforce all of these protections on behalf of U.S. workers as well as H-2A workers.

## 2. DOL’s Critique of the USDA Farm Labor Survey Is Faulty

The reality is that data about farmworkers is not perfect. The statement of economist Sylvia Allegretto, a professor at University of California at Berkeley, is attached to these comments and discusses the advantages and disadvantages of the various data sources under discussion. Exh. W-6. DOL made strong arguments in 1987 through 1991 about the validity and appropriateness of the USDA Farm Labor Survey in accomplishing the statutory goals when it sought to lower H-2A wages by 20%. In fact, DOL relied on the USDA FLS for decades before 1987 as an index to determine how to adjust guestworker program wage rates in accordance with trends in agriculture while recognizing that the absolute wages in the survey were tainted by depression from the hiring of undocumented workers and guestworkers. Nothing DOL says today about the USDA FLS justifies a switch to the BLS OES.

DOL contends that the USDA FLS scope is too broad but the component of the FLS that DOL uses for its AEW formula studies nonsupervisory field and livestock workers employed on farms. As discussed more fully below, the BLS OES does not even survey farms, where most

farmworkers are employed. In fact, the BLS OES relies partly for its information on a separate BLS study, the National Compensation Survey (NCS), which does not even survey agricultural establishments. DOL offers no real argument in favor of the representativeness of the BLS OES results, which are unreliable because the study is not comprehensive in agriculture.

DOL expresses concern, after all these years, that USDA FLS asks employers about their wages and total hours worked to derive average hourly rates. The BLS OES does not ask employers the particular wage rate paid either. Rather, it asks employers to choose one of several relatively large wage ranges, or “intervals,” where their wage rate falls. (Most farmworkers’ wages will fall in one of the three lowest wage intervals, for example interval B, which is \$7.50 per hour to \$9.49 per hour). BLS then performs a procedure to estimate the average wage and other points on the wage scale. In fact, BLS apparently obtains an average wage by relying partly on the National Compensation Survey results, which surveys neither farms nor labor contractors; its “farmworkers” are apparently only a tiny group of people employed through companies listing themselves as non-agricultural establishments. DOL offers no valid reason why the BLS OES or the FLCDC results would be better than the USDA’s survey.

DOL argues that its position is reasonable by comparing it to the “AgJOBS” legislation that is pending in Congress (S.340/H.R. 371). AgJOBS would continue the use of the FLS but, as presently written, would return to a previous year’s findings and freeze the wage rates for three years. DOL does not offer a reasonable comparison. AgJOBS is a comprehensive compromise regarding farm labor and immigration policy in agriculture. It was the product of complex negotiations over several years. It contains numerous changes in the H-2A program and immigration law generally. Its wage provisions, which were drafted some time ago and are tied to particular dates, are also subject to change at any moment. In the give and take of negotiations, the parties agreed to make dramatic changes to the H-2A program that would benefit farmworkers, most notably the creation of a private cause of action in federal court for the guestworkers to enforce the promised job terms, including the H-2A wage rates that, though promised, are often denied them. DOL in this regulatory proposal would take rights and benefits away from farmworkers for virtually nothing in return and would weaken the enforcement provisions so that for many workers the suddenly-reduced wages and benefits would be mirages.

Moreover, what DOL does not say is that the changes to the H-2A wages under AgJOBS would be temporary, with a significant escalator after three years based on the cost of living and an annual escalator after that if Congress has not acted. AgJOBS calls for a special commission to be created and for an investigation by the Government Accountability Office so that recommendations would be made to Congress regarding the appropriate H-2A wage methodology for later Congressional action. Observers anticipate that the earned legalization program in AgJOBS would lead to ample labor supplies, and little use of the H-2A program during those three years, so few farmworkers would even be affected by the wage changes. DOL is proposing permanent, harmful changes that would be applied on a broad scale in a scenario that DOL predicts would include rapid growth of the H-2A program. It is an inappropriate comparison.

DOL also gives a false picture of the wage scale when it offers the comparison to the use of the FLS in AgJOBS. DOL compares the H-2A wages under AgJOBS to “the OES hourly wage rate at the national average or median rates.” (p. 55). However, DOL does not propose to use the OES average or median (which are significantly below those for the current H-2A AEWRS). Rather, DOL, as we have seen, proposes to allow employers to pay on a four-level wage skill, and level 3 is the average wage; presumably DOL, with its goal of reducing wages to encourage use of the H-2A program, will allow many employers to pay level 1 and 2 wages. Level 1 is the average of the wages paid to the bottom one-third of workers in a job and geographic area. Thus, DOL will allow wages to be paid at the 16.5<sup>th</sup> percentile. Level 2 is just barely above that level. It is misleading for DOL to rely on an analysis based on the 50<sup>th</sup> percentile or the average in the OES data when that is not what DOL expects employers will use.

As discussed further below, DOL also fails to admit that the FLS was recognized by DOL in the past as a method (though a flawed one) to avoid the impact on wage surveys of local areas with significant concentrations of undocumented workers or guestworkers. See Allegretto statement attached, Exh. W-6.

### **3. The Wage-Level Methodology Is Not Transparent: It Is Not Explained**

A wage system should be explained adequately before it is proposed for adoption. DOL does not offer any significant explanation of the methodology by which the various wage rates are determined. In the absence of such an explanation, DOL cannot demonstrate the alleged reasonableness of selecting this methodology. Commenters should not be required to guess DOL’s explanation for adopting a methodology. Many commenters requested an extension of time from 45 days until 90 days, partly to investigate the wage system proposal, but DOL only granted an inadequate 15 extra days. The public, and particularly farmworker organizations, deserve a reasonable opportunity to comment on DOL’s reasoning but they have not had that opportunity. The proposal should be withdrawn and a detailed explanation of the system should be offered in a proposed form with the opportunity for the public to comment.

For example, DOL does not explain how the BLS OES determines the wage rates that are used in the four-tier wage system. Our own investigation is incomplete. Apparently the BLS OES by itself cannot determine the average wage, or the 16.5<sup>th</sup> percentile of wages, or the average wage of the top-two thirds of workers in a geographic area and occupation because it only asks employers to identify the number of workers paid within 12 wage intervals that are fairly wide, rather than asking the actual wage rates paid. Apparently, the BLS OES results are obtained by using the results of a separate BLS survey, the National Compensation Survey (NCS), in some manner. The NCS, however, does not survey any agricultural establishments, and therefore probably only surveys an infinitesimal number farmworkers (those employed in non-agricultural establishments).

DOL, in proposing an entirely new methodology and source of information, should explain the methodology so that the public can consider it. DOL does not explain the methodology and independent efforts to learn about the methodology have not yielded a complete understanding. For this reason alone, the proposed change in the methodology should be withdrawn.

#### **4. The BLS OES Is an Inappropriate Source because It Does Not Survey Farms, Which is Where Most Farmworkers Are Employed**

The BLS OES data do not include wages paid by farms. Consequently, the OES does not report on the majority of farmworkers. The OES focuses on establishments that support farm production, rather than engage in farm production, and many of these establishments are farm labor contractors (FLC's). The employees of such non-farm establishments constitute a minority of the overall agricultural labor supply and are not representative of the farm labor supply. See Allegretto Statement, Exh. W-6.

The Bureau of Labor Statistics appears to have decided not to make an organized effort to survey farmworkers' wages, perhaps because USDA's FLS does so. It is inappropriate for DOL to suggest using the BLS OES for the H-2A program wage rates.

The majority of farmworkers are employed on farms. From 1993-94 to 2001-02, according to the National Agricultural Workers Survey, the share of crop workers employed by a farm labor contractor increased substantially, but only from 14% to 21%. NAWS 2005 Report, p. 31. The rest were directly employed (by farms or seasonal packing houses). The 2006 NAWS report concludes that 18% of crop workers are hired through farm labor contractors. (p. 27).

The USDA Farm Labor Survey, in referring to the broad group "hired workers," found that there "were 1,205,000 hired workers on the Nation's farms and ranches during the week of July 8-14, 2007. . . Of these hired workers, 847,000 workers were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 358,000 workers," or about 30% of hired workers. Under the USDA's definition, agricultural services are performed on the farm by custom service units such as farm labor contractors or custom crews. USDA NASS, "Farm Labor," August 17, 2007.

Such reports vary in the populations studied and each has advantages and disadvantages. According to USDA, only a very small percentage of Florida farmworkers are hired through labor contractors, but another study found that about 20% of Florida farmworkers are hired through farm labor contractors. Lurleen M. Walters, Robert D. Emerson, Nobuyuki Iwai & Jamille Palacios, "The Florida Farm Labor Market," Paper for Immigration Reform & Agriculture Conference Washington D.C., June 13-14, 2007, <http://migration.ucdavis.edu/cf/files/Walters-Emerson.pdf> (Based on NAWS data for crop workers). In California, by one analysis, the percent of contractor employment as a proportion of all crop workers may have grown from 25% in the late 1980s to 47%. Richard Mines, Data on Crops, Employment and Farmworker Demographics (2006), p. 37 (See Table 14.) <http://migration.ucdavis.edu/cf/files/MinesCAData.pdf>

The DOL's decision to rely on a wage survey of farmworkers that explicitly excludes farms, where the majority of farmworkers are employed, is invalid because it is not a representative survey. See Allegretto Statement, Exh. W-6.

## **5. The BLS OES Is an Inappropriate Source for the H-2A Program AEWB Because It Focuses on Employees of Farm Labor Contractors, Who Disproportionately Pay Low Wages and Hire Undocumented Workers**

### **a. Introduction**

The purpose of the adverse effect requirement is to prevent employers from claiming a labor shortage for the purpose of hiring guestworkers while offering wages that are acceptable only to foreign workers (i.e., guestworkers and undocumented workers, rather than U.S. citizens or lawful permanent residents). The use of the BLS OES as a source of wage data is fundamentally flawed because the farmworkers who are hired by farm labor contractors (the entities that dominate the OES data) are more likely to be undocumented workers than those hired directly through growers. In addition, because farmworkers hired through FLC's earn less than farmworkers hired directly through growers, DOL essentially proposes to use a wage survey of the lowest paid workers. That wage survey reflects the undocumented status that predominates among farmworkers at farm labor contractors.

The increased use of labor contractors often is not related (or not substantially related) to true economic efficiency, but due to efforts to evade increasingly strict (if still, largely unenforced) immigration laws and obligations under labor laws. A study of the Florida citrus industry following the immigration legislation of 1986, for example, concluded that growers had shifted to using farm labor contractors largely due to the presence of undocumented workers and concern over imposition of employer sanctions. Polopulos and Emerson, "Entrepreneurship, Sanctions, and Labor Contracting," *Southern Journal of Agricultural Economics* (July 1991) at 57, 59, 61, 66-67.

As one study has said: "The re-emergence of intermediaries -- FLCs [Farm Labor Contractors; cit. omitted] is the major farm labor market story of the 1980s. . . . The switch from a farm employer hiring workers directly to hiring workers through an intermediary such as an FLC can reduce workers' take-home pay dramatically. . . . Intermediaries such as FLCs tend to change the structure and efficiency of the farm labor market in ways that reduce the net earnings of farm workers. . . . **FLCs reduce labor market efficiency.** . . ." Martin & Taylor (Urban Institute 1995), p. 11. "The market share of intermediaries is often inversely-related to the quality of the farm labor market; where intermediaries play only a minor role, farm labor markets tend to offer higher wages and better jobs." *Id.* p. 12.

### **b. Farm Labor Contractors Disproportionately Hire Undocumented Workers, Who Are Paid Less than Documented Workers**

The farmworkers employed at FLC's are more likely to be undocumented than those employed directly by growers. In setting the AEWB, DOL should not rely on a study that focuses on a subgroup of employers that disproportionately hires undocumented workers, whose wages should be excluded from the wage survey entirely.

A recent analysis concluded that among the nation's crop workers who are hired directly by growers, 37% were unauthorized. But among the crop workers who were hired through labor

contractors, 57% were unauthorized. In Florida, the study concluded that while 47% of crop workers hired directly by growers were undocumented, 67% of crop workers hired through labor contractors were undocumented. Lurleen M. Walters, Robert D. Emerson, Nobuyuki Iwai & Jamille Palacios, "The Florida Farm Labor Market," Paper for Immigration Reform & Agriculture Conference Washington D.C., June 13-14, 2007, <http://migration.ucdavis.edu/cf/files/Walters-Emerson.pdf>.

Among crop workers employed through FLC's in 2001-02, 66% were undocumented, whereas the percentage of undocumented workers directly hired was 51%. (National Agricultural Workers Survey, Report No. 9, 2005, at p. 31 and Fig. 5.1). According to the 2006 NAWS Report, based on 2003-04 data, among foreign-born newcomers, 99% of whom are undocumented, 71% were employed directly by growers and 21% were hired by labor contractors. Among all other crop workers, however, 84% were hired directly by employers and only 16% were hired through labor contractors. p. 30 Table 5.5.

Unauthorized immigrants are paid less than authorized immigrants and U.S. citizens. Walters, Emerson & Ibai, in "Implications of Proposed Immigration Reform for the U.S. Farm Labor Market," International Agricultural Trade and Policy Center, Univ. of Florida, (Feb. 2007), compared subgroups of foreign-born farmworkers, separating them into four subgroups based on whether they held lawful immigration status or unauthorized status and whether the job they held was unskilled or relatively skilled. **The average hourly earnings were lowest for the unauthorized workers regardless of skill level.** They especially noted that "unauthorized workers doing skilled work" were paid the least and "are significantly penalized for their legal status. These findings are consistent with those reported by Taylor (1992) who concluded that unauthorized status could hamper workers' chances of skilled employment or at least result in lower wages that would in turn discourage them from moving into those jobs." Id. at p. 14.

In a presentation based on that study, the authors said, "**Legal status matters: Workers selecting into employment with authorized status earn more regardless of skill level.**" For example, authorized workers averaged \$9.50 per hour in Florida while unauthorized workers averaged \$6.76 (during 2002-04). Walters, et al., "The Florida Farm Labor Market," p. 8. <http://migration.ucdavis.edu/cf/files/Walters-Emerson.pdf>. A cursory look at the NAWS data suggest that crop workers who are authorized earn about 10% more than undocumented crop workers. Allegretto Statement, Exh. W-6.

DOL should not rely on the BLS OES to set the AEWR's because the OES focuses on farm labor contractors who disproportionately hire undocumented workers. Given the available choices in data, and the statutory obligation to prevent the presence of undocumented workers from depressing H-2A wage rates, DOL should not choose a survey that over-represents farm labor contractors.

### **c. Farm Labor Contractors Offer Disproportionately Low Wages**

DOL's proposal to rely on BLS OES data, which survey farm labor contractors but not farms, leads to a selection of a subset of farmworkers whose employers -- farm labor contractors -- disproportionately pay lower wage rates.

Walters, et al concluded that both nationally and in Florida, hourly compensation is higher for workers directly hired by growers than for those hired through farm labor contractors, regardless of legal status, task type, or seasonal/year-round contract (p.8). In Florida, the differential was \$.73 per hour, or 12.5% higher pay for directly hired workers. At the national level the difference was \$.51, about 8% higher for directly hired workers.

Farm labor contractors for many years have been known to pay less than growers who directly hire their employees.

In a study of farmworkers in the area of Immokalee, Florida, the authors found that farmworkers employed through labor contractors, compared to those hired directly by farmers, suffered “extreme differences in family income.” At the time of the study, 1989-90, only 20% of the farmworkers in the area lacked authorized immigration status and in the study’s sample there were no differences in the percentage of undocumented in the two groups (those hired by labor contractors and those hired directly by growers). Griffith, David and Kissam, Ed, *Working Poor: Farmworkers in the United States*, Temple University Press 1995, at p. 61

*The Report of the Commission on Agricultural Workers* (1992), ordered by Congress, found “Working conditions and wages, on average, are worse for FLC employees than they are for non-FLC employees. According to the NAWS, the average earnings of FLC employees is \$4.92 per hour compared with \$5.14 per hour earned by workers hired directly by growers. Piece-rate earnings of workers employed through FLCs average \$1 less per hour than for workers of other employers. During the 3 years of NAWS data gathering, the hourly earnings of piece-rate workers employed by FLCs fell, in real terms, from \$7.11 in 1989 to \$5.01 in 1991. This was even more dramatic for harvest workers employed by FLCs. For this group, hourly earnings in 1991 were just two-thirds of 1989 earnings (\$4.91 v. \$7.32). Not surprisingly, the average personal earnings for FLC employees were \$4,700 per year, compared to \$6,900 for non-FLC employees.” *Id.*, p. 121, see also p. 96 and Table 7.1.

A recent study by a former Department of Labor analyst who supervised the NAWS concluded the following regarding California:

The farm labor contractors, whatever percent they represent, are a critical group in setting the working conditions in California. Despite the existence of many excellent contractor employers, survey research indicates that contractors as a group are associated with a series of inferior conditions for farmworkers. They pay less per hour, are more likely to charge for rides, equipment, as well as other items sold at the work place. For example, the NAWS respondents who work for contractors are twice as likely (19% vs. 9%) to pay for equipment than those who work for growers (see Table 15). Furthermore, contractors are more than twice as likely to pay by the piece (23% vs. 11%) as shown in Table 16. Contractors also hire workers that are more desperate than directly hired workers. In Table 17, one sees that a much higher percent of the FLC employees are unaccompanied by their family than the directly hired (68% vs. 57%). Also, according to data from

the 2000-2002 NAWS, the FLCs hire a higher percentage of undocumented employees (68% vs. 58%) than the growers and packing houses.

Rick Mines, at p. 37, <http://migration.ucdavis.edu/cf/files/MinesCAData.pdf>

The USDA Farm Labor Survey found an average hourly wage for all California “hired workers” in agricultural jobs during July 2007 of \$10.32. By contrast, it found the average hourly wage for California employees at agricultural service firms, which includes farm labor contractors, to be \$10.00 per hour. USDA NASS, “Farm Labor,” Nov. 16, 2007 (<http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1063>).

DOL should not rely on the BLS OES to set the wage rates because the OES excludes farms and focuses on farm labor contractors who pay disproportionately low wage rates.

#### **6. The BLS OES Wage Suffers from High Error Rates and Is Not a Reliable Source of Data about Farmworkers’ Wage Rates**

DOL has provided neither enough information nor enough time to examine adequately the reliability of the data on which it intends to rely to set wage rates under the H-2A program. With additional information and time, this analysis would benefit and would be likely to show additional serious flaws in the agency’s reliance on the BLS OES and the FLCDC. Nonetheless, it is already evident that the proposed methodology suffers from such high error rates that it is not a reliable source of wage information. The USDA FLS is a reliable source of data, particularly in comparison to the proposed methodology.

The BLS OES is not an appropriate source for wage results because of the lack of data and its inaccuracy in many geographic areas. The BLS OES often lacks wage findings for crop workers and livestock workers for particular geographic areas that are or are likely to be in the H-2A program and in many locations the level of inaccuracy, as measured by relative standard error, is extraordinarily high. See Allegretto Statement, Exh. W-6.

For example, a quick glance at the BLS OES findings reveals that there is no wage finding for crop workers in several areas known to be important crop-growing regions, some of which have used H-2A temporary foreign workers. For example, there are no wage findings for crop workers (45-2092) in Southside, Virginia; Winchester, Virginia; Berrien (Niles/Benton Harbor), Michigan. In several states, the size of the sample is miniscule in comparison to the number of farmworkers in the state.

In numerous locations, the stated error rate is too high to be a valid source, particularly when the USDA FLS error rates are so much lower. For example, relative standard errors for crop workers in several geographic areas are: Southwestern Virginia, 11.1%; Northeastern Virginia, 11.5%; Gainesville, Florida, 23.2%; Payette County, Idaho, 10.1%; Kent County (Grand Rapids/Wyoming), Michigan, 8.4%.

As labor economist Sylvia Allegretto states, “Employment in some of these areas is very small (and, not reported in some areas) and the relative standards errors, as expected, blow up. Therefore, there are serious questions of reliability.” Exh. W-6.

The BLS OES results may not accurately reflect the true error rates. As indicated above, the OES does not actually determine average wage rates or percentiles from its own wage data; it relies on the NCS for wage information that is apparently applied to the OES data on the number of workers in each wage interval and converted to broader statistical results. The NCS, however, does not survey agricultural establishments, such as farms or farm labor contractors, and therefore its analysis of farmworkers is based on an infinitesimal sample that is very likely to be inaccurate. It is not clear whether the error rates reported by BLS OES take into account the lack of reliability in the underlying NCS information.

### **7. The BLS OES Is Out of Date and Harms US Workers**

The BLS OES data, if used by DOL for H-2A employment during the summer of 2008, would reveal the wage rates paid during 2006. The BLS apparently uses a six “panel” time period that it adjusts for inflation but apparently is not capable of preparing the survey results fast enough to be issued for the coming year. The H-2A employers should not be offering wage rates that are two years out of date, particularly when wage rates have been increasing modestly overall during the past decade, and especially during a period of increasing inflation in the cost of living. In using the USDA FLS for the H-2A program, DOL is using data from the prior season. That one-year delay is already inappropriate and should be fixed by providing an adjustment each year. A wage rate that is two years out of date is inappropriate because it allows employers to offer a non-competitive wage that many US workers will reject; guest workers will accept such wage rates and displace U.S. workers and increasingly cause the U.S. workers to experience the same low wage rates. BLS OES also apparently surveys farmworkers’ wages in May and November, which are not optimal times for achieving accurate results.

### **8. DOL Should Not Select the BLS OES because the BLS OES Wage Results Are Lower Than Those in Other Farm Labor Surveys**

The practical result of the above-stated problems with the BLS OES is that the wage findings are lower than in other wage studies in agriculture. For many reasons described in the sections of this wage analysis, DOL should not select a methodology that results in a wage finding that is among the lowest possible results of studies of farmworkers’ wage rates.

Initially, we will compare the *average* hourly wage findings in the BLS OES to those in other surveys, but we note that *DOL does not plan to require H-2A employers to pay a wage as high as the average wage*; it plans to allow employers to select wage rates that are significantly lower on the wage range.

#### **a. National Level Average: \$9.72 per hour to \$8.48 per hour**

The BLS OES findings on the national level are \$1.14 to \$1.24 per hour less than the USDA Farm Labor Survey results that are used for the H-2A adverse effect wage rate. The BLS OES concludes at the national level that the average hourly wage rate for crop workers is \$8.48 per hour. The USDA Farm Labor Survey (for nonsupervisory field and livestock workers combined), on which the AEW is currently based, at the national level was \$9.72. The USDA found that the average hourly wage for field workers was \$9.62 per hour. Since most H-2A employers hire workers to perform work in crops, these are the most relevant wage rates. (The USDA found an average of \$9.98 per hour for livestock workers, while the BLS OES found the somewhat lower average of \$9.92 per hour. Relatively few H-2A workers are livestock workers.)

### **b. State and Regional Average Wage Results**

Labor-intensive agricultural production is concentrated in only a few states even though it occurs throughout the nation. The USDA reports that California, Florida, Washington, Texas, Michigan, New York, and Oregon lead in the amount of land in fruit orchards. California alone accounts for about half of U.S. fruit and tree nut acreage (including berries), Florida over one tenth, and Washington close to one-tenth. California remains the major producer of fresh vegetables during the winter months. Florida, however, is the top producer of warm-season crops (e.g., tomatoes, peppers, snap beans); California, Florida, and Texas harvest the largest share of fresh vegetable and melon acreage.

(<http://www.ers.usda.gov/publications/VGS/apr06/vgs31301/vgs31301.pdf>). A study from the late 1990's noted that 20 counties in the United States account for over 50% of the dollar value of all fruit and tree nut production in the United States and 47% of the value of vegetables. These 20 counties were in just four states: California (13 counties), Florida (5), Arizona (1) and Washington (1). North Carolina has been the single largest user of H-2A workers in recent years.

The chart below shows that the BLS OES results in lower average wage findings for fruit and vegetable workers in these and other major, labor-intensive agricultural production states compared to the current H-2A program. In California, where perhaps 900,000 farmworkers work each year, the BLS OES concludes that wage rates for crop workers are on average 17.39% less than the wage rates currently required under the H-2A program.

#### **Comparison of Current H-2A Adverse Effect Wage Rate (USDA FLS Average Wage for Field and Livestock Workers Combined ) to BLS OES Average Wage for Crop Workers**

<b>State</b>	<b>USDA FLS H-2A AEW 2008</b>	<b>BLS OES Average (Crop workers)</b>	<b>USDA v. BLS</b>
<b>ARIZONA</b>	<b>8.70</b>	<b>7.45</b>	<b>-16.78%</b>
<b>CALIFORNIA</b>	<b>9.72</b>	<b>8.28</b>	<b>-17.39%</b>
<b>FLORIDA</b>	<b>8.82</b>	<b>8.43</b>	<b>-4.63%</b>
GEORGIA	8.53	7.95	-7.30%
IDAHO	8.74	9.95	12.16%
KENTUCKY	9.13	8.91	-2.47%

LOUISIANA	8.41	9.70	13.30%
MAINE	9.70	10.83	10.43%
<b>MICHIGAN</b>	<b>10.01</b>	<b>10.11</b>	<b>0.99%</b>
NEW JERSEY	9.70	10.2	4.90%
NEW MEXICO	8.70	6.74	-29.08%
NEW YORK	9.70	10.40	6.73%
<b>NORTH</b>			
<b>CAROLINA</b>	<b>8.85</b>	<b>8.30</b>	<b>-6.63%</b>
OHIO	9.90	9.70	-2.06%
OREGON	9.94	9.16	-8.52%
PENNSYLVANIA	9.70	10.1	3.96%
SOUTH CAROLINA	8.53	8.56	0.35%
TENNESSEE	9.13	8.92	-2.35%
<b>TEXAS</b>	<b>9.02</b>	<b>7.42</b>	<b>-21.56%</b>
UTAH	9.42	8.63	-9.15%
VIRGINIA	8.85	9.36	5.45%
<b>WASHINGTON</b>	<b>9.94</b>	<b>10.55</b>	<b>5.78%</b>
WISCONSIN	10.01	9.16	-9.3%

Washington State’s average wage under the BLS OES exceeds that of the USDA FLS, but, again, DOL would not require Washington State employers to offer the average BLS OES rate; the FLCDC wage levels would apply.

For the large majority of farmworkers in labor-intensive areas, the BLS OES survey also often results in lower average wage findings for crop workers than does the USDA FLS finding for field workers (i.e., omitting livestock workers from this aspect of the survey).

State	USDA FLS field worker average wage	BLS OES average wage for crop workers	Difference per hour	% Decrease (Increase)
Arizona	\$9.92	\$7.45	\$2.47	25%
California	\$9.56	\$8.28	\$1.28	13%
Florida	\$8.82	\$8.43	\$.39	4%
North Carolina	\$8.78	\$8.30	\$.48	5%
Oregon	\$9.87	\$9.16	\$.71	7%
Texas	\$8.38	\$7.42	\$.96	11%
Washington	\$9.87	\$10.55	-\$ .68	(7%)

DOL is proposing a special wage rate for sheepherding and some other livestock workers, rather than using the BLS OES data on livestock workers. If the BLS OES livestock workers’ average wage is compared to the current AEWR, the results vary by state. In Texas, where the 2008 AEWR is \$9.02 per hour, the BLS OES average hourly livestock wage is just \$7.70 per hour. In California, where the AEWR is \$9.72 per hour, the BLS OES average wage for

livestock workers is \$10.24 per hour. As explained below, the sheepherders and other range workers should be offered a wage rate based on the USDA Farm Labor Survey for the actual hours of work performed, rather than a low monthly rate that DOL currently uses and proposes to continue to use.

The USDA FLS analysis of a broad range of jobs (including supervisors) at California agricultural service firms (including farm labor contractors) also finds a higher average hourly wage rate than the BLS OES analysis of a broad group of California agricultural jobs (including supervisors) hired through agricultural service firms, which includes labor contractors.

<b>California Wage Rates</b>	Average Hourly Wage Rate
<b>BLS OES Farming, Fishing, and Forestry Occupations (45-0000)</b>	\$9.01
<b>USDA FLS Agricultural Service Workers (7/2007)</b>	\$10.00

## **9. The Foreign Labor Certification Data Center Methodology Is an Inappropriate Mechanism for the H-2A Adverse Effect Wage Rate**

### **a. The Resulting Wage Rates Would Be Unduly Low**

DOL proposes to use the Foreign Labor Certification Data Center. As explained above, the FLCDC relies on the BLS OES, which results in inappropriately low wage rates, but the FLCDC exacerbates this shortcoming significantly and is otherwise an invalid approach. That the resulting wage rates are low is obvious. The methodology would allow wages even lower than the BLS OES average, which is itself an unduly low wage rate. For example, in the important vegetable-growing area of Imperial County, California, the rates are as follows for crop workers:

**Area Code:** [20940](#)  
**Area Title:** EL CENTRO, CA  
**OES/SOC Code:** 45-2092  
**OES/SOC Title:** Farmworkers and Laborers, Crop, Nursery, and Greenhouse  
**Level 1 Wage:** \$7.41 hour  
**Level 2 Wage:** \$7.77 hour r  
**Level 3 Wage:** \$8.13 hour  
**Level 4 Wage:** \$8.49 hour

Not one of the four wage levels reaches the current California H-2A AEW of \$9.72 per hour, or even the 2007 rate of \$9.20 per hour (which was based on USDA Farm Labor Survey data from 2006). In fact, two of the wage rates fall below the state minimum wage of \$8.00 per hour.

In Kern County (where Bakersfield is located), one of the largest agricultural production areas in the country, the results for crop workers are:

**Area Code:** [12540](#)  
**Area Title:** BAKERSFIELD, CA (Kern County)  
**OES/SOC Code:** 45-2092  
**OES/SOC Title:** Farmworkers and Laborers, Crop, Nursery, and Greenhouse  
**Level 1 Wage:** \$7.39 hour  
**Level 2 Wage:** \$7.58 hour  
**Level 3 Wage:** \$7.76 hour  
**Level 4 Wage:** \$7.95 hour

Workers engaged in the grading and sorting work fare little better. In the Graders & Sorters occupation; two of the wage rates exceed the state minimum wage but none reach the USDA FLS average wage for the state's crop workers.

**Area Code:** 12540  
**Area Title:** BAKERSFIELD, CA (Kern County)  
**OES/SOC Code:** 45-2041  
**OES/SOC Title:** Graders and Sorters, Agricultural Products  
**Level 1 Wage:** \$7.73 hour  
**Level 2 Wage:** \$7.99 hour  
**Level 3 Wage:** \$8.26 hour  
**Level 4 Wage:** \$8.52 hour

In the southeastern part of North Carolina where many H-2A workers are hired (including in Duplin and Sampson Counties), the result is similar. The current AEWR is \$9.70 per hour.

**Area Code:** 3700002  
**Area Title:** BOS2 North Carolina  
**OES/SOC Code:** 45-2092  
**OES/SOC Title:** Farmworkers and Laborers, Crop, Nursery, and Greenhouse  
**Level 1 Wage:** \$6.14 hour  
**Level 2 Wage:** \$6.54 hour  
**Level 3 Wage:** \$6.94 hour  
**Level 4 Wage:** \$7.34 hour

In a major citrus growing area of Florida (including Hendry County), where the AEWR is \$8.82, the wage loss would be significant.

**Area Code:** [1200003](#)  
**Area Title:** BOS3 Florida

OES/SOC Code: 45-2092

OES/SOC Title: Farmworkers and Laborers, Crop, Nursery, and Greenhouse

Level 1 Wage: \$6.78 hour

Level 2 Wage: \$7.36 hour

Level 3 Wage: \$7.93 hour

Level 4 Wage: \$8.51 hour

In Yuma, Arizona, the AEW is \$8.70 per hour.

Area Code: [49740](#)

Area Title: YUMA, AZ

OES/SOC Code: 45-2092

OES/SOC Title: Farmworkers and Laborers, Crop, Nursery, and Greenhouse

Level 1 Wage: \$6.13 hour

Level 2 Wage: \$6.74 hour

Level 3 Wage: \$7.36 hour

Level 4 Wage: \$7.97 hour

The DOL's contention that the OES results in a geographic-specific wage that is accurate requires thorough investigation because it is highly questionable not only due to the methodology but based on the concrete results. Recently, an owner of a large Pennsylvania tomato operation, one of the largest in the Northeastern United States, held a press conference in which he discussed labor and immigration issues. He revealed that his farmworkers engaged in tomato picking on piece rates have earned an average of \$16.59 per hour. He generally employed 110 people in the field to harvest 2.3 million plants each season. Michael Rubinkam (Associated Press), "Major Grower Ends Crop, Lacking Workers," March 24, 2008; National Public Radio, "Immigration's Fallout: Fewer Fresh Tomatoes," March 26, <http://www.npr.org/templates/story/story.php?storyId=89099456&ft=1&f=1003>.

The employer, Fred W. Eckel Sons Farms Inc., is located in Clarks Summit, Pennsylvania in Lackawanna County. The FLCDC issued the following results:

**Area Code:** [42540](#)

**Area Title:** SCRANTON--WILKES-BARRE, PA

**OES/SOC Code:** 45-2092

**OES/SOC Title:** Farmworkers and Laborers, Crop, Nursery, and Greenhouse

**Level 1 Wage:** \$7.16 hour

**Level 2 Wage:** \$7.78 hour

**Level 3 Wage:** \$8.39 hour

**Level 4 Wage:** \$9.01 hour

The current AEW in Pennsylvania is only \$9.70 per hour. However, even the level 4 wage in the FLCDC is only \$9.01 per hour. The great discrepancy between this large employer's wages

(who presumably pays competitive piece rates locally) and the FLCDC wage levels suggests fundamental and serious errors that are endemic.

### **b. The Methodology for Setting Allowable “Wage Levels” Is Fundamentally Flawed**

Apparently, the wage-setting process occurs in the following manner, although this is not explained by DOL: DOL sets the wage levels using information from the Bureau of Labor Statistics Occupational Employment Survey (BLS OES). However, the public information reported by BLS OES on quartiles and average wage levels is not the same as the “wage levels” in the Foreign Labor Certification Data Center. DOL sets the Level I wage based on the average of the wages paid to the workers earning in the bottom one-third of the wage distribution range of wages in an occupation and geographic area. (For example, if there are 99 crop workers in a region, Level I is the average of the lowest-paid 33 workers.) The Level IV wage is the average wage paid to the workers earning in the top two-thirds of the distribution (not the top one-third). The two intermediate levels are created by dividing the difference between the first and fourth levels by 3, and adding three quotient to the first level and subtracting that quotient from the fourth level. Level 3 is equivalent to the average wage. Earlier, we discussed the inaccuracy in the data on which the levels are based. Here, we discuss the fundamental problems regarding the wage levels in the FLCDC. As explained below, employers will be permitted to select from one of the four wage levels.

This arithmetic formula for setting the wage levels is flawed for at least six reasons. It should not be used.

i. *First*, it is not appropriate in setting the adverse effect wage rate to choose a wage that is lower than the average. It is especially inappropriate to allow an employer claiming a labor shortage to offer a wage rate (such as level one and level two) that is at or just above average of the lowest one-third of workers.

As described above, DOL has recognized for decades that a broad measure of the labor market is needed to prevent adverse effect and that broad measure has been recognized as at least the average wage or a higher wage to compensate for the depression in average wages caused by the presence of undocumented workers and guestworkers.

In fact, the employers who claim a labor shortage should compete for labor by offering a wage higher on the average wage scale than the median or average. There are many U.S. workers in agriculture; some employers are succeeding in attracting and retaining them. Those employers that claim difficulty should meet the standards of the successful employers. Difficulty attracting job applicants should be solved by competing for workers through better job terms, not by offering wage levels that are paid to the lowest group of workers in the occupation.

This methodology is particularly inappropriate in agriculture, where, as described above in section 5(b), wage rates are substantially affected by the presence of large numbers of undocumented workers. The majority of farmworkers are undocumented. Most undocumented workers are willing to accept less than what U.S. workers will accept. Many employers are

paying undocumented workers less than what documented workers would be paid. Many employers are offering wage rates to their documented workers that are lower than they would offer if the large majority of the farm labor force was documented.

Selecting wage rates from below the average wage perpetuates and exacerbates the depressing impact of the hiring of undocumented workers. Indeed, as explained earlier, the adverse effect wage rate should be set at higher than the average wage to overcome the depressing impact of the hiring of large numbers of undocumented workers.

ii. *Second*, the methodology does not relate to skills or experience in agriculture and DOL has not made a showing there is any relationship between the FLCDC wage levels and reality. The proposed methodology for the wage levels is purely an arithmetical formula. The FLCDC simply chooses a range of wage rates on the lower end of the wage scale from which employers may choose.

DOL instructs employers to use the O\*Net system's list of "usual requirements," including the "Job Zone" regarding experience and job training, to determine which wage level to pay. The four wage levels, however, are not based on or even related to actual agricultural job requirements, experience or other job factors in agricultural jobs. DOL has not shown and cannot show that employers set wage rates based on such an analysis or that, even if such an analysis occurred, the particular wage rates in the levels bear any relation to reality. While DOL contends that the USDA FLS "does not provide refined data by skill level or experience" (p. 48 and 51), it has chosen as a proposed replacement a survey that also does not survey skills or experience.

iii. *Third*, this methodology virtually guarantees stagnation in piece rates and makes the adverse effect wage rate almost meaningless. It will lead to a perpetuation of low piece rates and earnings that only temporary foreign workers will accept.

Many agricultural jobs, such as harvesting citrus, are paid using piece rates. As explained above, examples abound where employers have kept piece rates constant or have barely changed them even as the broader market-rate wages and legislatively-determined minimum wages have increased. To the extent these employers comply with the law, they are often "building up" or supplementing the workers' earnings so that they average the minimum required rate per hour.

DOL's proposal in most places will decrease the required hourly wage rate compared to current law and enable employers to maintain current low piece rates even though generally farm wages have been increasing modestly. The minimum floor proposed by DOL is inadequate.

For example, in Hendry County, Florida the level 1 wage is \$6.78 hour, whereas the current AEW is \$8.82 per hour. If the employer has perpetuated low piece rates, it probably will be permitted to offer that same low piece rate year after year and merely guarantee the worker the lower wage, a cut of \$2.04 per hour from the current AEW (except that DOL states it would require at least the upcoming federal minimum wage of \$7.25 per hour). If the low piece rate is the local area's "prevailing wage" (under the H-2A definition), because local

employers tend to pay that rate and the work force is dominated by undocumented workers (or guestworkers), there will be no incentive for employers to improve the piece rate. If workers already are working at roughly the productivity that can be expected of a human farm labor force, their average earnings will not increase and their average hourly wage rates will stagnate. In this Florida example, piece rates are likely never to rise as long as undocumented workers or guestworkers are available. Their low average earnings also will be recorded in wage surveys and affect the wage level system; the lower one-third of the wage scale will remain extraordinarily low.

The wage rates need to be set higher to prevent undue harm from the tendency of piece rates to stagnate at the lowest possible wage rate. In addition, the piece-rate/productivity protection described above is needed to overcome stagnation in piece rates. Further, when law-abiding, competitive employers are increasing piece rates to improve productivity and worker earnings, those employers should not be undercut by H-2A employers who would be permitted to stagnate their piece rates.

*iv.* Fourth, the proposed system is unworkable for agriculture and the government. DOL proposes four wage levels for all jobs in agriculture, which are placed in four or five relevant categories, in 532 geographic areas. There could be 8,000 to 10,000 different wage rates. The system's complexity is not justified.

DOL would establish a system that it could not possibly monitor effectively. Thousands of agricultural employers could use the H-2A system and DOL would not possess the resources to investigate the validity of the wage-level choices made by all but a tiny fraction of employers. An investigation also would be unduly complex, time-consuming and costly. Investigating a single employer who chooses the level one wage would require extensive interviews with individual farmworkers to determine whether they were required to possess or in fact possessed previous experience, special skills, or other attributes that should have warranted a higher wage level. Employers would know that such a labor-intensive task would rarely be carried out by DOL and therefore would have a financial incentive to choose level 1 when hiring guestworkers regardless of the actual job requirements.

*v.* Fifth, the division of the regional and state labor markets into so many geographic and occupational sub-markets does not reflect any reality in the job market and would cause harm to both employers and workers. The BLS OES data are based on wages paid by farm labor contractors and other entities that support farms, but not on wages paid by farms and therefore represent a minority of the farm labor force. In fact, the NCS, on which the OES is based, does not survey any agricultural establishments, neither farms nor farm labor contractors. These facts suggest that there is no valid geographic criteria for BLS or DOL to base a determination about the boundaries of labor markets. The OES lists the wage results by statistical metropolitan area and a few nonmetropolitan areas. The fact that there may be statistical differences in wage survey results in these separate geographic areas of the BLS OES does not mean that they are valid reflections of the market reality for farmworkers or their employers.

*vi.* Sixth, breaking up the labor market into such narrow areas will also allow the high concentration of undocumented workers and guestworkers in many areas to disproportionately

affect the wage survey. As discussed above, when DOL chose its current AEWB methodology, thereby lowering wages by an average of 20%, it argued that a broader measure of the labor market was needed to minimize the impact of undocumented workers and guestworkers in local areas. DOL has no basis for reversing course.

vii. The wage levels incorporate wages paid to undocumented workers and guestworkers with no effort to ensure that the wage levels are set at levels that avoid adverse effect on U.S. citizens and lawful permanent resident immigrants.

### **10. Shepherders and Other Livestock Workers' Wage Rates Must Be Protected Against Adverse Effect and Against Dire Poverty**

DOL should cover shepherders and other livestock workers under the Adverse Effect Wage Rate and should end the discriminatory wage system that results in extremely low earnings for such workers. DOL allows some employers, particularly those in the Western Range and Mountain Plains Association, to pay special monthly rates. The workers tend to work extremely long hours, are on call 24 hours a day, reside in remote areas for weeks or months at a time and otherwise have made great sacrifices to meet the needs of employers.<sup>97</sup> Yet DOL allows H-2A employers to pay a monthly wage rate to such workers that falls far below any fair wage that would result from paying the workers for all of the hours of work per week and is completely unfair in light of their long hours, which on average, amount to 80 hours per week.<sup>98</sup> Among the many abuses faced by these workers, a common one is the failure to actually pay wages on a monthly basis and to hold the vast majority of these wages until the worker completes their H-2A contract.<sup>99</sup> Agricultural employers are exempt from federal overtime pay requirements, but they should not be permitted to avoid paying workers the appropriate wage rate for all hours of work. They should earn the AEWB for their actual hours of work, which are ordinarily far in excess of 40 hours in a week.

DOL should not permit employers to populate a job category with guestworkers (or undocumented workers) and claim that the "prevailing wage" accepted by these workers is adequate protection. The history of the Bracero program demonstrated that guest workers will accept low, stagnant wage rates and that the Government must respond by determining a wage that would have been paid if U.S. workers had accepted the job. The shepherders' food and other living costs also are not adequately met by the present H-2A system. The conditions for such workers are utterly inappropriate. See, e.g., Nick Reding, "El Último Vaquero Habla Español (The Last Cowboy Speaks Spanish)," *Outside Magazine*, August 2004; Evelyn Nieves, "The Job No Americans Want Isn't Getting Any Easier," *Washington Post*, April 3, 2006, p. A02 (during lambing season, they work 12- to 16-hour days, seven days a week).

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<sup>97</sup> In a recent survey of shepherders in Colorado, 82% of herders stated that they do not get a single day off during the entire year. They live under extremely isolated conditions where 90% stated they could not leave the ranch and 83% stated that they were not allowed to have visitors. Survey on file with Colorado Legal Services (2008).

<sup>98</sup> Shepherders in Colorado are paid the prevailing wage rate of \$750 per month. In a recent survey of such shepherders, they stated that they worked approximately 80 hours per week. Survey on file with Colorado Legal Services (2008).

<sup>99</sup> See, e.g., Exhibits X-7, X-8 and X-9 (complaints filed with U.S. DOL about the failure to pay wages monthly in violation of 20 C.F.R. § 655.102(b)(10); U.S. DOL Special Procedures I.B.6).

Currently, Wyoming H-2A employers, with DOL's approval, advertise H-2A jobs for shepherders at \$650 per month. If they only worked 40 hours per week, shepherders would work 173 hours per month (2080 hours per year/12 months). Consequently, they currently earn a paltry \$3.75 per hour if they only work 40 hours per week, but they work close to double that amount, and therefore are earning about \$2.00 per hour.

The current monthly rate's yield of less than \$3.75 per hour falls far below any wage survey that DOL has used or is considering using for other H-2A jobs. While the USDA FLS field and livestock combined average hourly wage (i.e., the AEW) for Wyoming is \$8.74 per hour, the USDA FLS livestock wage is \$9.22 per hour (Livestock - Mountain I - July 8-14, 2007).

The OES average wage rates (wage level 3) for livestock worker (Farm workers, farm and ranch animals), in Wyoming area are higher than the USDA FLS results. In Wyoming's geographic area BOS2, the average wage is \$15.62 per hour; in BOS3, it is \$14.38 per hour and in BOS4 it is \$14.80. (Even level 1, which is the wage paid to the lowest-paid one-third of livestock workers in the BOS2 area is \$12.36 per hour).

The most appropriate solution is to require that shepherders be paid based on the adverse effect wage rate applicable to other workers, which should be based on the USDA Farm Labor Survey for field and livestock workers combined. For example, shepherders in Wyoming, where the AEW is \$8.74 per hour, should be earning at least \$1515 per month based on a 40 hour work week, and should earn more when the workers work more than 40 hours per week, which is the ordinary requirement for shepherders. Further, the depression in wage rates caused by the hiring of guestworkers and undocumented workers at the low, DOL-approved rates should be overcome by requiring that shepherders be paid higher than the average on the range of rates in the USDA Farm Labor Survey.

We express concern about reports that some livestock workers who are currently entitled to the AEW (under the USDA FLS) are being wrongly classified as subject to the shepherders' special wage rate and therefore are being underpaid.

**D. The DOL's Stated Reasons For Its Proposed H-2A Wage Methodology Are Fundamentally Flawed: Permitting Employers to Pay US Workers Less to Purportedly Ward Off Illegal Immigration Practices by Employers is Contrary to Law and Arbitrary and Capricious**

DOL's rationale is contradictory. It contends that it should lower the wage rates required of employers in the H-2A program so as to protect U.S. workers. Surely, there are better ways to protect U.S. workers than to lower their wage rates and encourage the hiring of guest workers at the lowered wage rates. If taken to its logical conclusion, to establish an immigration control system that will succeed over the next decades, American should create guestworker programs at low wage rates for numerous occupations with the goal of persuading employers to hire guestworkers instead of undocumented workers. It's the wrong approach in any occupation. It is also directly contrary to the statutory requirement of protecting U.S. workers from adverse effects on their wages caused by the presence of guest workers and undocumented workers.

DOL argues that changes, including lowering wage rates, are needed to make the H-2A program “functional” and thereby persuade agricultural employers to use the program. (pp. 16-17). The analysis ignores a central point. A chief reason the employers do not use the H-2A program is that they have had a ready supply of documented and undocumented workers to perform agricultural work at the job terms offered. If the Government continues to increase its efforts to enforce the immigration laws, agricultural employers might have an incentive to use the H-2A program.

Under the Bracero program in the 1950’s, the wage rates were scandalously low but the hiring of undocumented workers was rampant. In 1954, in response the hiring of undocumented workers alongside the Bracero program (which Ernesto Galarza referred to as the “Wetback Obligato,”), the Government launched a large-scale immigration enforcement effort called “Operation Wetback.” Use of the Bracero program expanded rapidly afterward. Galarza, *Merchants of Labor* p. 69-71.

Under the H-2A program, in 1987 DOL changed the AEW formula to lower H-2A wage rates by an average of 20% in a single year, but employers gradually increased their hiring of undocumented workers to the present time, when more than one-half of farmworkers are undocumented. Lowering wage rates in the H-2A program harms workers but does not prevent hiring of undocumented workers.

The available evidence suggests that immigration enforcement and labor law enforcement increases employers’ likelihood of using the H-2A program. Presently, interest by employers in the H-2A program has expanded rapidly in the last few years and the number of applications and guestworkers is rising quickly. That interest clearly has been sparked by the Government’s increased efforts to enforce immigration laws.

Wage cuts are not necessary for immigration law enforcement; certainly DOL cannot show that wage cuts are necessary for immigration law enforcement. If Government began effectively enforcing the labor and employment laws, including the federal minimum wage, employers would have less incentive to hire undocumented workers and might use the H-2A program more, regardless of the H-2A wage rates. Employers, as an economic matter, may not be avoiding the H-2A program due to its wage rates (despite what some say to the newspapers), but rather seeking to hire undocumented workers so that they can pay a low wage that results from the unlawful hiring. See Allegretto Statement. If the latter opportunity evaporates, employers may hire more US workers and may use the H-2A program more, regardless of the wage rates.

Immigration enforcement ( some, including Prof. Philip Martin have surmised) might also cause some employers to collaborate to make more efficient use of available workers, utilize labor-saving technology, and improve wages and working conditions to maximize productivity and retain workers. Some of these actions may very well benefit U.S. workers and the nation. Easy access to foreign workers is notorious for distorting employers’ economic responses; DOL should recognize that its offer of low wages may simply perpetuate the distortion in the marketplace caused by the presence of undocumented workers (by allowing employers to pay the

depressed wage rates to legal guestworkers). Employers' complaints about the H-2A program's bureaucracy and job terms are wildly exaggerated; almost all who apply to use the program obtain approval from DOL to do so and manage quite well. Nonetheless, even if the H-2A program could be modified to improve its functionality so as to encourage its use by agricultural employers, lowering the program's wage rates is not necessary or appropriate.

Lowering U.S. workers' wage rates in the H-2A program would hurt U.S. workers, not help them. In many places in California, for example, employers that are paying an average of \$9.72 per hour would be permitted to hire guestworkers at the state minimum wage of \$8.00 per hour. A pay cut for U.S. workers of \$1.72, an 18% loss harms U.S. workers. Farmworkers' average earnings already are sub-poverty levels; imposing a wage cut would inflict much suffering on farmworker families as well as their communities. Such a pay cut is particularly harsh for low-wage workers at a time of rising costs caused by inflation.

DOL must recognize such a pay cut as an adverse effect within the meaning of the statute. In addition, such a pay cut will likely deter U.S. workers from continuing in or applying for such jobs. Currently, almost all new entrants to agricultural work are undocumented; it is quite likely that such pay cuts would further discourage U.S. citizens or lawful resident immigrants from seeking these jobs. The U.S. workers will lose their jobs to H-2A guestworkers unless they accept the low wages set by the desperation of undocumented workers. Such displacement is plainly an adverse effect. It will be no consolation to the displaced U.S. workers or their family members that, if DOL has its way, the employer offering the newly lowered wage rate would be employing a foreign worker legally.

DOL's contention that an "artificially too high" H-2A wage could harm U.S. workers is pure speculation. Farmworkers' wages are very low, about one-half of the average workers' wages in America. A substantial increase could be quite beneficial to all concerned. Prof. Philip Martin, an agricultural economist at the University of California at Davis who served on the U.S. Commission on Agricultural Workers, has said that farmworkers' wages could be improved substantially with only a minimal impact on the cost of groceries to consumers and that market forces could lead to positive changes by employers enabling them to absorb such increases. See, e.g., Rich Lowry, "Jobs Americans Won't Do?," *National Review Online*, March 14, 2006 (quoting Philip Martin). Guestworker programs, he has written, by making cheap foreign labor available tend to distort business responses to market forces. Martin & Teitelbaum, "The Mirage of Mexican Guest Workers," *Foreign Affairs*, Nov./Dec. 2001. In any event, the contention is irrelevant. The H-2A wage rates currently are not "too high," but rather too low and DOL does not propose to increase them.

DOL's contention that the wages must be taken into consideration in conjunction with other benefits required by the H-2A program does not justify slashing wage rates. DOL proposes to eliminate or substantially reduce most of the non-wage benefits available to farmworkers under the H-2A program. The wage rate cut certainly cannot be justified by complaining about the employers' cost of other employee benefits that DOL would also eliminate.

H-2A employers have it pretty good. They are exempt from paying Social Security Contributions and Unemployment Tax on H-2A workers' wages. 26 USC § 3301, 3306.

Virtually no other employer is permitted to save such costs of hiring workers. Agricultural employers under federal law are exempt from paying overtime and are not covered by the National Labor Relations Act, which prohibits employers from firing workers for union organizing. The fact that H-2A employers must provide housing and transportation costs to workers does not overcome these or other exemptions. Most employers in this country are expected to pay workers enough to enable them to afford housing, food, and transportation – basic needs in our society. And for most other kinds of workers, particularly those who do not migrate, they possess the resources and time to make arrangements for basic necessities; frequently that isn't possible for migrating farmworkers due to their circumstances and the unavailability of infrastructure in local areas to provide such necessities. That many agricultural employers have gotten away with paying farmworkers so little money that they cannot afford these basic items does not justify concluding that it is unfair to require such benefits under the H-2A program.

Many agricultural employers have been able to externalize the cost of employing people, forcing communities to absorb the cost of workers living in the fields, in garages, under overpasses, forcing government to pay for health care, and forcing workers and their families to subsist on annual incomes averaging less than \$15,000 per year. Employers' access to desperate, poor undocumented workers who cannot command decent wages or fringe benefits has warped the agricultural labor market. In the rest of our economy, we expect that employers will pay enough so that workers can afford shelter, food, and transportation. The H-2A program should require employers to pay the true cost of employing people in the American economy and society.

DOL ignores its own history and attempts to condemn us to past mistakes. The President's Commission on Migratory Labor in *Migratory Labor in American Agriculture* (1951) wrote: "When industrial employers were denied the immigrant workers they demanded, they were compelled, among other things, to develop working conditions and job standards compatible with the expectations of American workers. Farm employers of migratory labor, on the other hand, continue to offer jobs and working conditions that are no better and in many respects are worse than those offered three and four decades ago. Having failed to move forward on employment standards and finding that domestic labor does not respond readily to the working conditions offered, farm employers now ask for foreign laborers willing to accept the low standards they offer, or who are compelled to do so by 'dire necessity,' to use the words of the Country Life Commission of 40 years ago." (p. 22) "We have used the institutions of government to procure alien labor willing to work under obsolete and backward conditions and thus to perpetuate those very conditions." Written in 1951, the words remain applicable to DOL's proposal today. The Commission went on to ask:

Shall we continue indefinitely to have low work standards and conditions of employment in agriculture, thus depending on the underprivileged and the unfortunate at home and abroad to supply and replenish our seasonal and migratory work force? Or shall we do in agriculture what we have already done in other sectors of the economy—create honest-to-goodness jobs which will offer a decent living so that domestic workers, without being forced by dire necessity, will be willing to stay in agriculture and become a dependable labor supply?

Id. at 23. The answer was clear: “We must raise the standards and conditions of work in migratory farm employment and thereby eliminate the dependence by farm employers on poverty at home and misfortunate abroad as the foundation of the recruitment of their labor supply.” Id. at 24.

The Commission on Agricultural Workers made similar findings in 1992. More recent versions of the same admonition appear in Dawn Thilmany and Michael D. Miller, ‘The Dynamics of the Washington Farm Labour Market,’ in Findeis, Vanderman, Larson & Runyan, *The Dynamics of Hired Farm Labour*, (CAB International 2002), p. 90; and Richard Mines, *Family Settlement and Technological Change in Labour-intensive US Agriculture*, in *The Dynamics of Hired Farm Labour*, Findeis, Vanderman, Larson & Runyan (ed.), CAB International 2002, pp. 51-52. DOL drew similar conclusions in its own report, “U.S. Department of Labor Report to Congress: The Agricultural Labor Market – Status and Recommendations (2000).

## **E. Conclusion**

The Department of Labor has embarked on a low-wage strategy aimed at allowing employers to offer wage rates under the H-2A guest worker program that are based at the lower end of a wage scale in a sector dominated by vulnerable undocumented workers. Offering such a wage will harm U.S. workers.

The wage survey it has chosen to rely on, the BLS OES, offers no advantages to the current methodology except that it results in lower wage rates. In fact, it does not even survey the primary businesses that employ farmworkers: farms. Instead, the BLS OES surveys the farm labor contractors, a minority segment of the agricultural sector that has developed as a mechanism for farms to hire indirectly large numbers of undocumented workers at low wages. As if that were not bad enough, the underlying wage survey on which BLS OES relies (the NCS) does not even survey any agricultural employers at all. Consequently, it hardly surveys any farmworkers. The wage data are not representative of farmworkers’ wages; they are just low. In addition, DOL would manipulate this unrepresentative data into a complex system of four arbitrary “wage levels” in each of several separate occupations and more than 500 geographic locations. DOL has not only proposed a low-wage strategy but offered an unworkable system that would be manipulated by employers to pay the lowest of allowable wage rates regardless of the proper level. If the agency had any interest in enforcing the sliver of wage obligations that would remain, it has all but guaranteed that it would lack the capacity to do so due to the complex system it proposes.

DOL should be proposing a mechanism to confront the fact that the wage rates of the nation’s 2.5 million farmworkers have been depressed by the presence of hundreds of thousands, if not more than a million, undocumented farmworkers and tens of thousands of vulnerable guest workers. The H-2A program currently requires employers to offer an average wage based on surveys that include undocumented workers even though the statute obligates the DOL to prevent adverse effects on U.S. workers caused by the presence of undocumented workers and guest workers.

DOL should continue to use the USDA Farm Labor Survey's annual results for regional hourly average wage rates for field and livestock workers combined as the basis for its adverse effect wage rate under the H-2A program. If improvements are needed in wage surveys, the FLS is the best source to begin improvements. DOL should adjust its current methodology by compensating for the depression in wage rates caused by the employers' hiring of hundreds of thousands of undocumented workers. It should do so by requiring employers to pay a higher wage on the range of wages; H-2A employers should compete for labor by offering wage rates of businesses that are succeeding at hiring and retaining United States workers. There are ways to measure the impact of the hiring of undocumented workers and guest workers on farmworkers' wage rates. We suggest that H-2A employers should pay the highest of the 66 2/3d percentile or the average wage in the FLS survey of field and livestock workers combined.

## **V. HOUSING**

### **A. Employers' Obligation to Provide Housing**

#### **1. The Proposed Regulation Violates the H-2A Statute by Permitting Employers to Distribute Housing "Vouchers" Instead of Providing Housing to Workers**

The H-2A statute states: "Employers shall furnish housing in accordance with regulations. The employer shall be permitted at the employer's option to provide housing meeting applicable Federal standards for temporary labor camps or to secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation..." 8 U.S.C. §1188(c)(4). Congress made clear in enacting the current requirement in 1986 that it was continuing the obligation of H-2A employers to provide housing at no charge to either U.S. or foreign workers. U.S. House of Representatives, Judiciary Committee Report, House Report No. 99-682(I) to Immigration Reform and Control Act of 1986, P.L. 99-603 (1986) at p. 82. DOL's proposed regulation, contrary to this law, purports to offer an "additional option" for employers to meet the statutory obligation to furnish housing to workers. 73 Fed. Reg. 8554 (hereinafter "voucher system"). The proposed regulation at § 655.104 (d)(1)states:

The employer shall provide housing to those workers who are not reasonably able to return to their permanent place of residence within the same day through one of the following means...(i) Employer-owned housing...(ii) Rental and/or public accommodations...(iii) Housing voucher. Except where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for migrant farmworkers and H-2A workers seeking temporary housing while employed in agricultural work, the employer may satisfy the requirement to provide housing by furnishing the worker a housing voucher....

DOL's proposed permission to allow employers to provide a housing "voucher" does not comply with the statutory mandate to require H-2A employers to furnish housing; to the contrary, it does

the exact opposite - it eliminates outright the employer's obligation under the H-2A statute to provide housing to workers.

The employer's only concrete obligation under this new option is to provide workers with a "voucher" that could be used for "housing."<sup>100</sup> The voucher system apparently would impose on foreign and domestic workers the obligation to search for housing, locate housing, and make arrangements necessary to live in the housing. The worker would then pay for housing using the "voucher, or such other means, that is not redeemable for cash by the employee to a third party." Proposed regulation § 655.104(d)(iii)(C).<sup>101</sup> Giving workers vouchers to obtain housing is not the same as furnishing housing. We note that a "voucher" is not the same as a cash payment (or housing allowance) for housing, which, even if permissible under the proposed regulation, is not lawful under the H-2A statute.

Congress intended that H-2A employers actually provide housing, not that employers pay workers for housing the workers provide or obtain. Indeed, Congress expressly rejected just such a proposal when it passed the current law. The housing provision of an H-2A bill introduced in the House contained a provision that would have permitted employers to provide a housing allowance rather than "actual housing" for three years after the bill's passage. S.1200 (9/19/1985) (amended by S.Amdt. 612, passed 11/6/1986)(emphasis supplied). The bill Congress passed, the current statute at 8 U.S.C. §1188(c)(4) does not include such a provision. Congress' intent is clear. The employer's obligation to furnish housing means the obligation to provide or secure the housing itself free of charge. DOL's proposed regulation violates the statute by allowing H-2A employers to avoid the statutory obligation to furnish the worker with housing.

Furthermore, the H-2A statute does not give DOL any discretion to offer employers such an "additional option." The language of the H-2A statute is unambiguous and specific – it explicitly permits two options for providing workers with housing – an employer can either provide housing that meets Federal temporary labor camp standards, or provide rental or public accommodation housing that meets applicable local or state standards. Providing temporary labor housing, or securing rental or public accommodations housing are the employers' responsibilities under the statute. The voucher system unlawfully imposes on workers all of the employer's statutory obligations to "identify, locate and secure" housing.<sup>102</sup>

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<sup>100</sup> DOL incorrectly asserts in the preamble that "if acceptable housing cannot be obtained via the voucher, the employer is not relieved of his obligation to provide housing meeting the applicable safety and health standards and must either provide or secure housing for the H-2A workers." 73 Fed. Reg. 8554. There is no such requirement in the proposed regulation. In addition, the proposed regulation includes certain provisions theoretically limiting the use of housing vouchers. These vaguely-written provisions lack substance but, in any event, do not change the fact that the voucher system eliminates employers' statutory obligations to provide housing.

<sup>101</sup> The regulation also is notably devoid of any payment standard, i.e., there is no process to determine rental housing costs in the area or the rental amount that the employer must pay. Nor is there a method of regular payment, any requirement for a lease with tenant safeguards or term of occupancy, any guarantee that the presumed payment of money associated with the voucher will include all of the rent that is required and all of housing costs (e.g., utilities), or any requirement that housing actually must be available when needed.

<sup>102</sup> DOL recognizes that the voucher system shifts the burden of furnishing housing from the employer to workers. One of the "safeguards" of the voucher system requires the employer to make a good faith effort to assist a worker who requests assistance in "...identifying, locating and securing housing..." 73 Fed. Reg. 8554 (emphasis supplied). There is no standard to define good faith effort, no requirement that the worker be given notice of the

The requirements to both furnish the housing and provide it free of charge accomplish key underpinnings of the statute, i.e., ensuring that housing is actually available when the worker arrives and work commences, relieving the worker of the risk of not being able to locate housing and placing the burden of obtaining and furnishing housing on the employer, rather than the worker who will have obvious challenges in negotiating the rental housing market.

Finally, the failure to require inspection and certification of voucher housing violates the H-2A statute. All temporary labor housing must be inspected and certified to be in compliance with Federal OSHA or ETA labor housing regulations before labor certification is granted. The voucher system does not, and in all practicality cannot, provide a mechanism to have such “voucher housing” inspected and certified.<sup>103</sup>

DOL does not have the discretion to adopt this “additional option” because it has no authority to add options to the statutory methods of furnishing housing, because it effectively eliminates the employers’ statutory obligation to actually furnish housing, and because it would result in violation of the requirement that all housing be inspected and certified for compliance with housing regulations.

## **2. The Proposed Voucher System is Arbitrary and Capricious**

The voucher system is not a reasoned, rational option for providing housing to workers. The proposed regulation is without factual or legal support, is contrary to available evidence, and will result in violations of the H-2A statute, and H-2A and Wagner-Peyser regulations.

For more than four decades under the H-2A program and the predecessor H-2 program, DOL’s regulations and policies have consistently required employers to actually provide or secure housing for workers. See, e.g., 43 Fed. Reg. 10314 (1978), former 20 CFR § 655.202(b)(1); 32 Fed. Reg. 4570 (Mar. 28, 1967), former 20 CFR § 602.10a(b). DOL policy requires employers to provide housing that complies with Federal temporary labor housing standards through ownership or long-term lease, and, when an employer obtains rental housing for workers, DOL requires the employer to “...*make all the arrangements* and pay the rental fee directly to the owner or operator of the housing. H-2A Program Handbook, p. I-26 Chapter B(1)(b), p. 26. The burden, logically and consistent with Congressional intent, has been on the employer. DOL’s proposed voucher system represents a drastic departure from the law and its longstanding policies, which it proposes without adequate examination, factual support or analysis.

The critical failure of the proposed regulation is that it does not require employers to provide actual housing to workers. Beyond that underlying failure, and despite DOL’s assertion that workers’ rights to housing are protected by certain “safeguards,” the voucher system affords no protection to job applicants who are unable to conduct a housing search, and no assurance that

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“right” to assistance and no requirement that the worker is ensured housing is available.

<sup>103</sup> Since Wagner-Peyser regulations require that housing meets minimum federal, state or local standards, as applicable, before a job order can be placed in the clearance system for recruitment of U.S. workers, this deficiency also contradicts SWA mandates. See discussion below and 20 C.F.R. 654.400(a).

hired workers will in fact have adequate housing. The proposed regulations lack any explanation for creating this additional option. The explanation DOL does offer misses the point. 73 Fed. Reg. 8554. The “appreciation” by DOL that employers face obstacles when looking to build housing for workers is a justification, if at all, only for the existing option already provided by the statute, that is, to obtain rental housing or public accommodations for workers, that should be inspected and provided in advance of the workers arrival. It is not a justification for placing the burden of securing housing on the worker or for placing the risk of unavailability of housing on the worker. The “additional option” can be explained only if it is intended to allow the employer to escape the statutory obligation to furnish housing.

a. The Voucher System is Unworkable and Ambiguous

The idea that workers have the means to locate and secure their own housing is implausible and ignores the realities of the circumstances for both U.S. and H-2A workers. The barriers to farmworkers obtaining decent affordable housing are virtually insurmountable.

Many U.S. workers live long distances from the place of employment, and H-2A workers travel to the United States from other countries, such as Mexico or Thailand. Farmworkers do not have the necessary tools to perform a long distance housing search.

Many U.S. workers have limited English language skills and very few H-2A workers have English language skills. All H-2A workers and virtually all U.S. workers, living far away from the area where the work will be performed, without community ties, and having no means of identifying housing through newspaper advertisement, word of mouth or other methods will not readily be able to locate housing. The increasingly common use of internet resources is not a meaningful option for most such workers and even where it is an option, the housing information needed by these workers is either unavailable online or is not in the workers’ native language. Thus, linguistic, cultural, and accessibility barriers compound the logistical obstacles to workers being able to locate and secure adequate housing in advance of traveling for work.

The logistics of arranging to rent housing are not feasible under these circumstances. Rental properties require security deposits, and arrangements for utility payments, which also require deposits. The proposed regulations set no standards for the amount of rent that can be charged, whether additional payments can be required of the worker, or how or when security or utility deposits will be paid or by whom.

The proposed regulation does not require employers to ensure that workers have housing before they travel to the place of employment. Therefore, most workers likely will arrive without having arranged housing in advance. The regulation likewise does not require that employers provide housing to workers who have arrived for work but have no place to live. The unavoidable consequence will be workers who are homeless, temporarily or long-term, and workers who are forced to live in overcrowded, substandard housing.

These and other barriers, discussed below, make certain that even if workers do manage to obtain housing it is likely to be uninspected and uncertified, overpriced, substandard and overcrowded.

## b. DOL's Proposed "Safeguards" Are Illusory and Fail to Protect Workers' Rights to Housing That Meets Minimum Standards

The preamble to the regulations suggest that certain requirements and uses of vouchers operate as "safeguards" for workers who are entitled to free housing provided by the employer. 73 Fed. Reg. 8554. The proposed housing regulations, however, do nothing to ensure that workers are provided the housing to which they are entitled. Instead DOL would relieve employers of their statutory obligation to provide housing and ensure that workers will live in substandard conditions, or be homeless, and that U.S. workers will be discouraged from accepting otherwise suitable employment because of the lack of employer-provided housing.

First, the employer must "verify" that "housing meeting applicable standards is available for the period during which the work is to be performed, within a reasonable commuting distance of the place of employment, for the amount of the voucher provided, and that the voucher is useable for that housing." Proposed regulation §655.104. The regulation provides no guidance or standards for employer to make such an important verification.

Although the regulation says the employer must verify that adequate housing for the amount of the voucher is available, the proposed regulation does not mandate a standard or formula to determine the amount of the voucher. Most importantly, there is no requirement that the amount of the voucher fully cover the cost of housing a worker actually finds that meets minimum standards. There is no definition of the cost of housing or the payment standard for the voucher.

The proposed voucher system lacks information that would be needed to implement it even if it were lawful. There is no requirement for how and when vouchers will be issued. The proposed regulation offers no explanation of how the vouchers would actually be redeemed. There is no meaningful guarantee that the employer, or other entity, that supplies the voucher will in fact make the payment that would secure the housing, and no provision for workers who are evicted in mid-season because a payment that underlies the voucher has not been made by the employer. There is no requirement for a lease or lease term, or provision about how and when rent or utilities will be paid. Therefore, it is a virtual certainty that workers will have to live in substandard housing, contribute to the cost of housing that meets minimum standards, or remain homeless.

Also, workers will be vulnerable to exploitation by unscrupulous landlords who would demand payments in addition to the amount of the voucher. Workers, possibly with families including children, are in no position to refuse such demands. They are far from home with no support systems or ties to the local community. The reasons workers are willing to travel for employment are well-documented. Unemployment at home and the potential for higher wages at the AEW rate together with promises of free housing, combine to make H-2A employment attractive to both U.S. and H-2A workers. Sacrificing that work opportunity and bearing the cost of transportation home is not a viable option. Thus, workers are easy targets of such exploitation. The proposed voucher system creates risks of such problems but offers workers

and their families no clear assignment of responsibilities and no solutions or remedies to address them when they arise.

If the verification requirement is to have any substance at all, surely it must require that, at a minimum, the employer contract with landlords or motels that have suitable housing – for it to have real meaning, the employer must be required to secure that housing for the workers as the statute requires. If that does not happen, in areas where many workers seek such housing, the housing the employer has “verified” may no longer be available when specific workers attempt to secure it. That is, there is no guarantee that the housing the employer has “verified” will be available when the workers arrive. In short, the verification process does nothing to ensure that workers will in fact be able to secure acceptable housing.

Second, the voucher system creates a presumption that adequate housing in fact is to be had, a presumption for which DOL has no support and which directly contradicts available information. The proposed regulation prohibits use of the voucher system where the “Governor of the State has certified that there is inadequate housing available in the area of intended employment.” Requiring the Governor of a State to make a certification of inadequate housing turns reality on its head. Numerous studies, market analyses and anecdotal evidence all demonstrate that rural housing for farmworkers is in short supply, even to the point of being termed a rural housing crisis. As discussed further below, housing for farmworkers on the private market is largely unavailable, and what is available is often substandard.<sup>104</sup>

Moreover, the regulation lacks standards to guide a state Governor in deciding whether to issue such a certification. There is no system for requesting and obtaining the Governor’s certification, no assurance that a certification be obtained before employers attempt to use the voucher system, and no established recourse for workers if the Governor does not issue a certification. Without such standards, few if any state governors will issue a certification. Some states could require state legislation or rulemaking to provide standards. Without any recourse, workers will suffer the consequences. The “certification,” moreover, does not take account of variation in vacancy rates that exist from community to community and season to season, sometimes in a matter of weeks or within a relatively small area. There is no provision for when or how a Governor must make such a determination.

Third, an employer would have to make a “good faith effort” to assist a worker who requests help in identifying, locating and securing housing. Even here the employer is relieved of any responsibility unless a worker requests assistance. There is no requirement that a worker must be informed that assistance is available. Even if a worker does request help, the regulation does not say what constitutes an employer’s good faith effort. Arguably, it would be sufficient for an employer to just give a worker a list of motels or apartment buildings in the area, without any assurance that dwellings or rooms are available or affordable, or that anyone will recognize the voucher. As presented, this is a meaningless, unenforceable requirement.

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<sup>104</sup> See discussion below, § d. See also, Ex. H1, Housing for Farmworkers in New York: Analysis and Recommendations (2000) ; Ex. H2, Farmworker Housing Development Corporation Market Analysis – Woodburn Oregon (2007); Ex. H3 *No more sweet corn?* Montrose Daily Press, Colorado February 24, 2008.

The determination of whether there is inadequate housing and how an employer shall assist a worker in using vouchers both are tied to the definition of the “area of intended employment”. This is unworkable in either context. DOL proposes to tie a state Governor’s certification of inadequate housing to a substantially increased area of intended employment. The definition under the proposed regulation incorporates Metropolitan Statistical Areas (MSAs), which often encompass huge geographic areas and combine urban and rural areas. See Section VI.C. herein. In the context of determining whether adequate housing meeting minimum standards, MSAs, and consequently the certification, will have no meaning because of their size and the lack of any nexus between the location of the employment and location of housing. The area of intended employment as proposed is entirely unrelated to the actual location of any particular worksite. Given the size of many MSAs the certification would not in fact represent that housing would be available for employees of any particular employer. The same is true, therefore, of any assistance the employer might be obliged to provide a worker in locating and securing adequate housing. The area would incorporate large distances, different cities, counties, densely urbanized areas, potentially unknown and inaccessible to the employer or the employee. It also might require significant commuting time and distance. The proposed definition of area of intended employment makes both the Governor’s certification and the employer’s offer of assistance useless.

Finally, DOL refers in the preamble to allowing workers to “pool” their vouchers, as a sort of “safeguard” for helping workers secure housing. Pooling of funds is not likely to alleviate the difficulty in locating housing but is more likely to result in overpaying for crowded and substandard housing. In addition, DOL appears to place the burden for avoiding overcrowding by pooling vouchers on the workers, once again relieving employers of their obligation to provide housing that complies with applicable safety and health requirements.

#### c. DOL’s Rationale for the Voucher System is Improper

The sole rationale DOL offers for the voucher system is that “[t]he Department appreciates the obstacles faced by employers when looking to build housing for farmworkers, including zoning restrictions, resistance from the community, cost and the Federal housing standards to which the housing must be built.” 73 Fed. Reg. 8554 (2/13/2008). This rationale exposes DOL’s intent to give employers, including those who already possess farmworker housing, a means of avoiding Federal housing standards for temporary labor housing, as noted above.

Inspection and certification of voucher housing, moreover, is impracticable. As discussed above, few workers if any will be able make housing arrangements in advance of arriving at the workplace. The employer will not be able to identify the location of housing to have it inspected and certified before occupancy, much less 30 days in advance. As discussed below, failing to require inspection and certification violates the H-2A statute and regulations, and contradicts SWAs requirements for circulating a job order for recruitment of U.S. workers.

Shifting responsibility for ameliorating substandard conditions from employers to workers is another indication of DOL’s improper motivation to reduce employers’ responsibilities for ensuring housing that meets applicable standards. DOL states that “Workers may ‘pool’ the housing vouchers to secure housing...but such pooling may not result in a

violation of the applicable safety and health standards.” 73 Fed. Reg.8554. Workers are far more likely than employers to be exploited in the process of obtaining housing or ensuring that it does not violate applicable safety and health standards. Ample evidence shows that even under the existing regulations farmworkers throughout the country are subjected to overcrowded and substandard conditions, and cannot exercise control over those conditions without subjecting themselves to threats, retaliation, termination and worse conditions. The employers, not the workers, possess the economic power in the marketplace to provide safe, sanitary housing, and the Department should be insisting that the employers satisfy their demand for migratory labor by offering housing and other conditions that attract and retain a productive, healthy labor force.

The voucher system thus impermissibly weakens important worker protections while eliminating employers’ obligations under the H-2A statute.

d. The Voucher System Fails to Provide the Essential Minimum Protections of Existing Voucher Programs While Incorporating their Weaknesses

The Department proposes to allow employers to provide housing vouchers but does not attempt to establish a viable voucher system or incorporate its proposal into an existing system. DOL fails to adopt procedures and protections required of a housing voucher system, such as the the Section 8 housing voucher system overseen by the Department of Housing and Urban Development and operated by local Public Housing Authorities. Despite its procedures and protections, none of which appears in the DOL proposal, there is no dispute that the Section 8 program has long waiting lists for eligible applicants, has payment standards that often are insufficient for the rental demand in the market, cannot account for vacancy rates, does not guarantee that eligible tenants actually secure housing, places time limits on obtaining qualified housing that often must be extended or simply lapse without the tenant having been successful in finding decent, affordable housing, is underfunded and extremely competitive, in some areas has a dearth of willing landlords, in some circumstances has been used to provide substandard housing, has been exploited by landlords who demand under the table additional side payments from tenants who pay them under duress and are afraid to complain for fear of losing their housing and their vouchers, and does not come close to meeting local demand for housing that is decent, safe and sanitary, affordable and available to low income people.

Under Section 8, landlords who accept vouchers are guaranteed payment of a portion of rent from public housing authorities (PHAs) with which they enter written contracts that set forth the duties and obligations of the PHA and the landlord. Landlords similarly are required to enter lease agreements with particular requirements regarding landlord and tenant duties and obligations, rental amounts, deposits, utilities, related rights, due process and hearing requirements when there are disputes, housing quality standards, state eviction procedures and more. There are regulations and handbooks that establish the requirements for PHAs, landlords and tenants and there is no guarantee that applicants will not face discrimination, or that housing will be available for them, even with procedural safeguards and a bureaucracy to protect them.

The additional option proposed by DOL has no such requirements and no such safeguards or guarantees, and no guidance for how such “vouchers” are supposed to be provided, distributed, managed, or redeemed, except that they cannot be cashed by the worker. There is no

oversight, no provision for rights and responsibilities, and no assurance of due process. Any “verification” will be elusive. Migrant farmworkers are not competitive in the existing Section 8 housing voucher program due to discrimination, because they need housing for limited periods of duration, during different times of the year, cannot afford security deposits for rent and utilities, often have language and other barriers making it difficult if not impossible to negotiate the market and the bureaucracy.

e. The Voucher system is Arbitrary and Capricious In Light of Current Housing Availability and Substandard Housing Abuses

The proposed regulation allowing an employer to provide housing vouchers to H-2A workers eliminates the requirement that all housing for H-2A workers must meet health and safety standards. Although the employer would need to verify that available housing meeting those standards exists, the employer is not required to ensure that the employee lives in that housing, even if the worker requests and receives employer assistance in securing housing. Proposed 20 C.F.R. § 655.104(d)(iii)(A-B). Given the poor quality of housing available in rural areas, and in particular to farmworkers, the proposed regulation is likely to lead to many more H-2A workers living in substandard living conditions that do not comply with federal, state, or local regulations or overpaying for crowded housing.

DOL is well aware of the fact that farmworkers throughout the country often are forced to live in dilapidated housing conditions that threaten the lives, health and safety of its occupants, regardless of whether they are families or unaccompanied workers. Health and safety standards, therefore, cover such requirements as potable water, effective sewage disposal, minimum square feet for living areas, privacy for families, window screens, sufficient heat, functional plumbing and electricity, adequate toilets and bathing facilities, decent cooking and eating areas and facilities, trash disposal, fire safety, insect and rodent control, proper bedding, and other housing conditions that most of us are privileged to take for granted. *The Human Cost of Food, Farmworkers’ Lives, Labor, and Advocacy*,<sup>105</sup> relates this long standing story. “Farmworkers are among the worst housed groups in the United States. After long hours toiling in the fields, few farmworkers can look forward to a warm shower, clean laundry or a room to call their own. Even a decent supper is difficult to come by if the stove is broken, the refrigerator does not work, or the place lacks a kitchen altogether. The deplorable housing conditions experienced by many of the nation’s migrant and seasonal farmworkers [and their families] have been described in journalistic accounts. . .” The author notes that without the H-2A inspection certification growers would have little incentive to meet basic housing standards. These standards must be constantly and vigorously enforced by DOL.

Rental housing available to farmworkers is generally substandard. That most housing provided to H-2A workers must comply with federal standards for temporary labor camps under the current regulations, 20 C.F.R. § 655.102(b)(1)(i and iii) often has meant that H-2A worker

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<sup>105</sup> Holden, Christopher, Chapter 6, pp. 169, 180, *Bitter Harvest, Housing Conditions of Migrant and Seasonal Farmworkers*, Thompson, Charles D. and Wiggins, Melinda F., Editors, *The Human Cost of Food, Farmworkers’ Lives, Labor, and Advocacy*, University of Texas Press, Austin, c. 2002; AARP and Housing Assistance Council, *After the Harvest: The Plight of Older Farmworkers* (1987); National Advisory Council on Migrant Health, *Losing Ground: The Conditions of Farmworkers in America* (1995) at p. 30

housing is generally of higher quality than that available to U.S. workers.<sup>106</sup> Even where sufficient rental housing is available to farmworkers, the quality tends to be low. In a survey conducted by the Housing Assistance Council, 15% of farmworkers lived in mobile homes, and 44% of those homes were found to be severely or moderately substandard.<sup>107</sup> Among all types of farmworker housing surveyed, 22% had serious structural problems, 15% had problems with the roof, 22% had holes in the walls, and 19% had unsanitary conditions, including rodent or insect infestations.<sup>108</sup> In more than half of the housing surveyed, there was no access to laundry facilities, which is critical for farmworkers because of their potential exposure to pesticides. Twenty-two percent of units surveyed had a major appliance either missing entirely or broken.<sup>109</sup>

The California Department of Housing and Community Development (DHCD), e.g., published a report in March 2008 entitled “California’s Deepening Housing Crisis”. The report chronicles high population growth rates and tightening housing markets in California and makes it very clear that housing production has not kept pace with housing need and that housing needs are particularly severe for low income households and renters throughout California. The study notes a growing inequality in earnings for low-income households and indicates that 4 out of 10 of all California households are rentals, more than a ¼ of whom pay more than half of their income on rent. “In 2002, almost half a million of California’s working families were ‘officially’ poor with incomes below the federal poverty level,” and many more do not have an adequate standard of living. Overcrowding is a serious problem among low-income households and there has been a dramatic diminution in the availability of licensed farmworker housing, while the number of farmworkers has dramatically increased. “Farmworkers and their families cope with substandard housing conditions fraught with serious health and sanitation problems. To avoid harassment, they often live out of sight in undeveloped canyons, fields, squatter camps and back houses.” This is hardly a housing market into which H-2A workers can be dropped and expected to use “vouchers” to locate decent, affordable housing. It is most definitely a housing market in which H-2A workers will be forced to compete for the crumbs of substandard, overcrowded, dangerous and unhealthy living conditions.<sup>110</sup>

The current H-2A regulations, however, also have failed to protect workers from substandard housing conditions. Rather than improving this deficiency, the proposed regulations increase the likelihood that H-2A workers will live in housing which is dangerous to their health, safety and wellbeing. Evidence of violations of existing housing protections abound. In 2004 Global Horizons, Inc. received approval to bring in H-2A workers into Washington State. Global promised to house workers in the Clarion Hotel in Yakima. Global instead housed workers in a number of alternate locations, none of which had been approved by the State Department of Health. Global admitted after investigation that the alternative housing was not in conformance with applicable rules and regulations and that the sewer system in one location would not support the number of workers being housed. Another location lacked cooking and laundry facilities.

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<sup>106</sup> Ex. H4, Ellen Phelps, *North Carolina Migrant Housing and Safety Standard: An Empirical Assessment of Compliance and Enforcement Statistics*, 2006.

<sup>107</sup> Housing Assistance Council, *Migrant and Seasonal Farmworker Housing*, September 2003, p. 1

<sup>108</sup> *Id.* at 2.

<sup>109</sup> *Id.*

<sup>110</sup> Exhibit H5, California’s Deepening Housing Crisis.

Twenty-four percent of housing stock in rural areas is rental property.<sup>111</sup> Rural housing quality tends to be low, especially for minority residents, who are three times more likely than white rural residents to live in substandard housing.<sup>112</sup> Overcrowding is a common and disproportionate problem for rural Hispanic residents.<sup>113</sup> There has been a recent dramatic increase in the number of immigrants living in rural communities in the United States, which has strained already limited housing supplies and resulted in poorer quality of available housing.<sup>114</sup>

Housing shortages for migrant farmworkers are the norm.<sup>115</sup> A 2002 study in Washington State estimated 46,659 new units for migrant and seasonal farmworkers were needed.<sup>116</sup> Nationally, it has been estimated that there is a shortage of 800,000 affordable housing units for farmworkers.<sup>117</sup>

The lack of supply of rural rental housing on the private market generally is a barrier to farmworkers obtaining housing.<sup>118</sup> Landlords have little interest in renting to persons on such a short-term basis.<sup>119</sup> Where housing is in short supply, whether for a lack of available units or the inability to access available housing, farmworkers are forced to live in overcrowded situations.<sup>120</sup>

Many farmworkers tell the story of experiencing such substandard conditions. In New York, where growers frequently do not provide housing, overcrowding in rental units led to overflowing sewage and contamination of local groundwater.<sup>121</sup> Farmworkers in Washington State resorted to camping in dangerous conditions when housing was not available. Affidavits from workers describe lack of food storage and cooking facilities, bathing in cold rivers, and vulnerability to wild animals.<sup>122</sup> Other workers have congregated in local parks and slept in cars.<sup>123</sup> Housing staff from farmworker service agencies could not find housing for homeless workers.<sup>124</sup> More than half of 180 farmworkers hired under a contract with the Northwest Treeplanters and Farmworkers United (“PCUN”) were unable to find suitable housing, and many

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<sup>111</sup> Housing Assistance Council, *Housing in Rural America*, March 2006, p. 2.

<sup>112</sup> *Id.* at 3.

<sup>113</sup> *Id.*

<sup>114</sup> Housing Assistance Council, *Immigration and Housing in Rural America*, September 2007, p. 3.

<sup>115</sup> Housing Assistance Council, *Housing for Families and Unaccompanied Migrant Farmworkers*, August 1997 (identifying shortages for farmworkers in South Central Wisconsin).

<sup>116</sup> State of Washington, Department of Community, Trade and Economic Development, *Farmworker Housing in Washington State: Safe, Decent and Affordable*, March 2005, p. 8.

<sup>117</sup> Testimony of Robert A. Rapoza, National Rural Housing Coalition, before the Senate Banking, Housing and Urban Affairs Committee Subcommittee on Housing and Transportation, September 25, 2002, p. 3.

<sup>118</sup> *Id.* at 7.

<sup>119</sup> *Id.* at 4-5.

<sup>120</sup> Ex. H4 *Migrant and Seasonal Farmworker Housing* at 1 (finding 52% of farmworker housing units surveyed were overcrowded).

<sup>121</sup> Ex. H1 Rural Opportunities, Inc., *Housing for Farmworkers in New York: Analysis and Recommendations 2000*, October 2000, p. 7.

<sup>122</sup> Ex. H6, Declaration of Teresa Bacilio, February 16, 2007; Ex. H7, Declaration of Maria Florentina, February 15, 2007; Ex. H8, Declaration of Fabiola Nieves, February 21, 2007; Ex. H9, Declaration of Esthela Rios, February 21, 2007; Ex. H10, Declaration of Rocio Gonzalez.

<sup>123</sup> Ex. H11, Declaration of Julia Renteria, April 18, 2007; Ex. H12, Declaration of Maria Velasquez, April 20, 2007.

<sup>124</sup> Ex. H10, Declaration of Rocio Gonzalez

were unable to find any housing at all, despite ongoing efforts by PCUN staff to locate such housing.<sup>125</sup>

Farmworkers in California have similarly experienced unhealthy and dangerous living conditions documented in litigation and studies. A recent report prepared by Don Villarejo and Marc Schenker for the University of California at Davis<sup>126</sup> indicates that the demand for farm labor has increased in California while the supply of employer provided housing has declined and that farmworkers have little choice but to reside in substandard or crowded units including garages, sheds, barns and temporary structures, citing studies showing that nearly half of farmworker dwelling units are overcrowded and nearly one third severely overcrowded. Many are irregular structures not intended for human habitation and many lack plumbing or food preparation or both. The study also notes that housing costs have skyrocketed, making housing unavailable to farmworkers.

### **3. The Voucher System Will Have an Adverse Effect on U.S. Workers**

The H-2A statute and regulations require employers to recruit U.S. workers before labor certification is granted for H-2A workers. The law further requires that worker housing be identified, inspected and certified prior to and as a condition of granting a labor certification. 8 U.S.C. 1188(c)(4). The proposed regulation and the inspection requirements are in conflict.

Many U.S. workers considering employment with an H-2A employer migrate and need housing at the work site. These U.S. workers will have to decide whether to accept an offer of employment without knowing where or even whether they will have housing. That fact alone will discourage U.S. workers from accepting employment. In addition, as discussed in more detail below, the proposed regulation eliminates the requirement that housing be provided free of charge from the contents of job offers. The prospect of being without housing, or having to pay for housing out of pocket, will be a strong deterrent for workers to accept a job that requires the worker, possibly with his family, to migrate for work.

In *Working Poor: Farmworkers in the United States*,<sup>127</sup> the authors conclude that the availability and condition of housing are critical aspects of farmworkers' choice to migrate for work. Nearly all farmworkers the authors interviewed considered the availability of housing key to choosing to travel for work. The condition of housing was also very important. Thus, the lack of certainty about housing, and the lack of information about charges for housing, will have an adverse effect on recruitment of U.S. farmworkers interested in agricultural employment.

In addition, U.S. workers are potentially subject to less favorable treatment than H-2A workers as a result of the voucher system. Since U.S. workers are the first to be recruited and hired, employers are more likely to require U.S. workers to use the voucher system to obtain housing. Employers will reserve any housing it already has in anticipation of increasing time

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<sup>125</sup> Ex. 13, Declaration of Ramon Ramirez.

<sup>126</sup> Villarejo and Schenker, Environmental Health Policy and California's Farm Labor Housing, A Report Prepared for the John Muir Institute on the Environment, University of California, Davis, October 2006.

<sup>127</sup> Griffith, D, and Kissam, E., chapter 9, *Working Poor: Farmworkers in the United States*, Temple University Press, c. 1995.

pressures that will require specifically identified housing to be inspected and certified. Thus, H-2A workers hired after labor certification are more likely to benefit from such reserved housing.

Furthermore, unscrupulous employers who prefer an H-2A work force<sup>128</sup> undoubtedly will use the voucher system to discourage U.S. workers. Consequently, U.S. workers will suffer adverse effects and unequal treatment in recruitment and benefits under the voucher system.

## **B. THE H-2A STATUTE REQUIRES THAT EMPLOYERS PROVIDE HOUSING FREE OF CHARGE AND THAT INFORMATION MUST BE COMMUNICATED TO WORKERS IN THE CONTENTS OF JOB OFFERS**

The Immigration and Nationality Act mandates that H-2A employers provide free housing: 8 U.S.C. § 1188 (c)(4). When Congress revised the former H-2 Program to create the H-2A program, it required that employers provide housing at no charge to workers, continuing a longstanding obligation that had been in the form of a regulation. “Under current regulations, H-2 agricultural employers are required to provide workers with free housing. The Committee bill continues this basic policy.....” House Judiciary Committee, Conference Report, House Report No. 99-682(I), regarding , Immigration Reform and Control Act, P.L. 99-603, p. 82 (1986). DOL’s proposed regulations weaken and eliminate protections that ensure the continuation of the employer’s obligation to provide housing free of charge to workers, and that this benefit is communicated to workers.

DOL deleted language from the regulation dictating the Contents of Job Offers. Currently, § 655.102(b)(1) Contents of Job Offers, states plainly employers’ obligation to provide workers who are not able to return to their residence with housing “without charge to the worker.” This regulation further specifies that the employer must pay directly to the owner or operator any charges for rental or public housing. 655.102(b)(1)(iii) and (iv). Under the proposed regulation, this information would not be provided to job applicants.

All of an employer’s recruitment efforts, both through newspaper advertising and circulating job offers through the Employment Service must contain all of the details required in the job offer. Job applicants rely on the contents of that job offer in making a decision about whether to accept employment. If the job offer does not clearly and unambiguously inform U.S. workers of such an important benefit as free housing, far more U.S. workers are likely to reject a good employment opportunity due to lack of information.

DOL is attempting to eliminate or dilute the free housing requirement. The language “without charge to the worker” is completely deleted from 655.120(b)(1). Although the language is included in 655.105(e)(2): Assurances and obligations of H-2A employers, workers will not be informed of the requirement, and the requirement is weakened. Thus, the proposed regulations diminish and dilute the free housing requirement in contravention of the statutory requirement to provide free housing, and in contravention of the requirement that the regulations not have an adverse effect on the recruitment of U.S. workers. DOL must retain all the language in the

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<sup>128</sup> See discussion, Recruitment herein.

current regulations regarding free housing, including in the Contents of Job Offers advising job applicants that the employer is required to provide housing free of charge.

**C. All H-2a Housing Should Meet Or Exceed Minimum Federal Standards (20 CFR 654 Or 20 CFR 1910.142) Or Applicable State Or Local Standards for the Housing of Agricultural Labor, *Whichever Are More Protective of Workers' Health, Safety and Sanitation.***

**1. The Proposed Change in the Application of H-2A Housing Standards from “Employer-Provided” to “Employer-Owned” Housing Will Result in the Wholesale Exemption Of H-2A Housing from the Minimum Federal Standards for Housing of Agricultural Workers. [Proposed 20 CFR 655.104(d)(1)(i)]**

Historically, all “employer-provided” housing has been subject to the full set of federal health and safety standards for temporary labor camps (OSHA or ETA). Congress has mandated this protection for all housing that H-2A employers “provide” to their workers. INA 218(c)(4).

DOL has interpreted the term “employer-provided housing” to include “housing which is owned or leased through long-term arrangements by the employer for housing temporary agricultural workers.” *H-2A Program Handbook*, ETA No. 398, 53 FR 22081 (6/13/1988); cf. 2<sup>nd</sup> Ed. Revised “Draft” (12/2003), p. C-13. [“H-2A Handbook”] Pursuant to current H-2A regulations, all employer-provided housing must meet federal standards imposed for temporary labor camps. 20 CFR 655.102(b)(1)(i). However, in the absence of applicable local or state standards, DOL allows other categories of habitation, such as “rental or public accommodation” type housing, to meet local standards for such housing. 20 CFR 655.102(b)(1)(ii).

In proposing this new category of “employer-owned” housing -- to replace “employer-provided” housing -- it is evident that DOL intends to restrict the type of employer-furnished housing that will be subject to the minimum federal standards for temporary labor camps (OSHA or ETA). The intended result is contrary to the statutorily-mandated federal inspection standard for housing furnished by H-2A employers. INA 218(c)(4).

This change would result in the wholesale exemption of H-2A housing from the minimum federal standards when employers discover that the federal standards (OSHA or ETA) will only be applied if they technically “own” the furnished housing. As the current DOL definition acknowledges, employers often “provide” housing for temporary agricultural workers by leasing labor camps through arrangements with fellow employers and others. The proposed H-2A regulatory changes offer no justification for exempting such temporary labor camps from the minimum federal housing standards, solely due to the H-2A employer lacking a technical “ownership” interest in the labor camp. Modern agricultural employers possess sufficient sophistication to readily transfer “ownership” of any H-2A labor camp to a relative, corporation, or other “straw man” in order to evade the newly proposed regulation affecting “employer-owned housing.” Even without transferring “ownership” of a labor camp, employers in the same geographic area could simply agree to exchange labor camps and house their respective workers in the other’s camp in order to evade the statutory requirement of meeting federal standards for temporary labor camps. Also, given the growing trend toward utilization of the H-

2A program by farm labor contractors – who rarely “own” housing – the proposed regulation would greatly decrease the likelihood that workers housed by labor contractors would be protected by the minimum federal standards for temporary labor camps.

## **2. DOL’s Regulation Allowing “Rental and/or Public Accommodation” Housing Options Fails to Ensure that Such Housing Complies with the Minimum Federal Standards for Temporary Labor Camps. [Proposed 20 CFR § 655.104(d)(1)(ii)]**

The H-2A statute allows an employer to furnish “rental and/or public accommodations or other substantially similar class of habitation” *provided that*, “in the absence of applicable local or State standards, Federal temporary labor camp standards shall apply.” INA 218(c)(4). Congress determined that, in the absence of state or local standards which are “applicable” to temporary labor camps, DOL is compelled to require H-2A employers to furnish labor housing that meets, at a minimum, the federal temporary labor camp standards.

The proposed DOL regulations do not explicitly implement this statutory mandate. Instead, the proposed language implies, incorrectly, that all such non-employer-owned housing need only comply with “local standards *for such housing*.” [Proposed 20 CFR 655.104(d)(ii)] This agency interpretation of the federal statutory mandate would impermissibly subject temporary agricultural workers to housing conditions that are substandard in relation to the federal standards for labor camps.

Federal law also requires employers seeking temporary alien agricultural labor certification to demonstrate that they have attempted to recruit U.S. workers by circulating job offers through the interstate employment service system operated pursuant to the Wagner-Peyser Act. INA 218(b)(4). Applicable Wagner-Peyser regulations require all employers recruiting workers through the intrastate or interstate clearance system to assure “the availability of no cost or public housing *which meets the Federal standards* and which is sufficient to house the specified number of workers requested through the clearance system.” 20 CFR § 653.501(d)(2)(xv) and (e)(1). [Emphasis added.]

DOL standards for housing agricultural workers recruited through the clearance system have long recognized “[t]he experience of the employment service...that employees so referred have on many occasions been provided with inadequate, unsafe, and unsanitary housing conditions.” 20 CFR § 654.400(a). Consequently, DOL has determined “that recruitment services shall be denied unless the employer has signed an assurance, a preoccupancy inspection has been conducted and the ES staff has ascertained that, with respect to intrastate clearance, if the workers are to be housed, the employer’s housing meets or, with respect to interstate clearance, that the employer will provide housing for the workers which meets either the full set of standards set forth at 29 CFR § 1910.142 or the full set of standards set forth in this subpart.” There is no exception in this mandate to comply with applicable federal standards for “rental and/or public accommodation” housing. 20 CFR § 654.400(b).

This requirement that employers comply, at a minimum, with federal temporary labor camp standards in furnishing housing to agricultural workers recruited through the interstate employment service system is long-standing agency policy. The DOL publication, “The

Agricultural Recruitment System: An Employer’s Guide to Hiring Temporary Agricultural Workers,” September 1992, Appendix D, noted the following “Special Instruction” to employers utilizing the ARS system:

“Housing Facilities must comply with:

- a. The minimum standards found in ETA 20 CFR 654, or OSHA 29 CFR 1910.142 (if applicable), or
- b. State or local laws or regulations regarding safety, health, and sanitation, *if they are more stringent than DOL Regulations.*” [Emphasis added.]

There is no statutory authority, or regulatory precedent in the interstate clearance system, for DOL to allow an exception for “rental and/or public accommodations or other substantially similar class of habitation” from the mandate that employers using the system furnish housing that meets, or exceeds, the minimum federal standards applicable to temporary labor camps.

The language of the proposed DOL regulations purports to allow H-2A employers to furnish alternative housing if it merely “meets applicable local standards *for such housing.*” [Emphasis added.] This provision must be clarified to comport with the legislative mandate, as well as stated DOL policy “to deny its intrastate and interstate recruitment services to employers until the State employment service agency has ascertained that the employer’s housing meets certain standards.” 20 CFR § 654.400(a). The proposed H-2A regulation must acknowledge and clarify that the “certain standards” mandated are “the full set of standards set forth at 29 CFR 1910.142 [OSHA] or the full set of standards set forth in this subpart.” 20 CFR 654, Subpart E – Housing for Agricultural Workers, 654.400(b) As proposed, the regulation could be interpreted to allow “rental and/or public accommodation” housing that merely complies with a local or state standard *pertaining to such housing*, such as a local rental occupancy code or state motel licensing standard. This interpretation would result in temporary workers being housed in unsafe and inadequate housing conditions.

State and local occupancy codes that were not intended to be “applicable” to temporary labor camps must not be permitted to establish the minimum standard against which the safety and adequacy of employer-furnished H-2A housing is measured. For example, DOL has asserted that, “Normally, rental housing would consist of a commercial, motel-type accommodation for transients.” “H-2A Program Handbook,” 53 FR 22081 (6/13/1988). Motels typically do not include, and are not required by state motel licensing codes to include, the facilities that migratory agricultural workers need and which are required by federal temporary labor camp standards. Many older motel units – the type most often rented by rural employers to house migratory labor – are typically “grandfathered” by modern, state hotel/motel licensing regulations. As a result, many of these rural motels lack basic furnishings or adequate health and safety features, such as kitchens, laundries, garbage disposal, and even heat.

Often, as is the case in Michigan, it would require extensive factual investigation and legal advocacy to determine whether a particular rural motel used to house H-2A workers “meets applicable local standards for such housing.” Such inquiry would, first, require a determination of the existence of any relevant township ordinance regulating motels. According to a listing of

43 categories of “ordinances” listed on the website of the Michigan Townships Association, none specifically apply to “hotels or motels.” See <http://www.michigantownships.org/ordinances.asp>

Next, one would need to determine the applicability of any state standards to “hotels or motels.” The sole Michigan act affecting conditions found in hotels or motels (as opposed to the liability of innkeepers or the collection of sales tax) only prescribes requirements for fire escapes, fire detection and extinguishers. MCL 427.1. Furthermore, the Michigan law arguably applies only to “a building or structure...held out to the public to be an inn, hotel, or public lodging house.” *Id.* In rural Michigan, vacant motel units used to house migrant farm workers are often aging, dilapidated structures that are not currently being offered to the public for transient accommodations. Therefore, it is not obvious – and would require painstaking research and investigation – to conclude whether a particular rural motel housing H-2A workers constitutes “rental and/or public accommodations or other substantially similar class of habitation which meets applicable local standards for such housing.” This should not be the criteria for determining whether temporary housing furnished to H-2A workers is adequate, safe and sanitary.

Similarly, DOL has recognized that, “there is nothing to preclude an employer who does not actually own housing on his/her property from renting non-commercial housing from other individuals or entities for the purpose of housing temporary agricultural workers.” A typical example is a vacant, rural farmhouse. In Michigan, the likely governmental unit with jurisdiction would be the township. But such township rental housing ordinances are not appropriate for protecting the health and safety of migratory agricultural workers. For example, the “model” township inspection ordinance posted by the Michigan Townships Association, allows “for the issuance of certificates of compliance for up to six (6) years for multiple dwellings...and for up to three (3) years for all other premises...including single-family homes and duplexes.”

[http://www.michigantownships.org/downloads/rental\\_unit\\_inspection\\_ordinance1.pdf](http://www.michigantownships.org/downloads/rental_unit_inspection_ordinance1.pdf)

Even if, arguably, such a local ordinance prescribed conditions relevant to the unique needs of migrant farm workers (e.g., furnished kitchens and eating areas, beds and bedding, laundry and first-aid facilities), an H-2A employer should not be allowed to rely on a “certificate of compliance” issued years prior to occupancy in order to circumvent minimum federal housing protections for temporary workers.

These challenges will be repeated in other states and localities.

The ramifications of exempting H-2A employers from the minimum federal temporary labor camp standards are abundantly evident. Consequently, DOL must require that all housing used to accommodate H-2A workers meet, at a minimum, the federal temporary worker housing standards prescribed by either OSHA or ETA.

### **3. Proposed DOL Rules Must Require Pre-Occupancy Housing Inspections for All H-2A Housing. [Proposed 20 CFR 655.104(d)(5)]**

Congress mandated that, “[t]he determination as to whether the housing furnished by an employer for an H-2A worker meets the requirements imposed by this paragraph must be made

[30 days prior to the ‘date of need’].” INA 218(c)(4). DOL’s proposed regulation recognizes this mandate at 20 CFR 655.104(d)(5):

“(iii) The determination that the housing meets the statutory criteria applicable to the type of housing provided must take place prior to certification as outlined in sec. 218(c)(4) of the INA.”

However, the proposed regulation then purports to authorize a post-occupancy inspection in the event that “the housing inspection has not taken place by the statutory deadline of 30 days prior to date of need...” This inconsistency is not tenable given the plain mandate of the statute. Nor is it necessary to effectuate the purposes of the statute. Existing H-2A regulations include language authorizing “conditional access to the intrastate or interstate clearance system” in the event that housing has been inspected and determined to not fully meet the applicable standards. 20 CFR 655.102(b)(1)(i). This current procedure allows for, and encourages, employers to bring failing housing “up to standards” before workers actually occupy the facilities.

This conditional approval language has been eliminated from the proposed regulation. See proposed 20 CFR 655.104(d)(1)(i). The authority to permit “conditional access” is a superior – and lawful – accommodation for dealing with SWA delays in inspecting housing than authorizing post-occupancy inspections. The latter would not encourage employers to address identified deficiencies in their housing prior to occupancy and would only serve to justify delays by SWAs in inspecting H-2A worker housing. Such delays should be tolerated in only the most exigent circumstances to maintain adherence to the statutory principle that SWAs should determine, well before occupancy, whether H-2A housing meets the requirements for temporary labor camps.

Additionally, the proposed regulatory change contradicts Wagner-Peyser regulations requiring that the SWA inspect the workers’ housing to determine whether it complies with applicable standards *before the housing is occupied*. 20 CFR 654.403.

“(3) Assurance. The employer's request [for conditional access] pursuant to paragraphs (a)(1) or (a)(2) of this section shall contain an assurance that the housing will be in full compliance with the applicable housing standards at least 20 calendar days (stating the specific date) before the housing is to be occupied.”

\* \* \*

“(e) Inspection. (1) The local Job Service office serving the area containing the housing of any employer granted conditional access to the intrastate or interstate clearance system shall assure that the housing is inspected no later than the date by which the employer has promised to have its housing in compliance with the requirements of this subpart.”

The importance of pre-occupancy housing inspections has been recognized as valuable by many sources. For example, the Helsinki Commission concluded: “Government enforcement personnel should inspect migrant housing before and during each season. Governments should offer incentives to growers, contractors, and local communities to provide decent housing for

migrant and seasonal farmworkers.” Commission on Security and Cooperation in Europe, *Implementation of the Helsinki Accords: Migrant Farmworkers in The United States* (1993) at p. vi, ¶ 10. DOL not only contravenes the recommendations on inspections but also the recommendation to create incentives to develop safe, affordable farmworker housing.

#### **4. Certified Housing that Becomes Unavailable [Proposed 20 CFR 655.104(d)(6)]**

This new regulatory provision would authorize H-2A employers to “substitute other rental or public accommodation housing” for the housing originally certified by the SWA in conjunction with approval of the ETA 790. This change is not permitted by statute [INA 218(c)(4)] and would encourage potentially fraudulent “bait and switch” tactics perpetrated by H-2A employers with respect to employer-provided housing.

Historically, DOL has recognized the need for SWAs to be vigilant “to ensure that employers in an area are not attempting to circumvent DOL’s housing standards by entering into reciprocal rental arrangements as a means to avoid pre-occupancy housing inspections.” *H-2A Program Handbook*, 53 FR 22081 (6/13/1988). The proposed regulatory change would enable this impermissible practice.

An example of the “bait-and-switch” practice that would be authorized by this proposal is a 2005 case involving a Michigan employer. As the attached correspondence [Ex. H14 In Re Vreba Hoff Farms] shows, this Michigan employer and its agent misinformed ETA, as part of its 2005 Clearance Order application, that “The employer has arranged accommodations and meals by providing the workers with their housing at a local hotel, Ramada Inn, (Montpleier [sic] Ohio).” When the 40 requested H-2A workers were not found at the identified Ramada Inn after the certified date of need, an investigation was commenced involving both the Michigan and Ohio state monitor advocates. This investigation revealed not only that no H-2A workers had ever been housed at the Ramada, but that the employer and his agent never intended that the workers would actually reside in the certified hotel units. Contrary to the written communications to ETA from the labor broker, the owner of the Ramada stated that “Those workers don’t stay at the hotel...That’s just a government requirement...there was never any expectation that anyone would really end up coming here.”

Whether or not the certified housing becomes unavailable “for reasons outside the employer’s control,” the negative effect upon the workers is the same if DOL regulations do not explicitly require that the employer notify the SWA in writing – and that the replacement housing be inspected – *prior to the change* in accommodations. Without mandatory language requiring that the SWA inspect and approve such substituted housing *prior to its occupancy* by H-2A workers, there is no meaningful way for ETA to prevent the “bait-and-switch” tactic utilized in the Vreba Hoff case, with the result that H-2A workers can effectively be housed in substandard housing – or left to fend for housing by themselves – until the employer gets around to notifying the SWA of the change in accommodations, if at all.

The deficiencies in this proposed regulation are not ameliorated by the requirement that the substitute rental or public accommodations be “in compliance with applicable housing standards and for which the employer is able to submit evidence of such compliance.” The legal

and policy arguments against using “local standards” for measuring the adequacy and safety of migrant agricultural worker housing are magnified where, as here, an inappropriate standard – coupled with unspecified “evidence of compliance” – is authorized as a substitute for the pre-occupancy certification by SWAs that worker housing complies with the minimum federal standards. As noted above, a local rural township may merely require rental housing to be inspected every three to six years and may issue a “certificate of occupancy” based on a years-old inspection, pursuant to an ordinance lacking any requirements for facilities or furnishings that are necessary to adequately and safely accommodate migratory agricultural workers.

It is noteworthy that, in authorizing reliance on “local standards,” the proposed regulations omit any reference to the numerous states that have adopted their own agricultural labor camp standards and which, in many cases, require a current state license as a prerequisite to operating a “migrant labor camp” within the state. [Cf., Mich. Comp. Laws sec 333.12401-12434 (P.A. 368 of 1978).] Similarly, approximately half of the states are approved by OSHA as “state plan” states, and enforce various state-specific versions of the OSHA temporary labor camp standards. [See <http://www.osha.gov/dcsp/osp/states.html>.] The effect of state migrant housing regulations, such as Michigan’s “Agricultural Labor Camp Law,” is to require employers to obtain a current license – based on a pre-occupancy inspection – in order to lawfully operate an agricultural labor camp within the state. The Michigan state agricultural labor camp standards and licensing requirements are made applicable to H-2A worker housing via an Interagency Agreement negotiated annually.<sup>129</sup> The procedure is consistent with long-standing policy of the agency that, “In States where either local or State standards for housing of agricultural workers equal or exceed those at 20 CFR 654 or 29 CFR 1910.142 and are strictly enforced, a formal written cooperative agreement may be secured with another governmental agency to do the necessary housing inspections.” H-2A Handbook, 53 FR 22097-8. This policy states the standard that the proposed DOL regulations should apply to all categories of H-2A temporary labor housing, whether “employer-owned,” “employer-provided,” or “rental and/or public accommodation or other substantially similar class of habitation.” As noted above, this is the standard expressed in the department’s former publication, “The Agricultural Recruitment System: An Employer’s Guide to Hiring Temporary Agricultural Workers,” September 1992:

“Housing Facilities must comply with:

- a. The minimum standards found in ETA 20 CFR 654, or OSHA 29 CFR 1910.142 (if applicable), or
- b. State or local laws or regulations regarding safety, health, and sanitation, *if they are more stringent than DOL Regulations.*” [Emphasis added.]

Only by explicitly reaffirming this dual standard in the proposed H-2A regulations will the agency – and the public – be assured that, regardless of the particular state where H-2A workers are being employed, they will be housed in conditions that comply with the most protective, applicable standards for temporary agricultural labor housing.

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<sup>129</sup> Ex. 15, H-2A MOU.

## **VI. TERMS OF JOB OFFERS/PROTECTIONS: THE PROPOSED RULES RELATING TO THE CONTENTS OF JOB OFFERS, 20 C.F.R. § 655.104, DO NOT ADEQUATELY PROTECT THE LABOR STANDARDS OF U.S. WORKERS.**

DOL proposes major changes in the rules regarding the contents of job offers. Several of the changes are discussed in other sections of these comments (See Section IV. addressing the Adverse Effect Wage Rate and section V. on Housing). Below are several specific points about the job offer requirements in the proposed rule.

### **A. DOL Would Improperly Allow Employers to Deny U.S. Workers Benefits Provided to H-2A Workers**

Through small language changes, DOL has reversed its longstanding policy of ensuring that U.S. workers are offered the same benefits as H-2A workers. The proposed regulations allow employers to treat U.S. workers less favorably than H-2A workers, undermining the statutory requirement that the wages and working conditions offered will not “adversely affect” those of U.S. farm workers. In particular, the proposed regulations remove any reference to U.S. workers when discussing the prohibition on preferential treatment of foreign workers and the minimum benefits required for the job offer.<sup>130</sup> The current regulations ensure that a job offer could not have any better terms and conditions for foreign workers, since it would result in depressing the wages and working conditions of U.S. workers.

In conjunction with the proposed change to the definition of “job offer,” which also removes the reference to U.S. workers and replaces it with the “eligible workers,” an employer could presumably offer less than the same benefits, wages and working conditions to a U.S. worker who is already employed. It does not matter that the U.S. worker is working alongside H-2A workers.<sup>131</sup> These changes are problematic because some agricultural employers have historically preferred foreign workers over U.S. workers in violation of the law. *See* discussion in recruitment section, *supra*, and *see e.g., Villalobos v. North Carolina Growers Association, Inc.*, 252 F. Supp. 2d 1(D.P.R. 2002); *Marquis v. U.S. Sugar Corp.*, 652 F. Supp. 598 (S.D. Fla. 1987).

The longstanding position of DOL has been that U.S. workers working in the same job classifications as imported temporary workers had to be offered at least the same benefits and conditions as are offered to H-2A workers. DOL should not restrict the protections of the law and regulations in this proposed manner. DOL’s policy also would authorize conduct that constitutes citizenship and/or alienage discrimination in violation of federal statutes prohibiting such discrimination.

### **B. Reduction in DOL Oversight of Job Terms Will Result in Abuses**

The proposed rules reduce the role of DOL in limiting abuses relating to the contents of job offers. DOL has historically required that employers provide actual proof of workers’

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<sup>130</sup> Compare proposed 20 C.F.R. §§ 655.104(a); (c) with existing 20 C.F.R. §§ 655.102(a); (b).

<sup>131</sup> Compare proposed 20 C.F.R. § 655.100(b); 29 C.F.R. § 500.10(w) with existing 20 C.F.R. §§ 655.100(b); 29 C.F.R. § 501(10)(o).

compensation coverage, including the name of the insurance carrier and the insurance policy number, as a condition of approval. The proposed change no longer requires an employer to provide actual proof of workers' compensation coverage, but merely to maintain such records for purposes of an audit.<sup>132</sup> Employers have attempted to circumvent the requirement of having actual workers' compensation coverage, either by having inadequate coverage or allowing coverage to lapse after-the-fact. By removing this requirement, it will only increase the potential for abuse by employers to maintain such coverage for their workers. *See* Exhibits F1-F2. Worker representatives also can better assist injured workers if such information is available in the H-2A applications.

### **C. The Importance of Continuing Transportation Benefits**

The H-2A program should continue to require employers to reimburse workers for the transportation and subsistence costs of coming from their homes, whether in the United States or in the foreign country, to work at the H-2A employers' place of business, pay workers for their costs of transportation to their home upon completing the season, and pay for transportation from the workers' local residences to the job site each workday. *See* current 20 CFR § 655.102(b)(5) and proposed § 655.104(h). It would be harsh and counterproductive to eliminate these important, longstanding provisions. Indeed, DOL should examine how to make transportation cost advances a more frequent benefit by which employers seek to attract workers.

For decades, our government has recognized that the failure to provide transportation cost payments to temporary foreign workers and seasonal U.S. workers would have serious negative consequences. The poor workers who fill these jobs cannot afford transportation costs. Often they must borrow the money, sometimes at usurious interest rates; prompt payment helps minimize the interest on the borrowed money. Low-wage workers also have difficulty saving enough money for the transportation to return to their homes at the end of the season.

Failure to pay a transportation allowance in cash for safe transportation is likely to lead to dangerous transportation practices. Without a transportation payment, many workers are unlikely to be able to afford transportation in safe vehicles by safe drivers. During the period of the Bracero program, the "Mexican worker's contract provide[d] for transportation by common carrier or in approved equipment." Safety regulations applied. For farmworkers based inside the U.S., however, transportation of migrant workers frequently occurred in vehicles that were "old and dilapidated and generally unfit for carrying people." President's Commission on Migratory Labor, pp. 94-95 (1951). Today, many farmworkers are killed and injured from dangerous practices inside the U.S. In the H-2A program, however, there appear to be few reports of casualties from the trips into and out of the U.S. The transportation payments contribute to that safety record, which not only saves lives but also money in the form of health care costs.

The employer's financial obligation to pay travel costs also helps discourage employers from inviting a glut of workers who are compelled by an oversupply to accept lower wages and fewer hours than originally offered and encourages employers to fully employ the workers in whom they have invested.

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<sup>132</sup> Compare proposed 20 C.F.R. § 655.104(e) with existing 20 C.F.R. § 655.102(b)(2).

In addition, employers should be faced with the actual economic costs of bringing foreign workers into the United States and sending them home so that they have an economic incentive to spend the necessary efforts and resources to recruit inside the United States. If it costs nothing (or very little) to bring in vulnerable guestworkers despite the distance and international border, employers will do so at the expense of U.S. workers because guestworkers often are preferable as “cheap foreign labor.”

Under the Bracero program, our government recognized its own interest in ensuring that the workers' transportation cost would be paid so that the worker would return home; where the worker sought to return home early without good cause, the worker would have to pay the cost. Rasmussen, Wayne D., *A History of the Emergency Farm Labor Supply Program, 1943-47*, Agriculture Monograph No. 13, USDA Bureau of Agricultural Economics (Step. 1951), 222-223. The problem with the latter provision is that it encourages employers to contend that workers left “early” without good cause in order to avoid paying the return transportation costs.

In addition, it became apparent under the Bracero program that a transportation system that only provided for depositing foreign workers at the U.S.-Mexico border would result in Mexican citizens massing at the border, far from their homes, where there was little support or employment for them, and a strong incentive for unauthorized return to the United States to seek employment. *See* Scruggs, Otey M., "The United States, Mexico and the Wetbacks, 1942-47, 30 *Pacific Historical Review* (May 1961) 238, 245-251, reprinted in Congressional Research Service, "Selected Readings on U.S. Immigration Policy and Law," for the Select Commission on Immigration and Refugee Policy (96th Cong. 2d Sess. Oct. 1980).

Furthermore, the Mexican government, after an initial period when workers were brought to Mexico City for recruitment and transportation into the United States, sought to ensure that recruiting and transportation were based on the location where the workers originated. Rasmussen, Wayne D., *A History of the Emergency Farm Labor Supply Program, 1943-47*, Agriculture Monograph No. 13, USDA Bureau of Agricultural Economics (Step. 1951) at 216-218.

The law and regulations have required transportation cost reimbursements and benefits for many decades and there is no evidence available to suggest any valid justification for reversal of these policies. *See, e.g.* prior H-2 regulations at 20 § CFR 655.202(b)(5)(1987). When Congress passed the current statutory provisions of the H-2A program, it identified several modifications it was making to the program, which had been operated primarily through DOL regulations. The transportation cost payments were not one of those modifications. *See* House Judiciary Committee Report, No. 99-682(I), on P.L. 99-603, p. 51 (1986).

The transportation costs provisions should not be weakened by applying a proposed new definition of a vague “intended area of employment” to exclude from the transportation or housing benefits those U.S. workers who cannot reasonably return to their homes each day. *See* proposed § 655.100(b) (defining “area of intended employment” to incorporate MSAs.<sup>133</sup>) U.S.

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<sup>133</sup> Some MSAs are very large and could include urban areas. For example, the Atlanta MSA contains over 20 counties. Under the proposed regulations, any worker located anywhere within those 20+ counties would be deemed to be in the same “area of intended employment” as any worksite within those 20+ counties.

workers who live in the same but large “metropolitan statistical area” as the employer, for example, may not have the transportation or financial resources needed to commute each day, particularly when the cost of gas has increased so substantially. To ensure that U.S. workers are hired wherever possible, employers of guest workers should not be permitted to extend such transportation and housing benefits to foreign workers, while denying them to domestic workers. The definition of U.S. workers entitled to transportation and housing benefits should not be narrowed.

DOL should require transportation cost **advances** in more cases than just those where it is the prevailing practice for employers to offer advances. The Government should be seeking ways of encouraging U.S. workers to accept jobs. In other settings, employers offer “signing bonuses,” payment of relocation costs, allowances for housing during relocation, and other benefits aimed at enticing workers to travel long distances to accept jobs. Agricultural employers that claim labor shortages should not be permitted to hire foreign workers without offering such benefits to U.S. workers. DOL could begin a voluntary pilot project for employers that are willing to participate to evaluate the success of such advances in attracting job applicants and retaining workers over a period of years.

The **subsistence** reimbursement for costs incurred during travel is inadequate for farm workers and does not reflect the true costs of such expenses. The current rule for travel utilizes an artificially deflated figure based on the amount an employer is authorized to charge workers when providing three meals per day. 20 C.F.R. § 655.104(h). The amount the employer is authorized to charge workers when providing meals is based on costs of institutional food preparation and the policy goal of prohibiting employers from profiting from the worker's need for food at the workplace or labor camp (e.g., in 2008, the figure is \$9.90/day). This figure, however, fails to accurately reflect the real costs being spent by workers at regular eating establishments while traveling. The subsistence cost reimbursement during travelling should be increased to enable workers to afford the costs of modestly-priced nutritious meals and, when appropriate, access to bottled water or other beverages during breaks. In some situations, when very long bus rides or other onerous travel arrangements are made (which are not uncommon in the H-2A setting), special subsistence provisions should be made to enable workers to rest and be sheltered in safety.

The transportation cost and subsistence cost requirements should remain. DOL needs to ensure that these transportation provisions are enforced as some workers have not received their full reimbursements or payments.

DOL also needs to improve its **enforcement** of the transportation benefits. Employers have been denying transportation cost payments upon completion of the season based on the contention that employees have abandoned employment prior to the termination of the season. However, in many instances H-2A employers, such as the North Carolina Growers Association, submit an H-2A application that overstates the length of the season and then, when workers leave after their work assignments have terminated, they are treated as having left “early” and therefore not entitled to be paid for their transportation costs home. (See section on three-fourths guarantee.) In some of these cases, employers tell workers that they are eligible to return in the following season even if they leave “early” but the workers are fearful that they will not obtain

future work if they press for their transportation benefits. DOL needs to end such abuses through vigorous review of the H-2A applications, enforcement at the end of the season and serious fines. DOL also should require employers to follow the requirements of the Fair Labor Standards Act, which requires that transportation and other costs be reimbursed at the beginning of the employment if the those costs, when treated as a de facto wage deduction, if, as they are in these situations, they are for the benefit of the employer, effectively reduce the workers' weekly income below the minimum wage. (See discussion below regarding the *Arriaga v. Florida Pacific Farms* litigation.)

**D. The Three-Quarter Guarantee Is an Important H-2A Program Provision but Due to Lack of Compliance and Enforcement It Is a Largely Illusory Protection for Workers**

**1. The Importance of the Three-Fourths Minimum-Work Guarantee**

The H-2A program requires employers to include in their employment terms a guarantee of a minimum amount of work. The origins of this longstanding H-2A protection are in the World War II foreign agricultural labor program that came to be known as the Bracero program. Rasmussen, *A History of the Emergency Farm Labor Supply Program, 1943-47* (US Department of Agriculture Monograph No. 13, 1951) at p. 204 (providing for payments during days of unemployment during the first three-fourths of the contract period). By requiring employers to offer a certain amount of work during the season or paying compensation for the shortfall, a minimum-work guarantee serves at least two important purposes. *See* GAO, "H-2A Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers," GA/HEHS-98-20 (1997), p. 60. First, workers traveling long distances and, very often, investing significant sums to accept a job, actually receive the opportunity to earn most of what they expect to earn on the job. Second, it encourages employers to accurately and fairly estimate the need for labor, and not seek the kind of oversupply of job applicants that historically led to reductions in promised wage rates due to workers' desperation for work.

DOL proposes to retain the three-fourths guarantee but, with one modest exception, it fails to make changes that would strengthen this important requirement or indicate that it will begin to enforce it effectively. *See* proposed 655.104(i) and current 655.102(b)(6). In reality, this "guarantee" offers little or no real protection because DOL has refused to enforce it or prevent employers from using invalid loopholes. The mechanisms to evade the three-fourths guarantee have varied. For years, during the 1980s, H-2A employers announced that they could "terminate" and shorten the employment contract, so that the three-fourths guarantee was based on a suddenly-shortened season, rather than the earlier one. Committee on Education and Labor, House of Representatives, Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry, Serial No. 102-J (July 1991) at p. 14. (The proposed regulation appears to address this issue by stating, "The work contract period can be shortened only with approval of the Department." 20 CFR § 655.104(i)(1).) In recent years, employers frequently identified artificially low statement of hours and/or artificially long seasons, claimed the workers quit prematurely or did not accept all available employment (when in fact no or little work was available), and then refused to pay compensation.

## 2. The Guarantee Is Frequently Violated

DOL has received ample evidence that it is failing to enforce the  $\frac{3}{4}$  guarantee but offers no plans to address this significant failure to enforce worker protections. This failure is especially important to remedy because many workers seem unaware of the three-fourths guarantee, unable to enforce it because they return to their distant homes at the end of the season, and/or too fearful of retaliation in a following season to enforce it.

### a. Violations Based on Season Length

In North Carolina, this failure to enforce the  $\frac{3}{4}$  guarantee negatively impacts a huge number of workers due to North Carolina Growers Association (NCGA) “master orders,” which include numerous growers and crops with false periods of employment. About 80% of the work on the NCGA orders is in tobacco, which ends by September, yet NCGA has won ETA approval repeatedly for master orders requiring workers to stay until November. While work is available on some NCGA farms in September and October in sweet potatoes, most NCGA workers will not have any work offered to them after early September. The result is that thousands of NCGA workers have gone home each year before the end of the artificially long contract period, paying their own transportation and, in the view of employers, not qualifying for the  $\frac{3}{4}$  guarantee.<sup>134</sup>

This problem was quantified and reported on in the 1997 GAO Report “H-2A Agricultural Guestworker Program: Changes Which Could Improve Services to Employers and Better Protect Workers.” The study concluded that the  $\frac{3}{4}$  guarantee protection was “difficult to identify and enforce,” though not impossible, and that unscrupulous employers took advantage of these difficulties:

...the three-quarter guarantee is only applicable at the end of the contract period, and H2A workers must leave the country soon after the contract ends. Labor officials said that monitoring the three-quarter guarantee is difficult because they cannot interview workers after they return to Mexico to confirm their work hours and earnings. These enforcement difficulties create an incentive for less than scrupulous employers to request a contract period longer than necessary. If workers leave the worksite before the contract period ends, the employer is not obligated to honor the three-quarter guarantee or pay for the worker’s transportation home. And if a worker abandons a contract, it can be very difficult to determine whether he or she has left the country or is instead remaining and taking jobs from domestic workers.

Executive Summary, p. 10. The GAO recommended that the  $\frac{3}{4}$  guarantee be applied incrementally to shorter periods of time throughout the duration of the contract. In response to the GAO findings, DOL “agreed that the structure of the three-quarter guarantee could result in

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<sup>134</sup> If the NCGA brings in 8000, and 80% of those workers find their employment ends prior to the end of the contract, and transportation costs average \$200.00 per worker, then workers have unfairly lost well over one million dollars.

employers overestimating contract periods in the expectation that less work and lower earnings toward the end of the contract will encourage workers to abandon and, thereby relieve the employer of the three-quarter guarantee and return transportation reimbursement responsibilities.” However, DOL felt that applying the guarantee “on an incremental basis” would be unfair to growers given crop fluctuations. Executive Summary, p. 12.

DOL has been on notice for at least 11 years of this evasion by employers of the rule but has done very little, if anything, to stop it either through enforcement efforts or tightening of the guarantee.

In 2004, the DOL Office of Inspector General issued a report which examined, among other issues, NCGA’s false period of employment in its master job order. The OIG found that NCGA asked for workers for a longer period than actually required to harvest crops and that this led to an increase in worker “abandonment.” In fact, the OIG found that work had ended for 65% of the workforce about three weeks before the stated end date.<sup>135</sup> The OIG submitted evidence of the overstated period of employment to ETA and recommended that ETA require that NCGA submit more accurate dates in its job orders.<sup>136</sup>

ETA did not follow this recommendation. In fact, the ETA responded as follows:

“ETA does not look beyond the anticipated starting and ending dates of need in their certification determination...Without compelling reason, staff would not routinely question the information provided by the employer regarding dates of need.”<sup>137</sup>

Apparently, a thorough analysis and recommendation of the OIG is not a “compelling reason,” but it should be. Despite the fact the ETA was provided evidence that NCGA overstated the period of employment, NCGA master orders continue to have ending dates in November, long after most NCGA farms have ceased operation for the season, and, because the employers violate the three-fourths guarantee (and transportation cost requirements), thousands of NCGA workers continue to pay their own homebound transportation and to be denied the  $\frac{3}{4}$  guarantee.

In addition to evasions by employers regarding the ending dates of employment, there are also problems with the three-fourths guarantee enforcement regarding the season’s commencement. Employers know that many U.S. workers are unlikely to stay at a farm if no work is available at the beginning of the season. In contrast, H-2A workers have no choice but to wait for work to begin. Employers therefore have been known to use start dates that are patently false, knowing that the misleading start date will help “weed out” any U.S. worker referrals.<sup>138</sup>

The proposed regulatory language includes a provision that may not be intended to restrict the guarantee but may be construed by some to do so if taken out of context. The sentence states:

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<sup>135</sup> See Exhibit LC2-8

<sup>136</sup> See Exhibit LC2-8

<sup>137</sup> See Exhibit LC2-8

<sup>138</sup> Exhibit LC2-4

In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

Proposed § 655.104(i)(1). It should be clarified to refer only to a worker who arrives at the place of employment, and therefore begins work, after the first workday. The practical result of the proposed language, without a clarification, is that the employer may simply provide a too early start date and wait to bring in H-2A workers. If a U.S. referral is made, the grower can remain confident the worker is likely to leave due to lack of work.<sup>139</sup>

#### **b. Violations Based on Work Day and Work Hours**

DOL has allowed and apparently encouraged a widespread evasion of the H-2A three-fourths guarantee by permitting employers to identify fewer number of hours in the work week than workers are expected to work. Employers now routinely file H-2A applications claiming that the work week is 30 hours or 36 hours, when the actual work week is 40 to 45 hours long, if not longer. The artificially low statement of hours shields employers from liability under the  $\frac{3}{4}$  guarantee because the employer claims an obligation to pay  $\frac{3}{4}$  compensation only when workers are not offered  $\frac{3}{4}$  of 30 or 36 hours in a week, rather than  $\frac{3}{4}$  of 40 or 45 hours in a week. DOL regularly approves such H-2A applications but should reject all of them. United States farmworkers who review job offers from H-2A employers are unlikely to apply for their jobs because the stated number of hours – and therefore the opportunity for earnings – falls so far below that of other employers. All workers are harmed when employers obtain more workers than needed and deprive workers of the opportunity for employment but refuse to pay the  $\frac{3}{4}$  guarantee. DOL needs to address these enforcement issues immediately.

In Georgia's Vidalia onion harvesting job orders, for example, no job order lists more than seven hours Monday through Friday or more than five hours on Saturday. However, workers regularly work ten or more hours a day six days a week, meaning the job orders underestimate the normal hours offered by 50%. In the short eight week harvest season, this artificially reduces the  $\frac{3}{4}$  guarantee from 360 hours for the season to 240 hours, effectively removing the protection from one of  $\frac{3}{4}$  of the normal hours offered to one of only half the normal hours offered. While H-2A employers on occasion still provide less than even the lower promised hours, as Bland Farms in Georgia did in the 2001 onion harvest, when they do so the amount of a worker's recovery is artificially limited as the growers have intentionally underreported the normal work hours.

Similar evasions occur in H-2A applications throughout the country. The statements about hours are prominent in the H-2A applications and DOL knows that they are frequently misstatements of the true nature of the job.

DOL, through enforcement and this regulatory proceeding, must take steps to protect H-2A workers from this intentional underreporting of hours by spot checking actual hours worked over the past several years against the employer's hours listed in the job order. For H-2A

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<sup>139</sup> Exhibit LC2-4

applications that state fewer than 50 hours per week, the DOL should require employers to submit payroll records from the prior season that substantiate that the normal hours worked were less than 50.

**c. The proposed regulations make some positives change for improving the efficacy of the three-quarter guarantee**

One positive change about the proposed regulations related to the three-quarter guarantee is the clarification that the grower isn't allowed to shut down the camp or the camp kitchen during the contract period. Employers who shut down a labor camp essentially render H-2A workers homeless and unable to work elsewhere in the United States. The worker has no real choice other than to return to his native nation and forfeit his right to the three-quarter guarantee.

Also, the new provisions require that employers must provide housing and kitchen privileges or prepared meals until the last date of the certification period is a positive addition.. As set forth above, the closing of a labor camp has also been used as a way to pressure a worker to leave and sign a "voluntary quit."

**d. The proposed changes weaken the previous guarantee**

**i. "Workday" is changed to "work hours"**

The proposed regulations would change the first sentence of the  $\frac{3}{4}$  guarantee. The proposal states: The employer shall guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period. . . ." Proposed 655.104(i)(1). The current regulation, by contrast, at the beginning of the sentence guarantees workers "employment for . . . work days," rather than work hours. We are concerned that this change could be interpreted to "legalize" the improper practice regarding misstatement of the number of hours. Currently, the workers are guaranteed a certain number of hours but the understanding is that they are being promised a certain number of workdays and those workdays last a certain number of hours (ordinarily assumed to be 8 hours). The proposal appears to allow employers to more easily justify evading the  $\frac{3}{4}$  guarantee by claiming that the workers will work an artificially low number of hours; the promise should be based on a workday, which in turn should be understood to signify the true number of hours in a workday

**e. The proposed changes fail to address the core failing of the three-quarter guarantee.**

The proposed changes to the regulations do nothing to address the reasons that the guarantee has rarely been utilized by workers even when they know about the three-fourths guarantee. First, workers who know their work has ended are unlikely to hang around for several weeks to get a bus ticket home, even if they have not had enough work to make the  $\frac{3}{4}$  guarantee. Without regular income, H-2A workers lack money to pay for food in the U.S. They also know that their cost of living will be substantially lower in their home country. So they cut their losses and leave. Especially for workers from Mexico, return transportation costs can be equivalent to only a little more than a week of food costs. Second, employers and their agents add to the

pressure to leave early by promising that workers can do so and return the following year if they will sign a “voluntary quit”.<sup>140</sup> Of course, few H-2A workers leave voluntarily when work is plentiful and conditions are as promised. After all, they have come to the U.S. to earn money for their families. But when only a few workers of a crew are given work daily, or it is apparent that the end of work for all is drawing nigh, H-2A workers can be easily persuaded to leave and return home on their own, especially if the employer promises there will be no punishment for leaving before the expiration of the visa.

DOL needs to start enforcing the three-fourths guarantee through strenuous investigations and enforcement actions. DOL also needs to require truthful statements of job terms in H-2A applications. The actual length of the season and the actual number of hours in a work day must be stated in H-2A applications. It is not difficult for DOL to ask farmworkers whether farmworkers in particular crops and geographic areas work the 6 or 7 hours a day alleged by many H-2A employers, rather than the common 8, 9 or 10. It should so starting now. To prevent the kind of abuse of the ending dates which has characterized NCGA’s master orders for the last fifteen years, audits of grower associations should require payroll information sufficient to show the number of positions actually available in the last third of the period of employment and the number of hours worked by each worker. If the number of positions actually available or work actually completed during that time varies significantly from the number of positions and amount of work specified on the order, the association should be requested to file separate orders for the late work (in the case of NCGA, a separate master order for the growers with the sweet potato work, for example), or, in the alternative, pay the  $\frac{3}{4}$  guarantee to all workers who left at the end of the work offered to them on the farm on which they were last placed.

If an employer truly has a hiatus in work towards the end of the contract, but reasonably expects to have work thereafter until the ending date of the certification, that situation can be addressed responsibly without evasions of the H-2A obligations.

#### **E. DOL Should Require Compliance with the Minimum Wage and Other Obligations under the Fair Labor Standards Act**

Ostensibly the purpose of these regulations is to protect U.S. workers. However, the regulations ignore employers’ obligations under other federal statutes and the scheme envisioned in the §655 regulations conflicts with employers’ obligations under those statutes.

For example, the proposed regulations appropriately retain the requirement that all wage deductions be “reasonable,” but inappropriately removes clarifying language that “an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA.”<sup>141</sup> Workers under the H-2A program are entitled to full coverage of FLSA, and DOL should not make regulatory changes which suggest otherwise. DOL may be seeking to lay the groundwork for inappropriately refusing to comply with court decisions which have properly recognized that workers who have been forced to bear certain costs for the benefit of employers should be considered to have been subjected to wage deductions that effectively mean the workers have not

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<sup>140</sup> Exhibit E-8

<sup>141</sup> Compare proposed 20 C.F.R. § 655.104(p) with 20 C.F.R. § 655.102(b)(13).

been paid the minimum wage. *See, e.g., Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002). The holding in *Arriaga*, that the employer must ensure that an H-2A worker's first week wages equal or exceed the guaranteed wage (the adverse effect wage rate, the state minimum wage or the prevailing wage, whichever is greater), including the pre-employment transportation expenses incurred by the worker from his home or previous place of employment in the U.S. to the employer's jobsite, has been followed by every court which has considered the issue. *Moreno-Espinoza v. J & J Ag Producents, Inc.* 247 F.R.D. 686 (S.D. Fla. 2007); *Martinez-Bautista v. D & S Produce*, 447F. Supp. 2d 954 (E.D. Ark. 2006); *Avila-Gonzalez v. Barajas*, 2006 U.S. Dist. LEXIS 9727 (M.D. Fla. 2006) *DeLuna-Guerrero v. North Carolina Growers Ass'n*, 370 F. Supp. 2d 386 (E.D.N.C. 2005). The proposed change not only undermines the rights of farmworkers with respect to their right to be paid the minimum wage free and clear of costs imposed on them for inbound transportation and visa costs, as established by case law, but also fails to harmonize such rights with those provided in the H-2A program.

Clearly, for H-2A workers, their inbound transportation costs, as well as the costs of their recruitment fees, passports, visas and border crossing fees primarily benefit the employer. The *Arriaga* court considered this in depth and its findings are well-reasoned, as are those of the courts who have also considered the issue. Certainly the H-2A regulations should not be at odds with many courts' interpretation of the FLSA.

DOL should amend proposed 20 C.F.R. § 655.104(h) and 655. 104(p) to conform with the holding in *Arriaga*. This would also make DOL policy comport with its practice, as set forth in letters sent by labor certification staff and, formerly, Regional Administrators, reminding prospective employers of H-2A workers that if a worker's pre-employment transportation expenses result in him/her earning less than the Fair Labor Standards Act (FLSA) minimum wage in the initial week of work, those expenses need to be reimbursed.

Transportation reimbursement obligations are not, as the preamble suggests, "unique to the H-2A program. Many H-2B workers and low-wage U.S. workers who migrate to seasonal jobs are entitled to reimbursement of transportation expenses under the FLSA as interpreted by the *Arriaga* court. *Rivera v. The Brickman Group*, 13 W&H Cases 2d. 275 (E.D. Pa. 2008); *Rosales v. Hispanic Employee Leasing Program, L.L.C.*, 2088 U.S. Dist. LEXIS 9756 (W.D. Mich. 2008); *Castellanos-Contreras v. Decatur Hotels, L.L.C.* 488 F. Supp 565 at 572 (E.D. La. 2007).

## **F. Required Job Qualifications Should Be Disclosed and Reviewed**

A bona fide occupational qualifications (BFOQ) imposed in a particular job offer should be approved by the DOL. The proposed regulatory scheme has removed any requirement that DOL review the "appropriateness of required qualifications." In the past, employers have created artificial, discriminatory and onerous occupational qualifications to discourage U.S. workers from applying and have denied jobs to U.S. workers.<sup>142</sup> DOL's oversight of this process is essential to ensuring that the BFOQ make sense within industry standards. *See, e.g., Bennett v. Hepburn Orchards, Inc.*, 1987 LEXIS 16873 (Apr. 14, 1987); *see also* Exhibit F3.

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<sup>142</sup> Proposed regulations entirely remove 20 C.F.R. § 655.102(c).

### **G. Tool and Equipment Charges Should Not Be Permitted**

The proposed regulations remove the requirement that DOL approve, in advance, any charges to workers for costs of tools and equipment, and instead allow an employer to go ahead and charge workers if “it is common practice in the particular area.”<sup>143</sup> Employers will be able to interpret for themselves what the “common practice” is for tools in their area and charge for such tools, without any oversight by DOL. Employers should not be permitted to require low-wage workers to pay for their own tools or equipment, and current section 655.103(b)(3) recognizes that this rule should have few exceptions. Moreover, some state laws restrict such charges and DOL should continue to enforce the requirement that H-2A employers offer job terms that comply with state laws.

### **H. Contract Termination for Acts of God**

The current and proposed regulations allow an employer to ask permission from DOL to terminate an H-2A contract if there is an extraordinary, unforeseen, catastrophic event or “Act of God” such as a flood or hurricane that makes it impossible for the business to continue. Currently and in the proposed regulations, the employer is partially relieved from paying the three-fourths minimum work guarantee in such circumstances, despite the possibility that the worker could be harmed substantially.<sup>144</sup> The three-fourths guarantee should be honored in such situations, particularly since the guarantee should be for the full season. The proposed rule retains certain protections for workers harmed by an Act of God, including requiring the employer to pay inbound and outbound transportation costs, but inappropriately eliminates a current requirement that “the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker.” The workers (particularly the U.S. workers, who, unlike H-2A workers are not limited to working for H-2A employers) deserve such an effort. It is no significant burden on employers to make such an effort, which may very well be rewarded by employee loyalty and productivity in future seasons.<sup>145</sup>

### **I. Rejection and Termination of U.S. Workers**

DOL should retain the language of the current 655.103(c), which states: “Rejections and terminations of U.S. Workers. No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.” DOL in proposed 655.015(a) proposes to require an assurance by an employer that “Any U.S. workers who applied for the job were rejected for only lawful, job-related reasons.” There is no mention in the sentence of termination, and it should be added. Firing US workers or forcing them to quit (a constructive discharge) has been a serious problem that must be prohibited clearly. In addition, proposed 655.103(g) would require employers to report separation from employment of H-2A workers to DOL and DHS, but not for U.S. workers. To monitor terminations of U.S. workers, and deter unlawful determinations,

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<sup>143</sup> Compare proposed 20 C.F.R. § 655.104(f) with existing 20 C.F.R. § 655.102(b)(12).

<sup>144</sup> Disaster assistance, crop insurance and other programs typically ensure the economic stability of the farmers in such situations. There are few such protections for the most vulnerable people, the farmworkers.

<sup>145</sup> Compare proposed 20 C.F.R. § 655.104(o) with 20 C.F.R. § 655.102(b)(12).

DOL should continue the requirement that employers notify the Government promptly of terminations or other separations from employment of U.S. workers.

**VII. ENFORCEMENT MECHANISMS: IN LARGE PART, THE PROPOSED CHANGES UNDERMINE ENFORCEMENT, RATHER THAN “ENHANCE” IT. MANY CHANGES TO THE ENFORCEMENT SYSTEM VIOLATE THE H-2A STATUTE.**

**A. The Proposed Changes to Definitions Will Undermine Enforcement and Create Confusion.**

**1. Changes to the Definitions of “Employ,” “Employer” and “Employee” Create a Muddled Standard that is Less Protective than Current Law.**

The current regulation defines “employer” as follows: “[e]mployer means a person, firm, corporation or other association or organization which *suffers or permits* a person to work . . .” 20 C.F.R § 100(b) (emphasis added); or “[e]mployer means a person, firm, corporation or other association or organization which *suffers or permits* a person to work . . .” 29 C.F.R § 501.10 (i) (emphasis added). The underlined language is drawn from 29 U.S.C. § 203(g), the definitional section of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., and earlier state child labor protection statutes. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). The Migrant and Seasonal Agricultural Worker Protection Act of 1983 (AWPA or MSPA) incorporates this definition. 29 CFR § 1802(5). In carrying out its mandate to assure that U.S. workers were not harmed by importing temporary workers, it was fitting that the Secretary has long applied this broad standard for employment, which is more inclusive and protective than the common law master-servant test. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989).

The proposed definitions appear to alter this appropriately sweeping coverage by adding new definitions for “employer,” “employ” and “employee.” In 20 C.F.R. § 100(b), employer and employee are defined in terms of the common law test. Although the “suffer or permit” language is retained in the definition of “employ” in 29 C.F.R § 501.10 (m), new definitions of “employer” and “employee” in subsections (n) and (o) use the common law test. (This creates the odd result that a worker could be “employed” under the broader test, but not be an “employee” or have an accountable “employer.”)

These definitional changes will enable farm employers to avoid responsibility for compliance with legal standards for workers on their farms by hiding behind farm labor contractors bringing in H-2A workers. It will encourage employers to seek to escape responsibility for compliance by clever legal arguments manipulating the factors making up the common law test for employment. This result is inconsistent with the longstanding position of DOL and its mandate to avoid adverse effects on U.S. workers.

Another anomaly with respect to the new definitions is that the definitions in 20 C.F.R § 100(b) seem to require that to be an “employer” one must have obtained a federal identification

number. Of course, only the most shady operators would not have obtained such a number, yet they would be excluded from the definition.

Adoption of the AWPAs definition for “agricultural employer” in 29 C.F.R. § 501.10 makes little sense. One must use it in AWPAs, as a statutory term, but it is quite technical and confusing. For example, it is theoretically possible to have an agricultural employer under AWPAs that does not employ anyone. No purpose is served by adding this confusing definition to the definitions under this program. It is used primarily in the preamble and in adopted AWPAs definitions, but “employer” would do just as well. This usage should be dropped.

## **2. The Definitions Proposed for Farm Labor Contractors Will Exclude Recruiters of Foreign Temporary Workers from Enforcement.**

The definitions for farm labor contractors at 20 C.F.R. §100(b) and 29 C.F.R. § 501.10(u) both refer to the corresponding definitions for “farm labor contracting activities.” 20 C.F.R. § 100(b) and 29 C.F.R. § 501.10(t). These definitions roughly parallel the AWPAs definition at 29 C.F.R. § 500.20(i), but with a twist:

*Farm labor contracting activity means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker as those terms are used in 29 U.S.C. 1801 et seq. and 29 CFR part 500 with the intent to contract those workers to fixed-site employers.*

(emphasis added). The underlined language presents two problems.

First, although the preamble heralds the benefits of how a new regulatory regime will help the H-2A employees of farm labor contractors, the provisions of these regulations will not apply. Under AWPAs, H-2A workers are not “migrant or seasonal agricultural” workers as defined by 29 U.S.C. 1801 et seq. and 29 CFR part 500. 29 U.S.C. §1802(8)(B)(ii); 29 C.F.R. §500.20(p)(1)(ii). Therefore, a contractor recruiting workers to become H-2A visa holders would not fit within the regulatory definition.

Second, the “fixed-site” employer language could present problems in certain kinds of work, like employment for a custom harvester that does not have a “fixed site.” It is also very unclear what it means, as a regulatory matter, to “contract” the workers to the fixed site “employer.” What if the contractor and farmer will maintain that the entity with the fixed site is not an employer under the law? What if, even as a legal matter, it is an employer, but the contractual parties did not so intend? This qualification on coverage should not be adopted.

## **3. Changes to the Treatment of Christmas Tree and Other Forestry Workers: the Back Door Elimination of Overtime Pay Should Not Be Included in This Rulemaking About H-2A regulations.**

The changes to 29 C.F.R. §§ 780.205; 780.208 and 788.10 have a much more significant effect than discussed in the rule commentary. These changes would mean that Christmas tree workers would be imported under H-2A, instead of H-2B. While the H-2A program as it

currently exists does provide more extensive protections than the H-2B program, the change would have some negative implications for these workers. As H-2A workers, H-2 Christmas tree workers would lose AWP protection. Further, it would also mean that all Christmas tree workers would lose their current rights to overtime -- a very significant matter, since the time for harvesting trees in the Christmas season is compressed, so extensive overtime is common.

A very weak regulatory case has been made for doing this. It is true that the 4th Circuit decided, in *Chao v. North Carolina Growers Ass'n*, 377 F.3d 345 (4th Cir. 2004), that Christmas tree workers were primary agriculture under FLSA. However, it did so in the face of about 50 years of DOL regulatory history and contrary case law. [See \*Ochoa v. Weisensee Ranch, Inc.\*, 763 P.2d 173, 93 Or. App. 520 \(Or. Ct. App. 1988\)](#). This back door repeal of rights of far greater importance than being discussed has not been justified and should not be adopted.

## **B. The Proposed Regulations on Audits, Revocations and Debarments Fail to Establish Meaningful Enforcement Mechanisms.**

The proposed changes relating to these enforcement mechanisms provide few actual improvements. The proposed regulations fail to prevent disaster, and do too little after the fact to repair damage or prevent future damage. Emphasis should be placed on preventing employers who have demonstrated an inability to comply with the law, intentional or not, from getting certification in the first place. If an employer does not comply with the terms of the certification, it is axiomatic that U.S. workers are always injured, for although the employer directly violates the rights of the foreign workers, wages and working conditions for similarly employed U.S. workers are also negatively affected. Many different agencies would play roles in the enforcement process, without adequate coordination and accountability, resulting in weak enforcement and harm to U.S. and H-2A workers. The proposed regulations do not address the role the lack of coordination and accountability across agency lines plays in inadequate enforcement.

### **1. Audits and Referrals**

#### **The audit procedure lacks a trigger or a goal.**

The government claims that rigorous audits will be *the* primary enforcement tool. The proposed audit regulations, at §655.112, however, merely state:

- (a) Discretion. The Department shall, in its discretion, conduct audits of temporary labor certification applications, regardless of whether the Department has issued a certification or denial of the application.

Such unfettered discretion, without further guidance, likely means that audits will be rare. Currently, Wage-Hour investigations are inadequate and there is no indication that DOL plans to launch a meaningful audit or enforcement campaign. The regulation is silent about whether there will be a plan, for example, to audit all new H-2A employers or all H-2A employers over a period of years or all H-2A employers using certain labor recruiters, etc. An even greater concern is that the regulation is silent about whether a referral from a SWA or a state agency charged

with inspecting migrant housing or a complaint from an individual worker or representative would trigger an audit.

DOL's record of listening to third party complaints and taking them seriously has been discouraging. In 2002, North Carolina Department of Labor migrant housing chief sent a letter to the ETA requesting that no further H-2B job orders be approved for Evergreen Forestry Services given this employer's long record of safety and wage violations.<sup>146</sup> ETA ignored her request. Later that year, fourteen Evergreen Forestry Services employees, who were employed through subsequently approved job orders, were killed in a vehicle accident in Maine. Vehicle safety violations were among the previously cited violations against the employer.<sup>147</sup> USDOL also ignored complaints from Colorado Legal Services for two seasons regarding Petrocco Farms seeking certifications for H-2B workers, yet placing those workers in agricultural work, in an effort to evade H-2A requirements like the AEW, transportation, free housing, etc. to the detriment of U.S. workers.<sup>148</sup>

These complainants had both dealt directly with the defendants and had firsthand knowledge of the problems of which they complained, yet their concerns and knowledge went unheeded. What is required is a better effort on the part of ETA to take seriously other agencies' concerns about improprieties with H-2A employers and, if audits are to be the tool of choice, at a minimum the concerns of third party complainants like these should automatically trigger an audit.

The regulations should specify certain events that will automatically trigger an audit, both to give other agencies reassurance that their concerns will be addressed and to give employers fair warning of consequences for certain conduct, while reserving the discretion to instigate an audit for other reasons within the Department's discretion.

### **The audit procedure will miss many violations.**

The audits will most likely occur after the workers have left their employment. This means that the USDOL is unlikely to interview workers or see where they are housed or employed and will be entirely dependent on documents provided by the employer. The inability to cross check information provided by the employers will render audits a very weak tool, indeed. Unscrupulous employers will hide violations by fabricating a paper trail, and no workers will be around to provide clarifying or contrary testimony. Perhaps more importantly, paper audits are simply unlikely to be able to accurately measure an employer's compliance with the terms and conditions contained in the certification or all of the attestations. Auditors in far away cubicles will lack on-the-ground knowledge, resources, and ability to resolve serious issues raised by farm workers and their advocates. How, for example, is an auditor in Chicago or Atlanta going to be able to resolve conflicting information in rural Oregon? The reality is that auditors will close files because they lack the tools to conduct a meaningful investigation.

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<sup>146</sup> See Exhibit E-1.

<sup>147</sup> See Exhibits E-2 and E-3.

<sup>148</sup> See Exhibit E-4, correspondence and supporting documentation from Jennifer J. Lee to the Chicago CO.

In Section VII, we note the example of the Wage and Hour investigation of New Tree Personnel Services, Inc. a farm labor contractor based in North Carolina. New Tree charged each of its H-2A workers from Laos a “lawyer’s fee” of \$3,000 each, supposedly to defray the costs of the applications. The “lawyer’s fee” was deducted from the wages of the workers in installments. In its investigation, Wage and Hour found that the workers were not being paid the AEW. However, because the “lawyer’s fee” charges were not listed on the books and Wage and Hour did not interview the workers, the investigators failed to learn of these deductions which impermissibly reduced the workers wages below the minimum wage. The additional FLSA violation was only revealed because one of the workers brought a private lawsuit under the Fair Labor Standards Act against New Tree in 2003; this case was settled in early 2004.<sup>149</sup>

Another example of a situation in which an audit would have been totally ineffective is the case of GTN Employment Agency, Inc. (See section VII for a more complete history of GTN.) The FLC greatly overstated the number of workers actually needed. When little work was available, GTN placed some H-2A workers in unauthorized, overcrowded housing and others in the back room of a digital sign shop owned by its president. One of the H-2A workers had been diverted to work in the digital sign shop, while another H-2A worker had been taken to a job in a rural restaurant. None of these abuses would appear in an audit that depended on records supplied by GTN. GTN would have simply indicated that the Indonesian workers who were granted H-2A visas and did not appear on the payroll records had “abandoned employment.”<sup>150</sup> An audit would never have revealed GTN housed four H-2A workers in the shop’s backroom. An audit would never have revealed the exorbitant recruitment fees paid to the employer’s recruiters in Indonesia. An audit would have revealed very little of the abuse.

The New Tree and GTN examples are but two illustrations of some of the more egregious violations which would remain hidden from an audit. Yet many smaller violations would as well. Any employer wishing to cover practices such as “loaning” H-2A workers to an uncertified employer or housing the workers in unlawful, substandard housing, or charging for rent or receiving a kickback from a recruitment fee would only have to fail to provide documents substantiating that conduct in order to keep the conduct hidden, absent on-the-ground inspections or interviews with workers. These practices would depress wages and working conditions for similarly employed U.S. workers: job opportunities at the uncertified employer would be lost, employers would save on unlawful, substandard housing that U.S. workers would not accept, and U.S. workers would have to pay for their jobs in order to compete with H-2A worker recruitment fee kickbacks.

Indeed the thirty (30) day window in §655.112(b)(2) for employers to respond and produce audit documentation is too long and could allow time for fabrication or manipulation.

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<sup>149</sup> See Exhibit E-5, an accounting of the deductions from pay for the “lawyer’s fee”; Exhibit E-6, the complaint in *Inthanlangsy v. New Tree Personnel Services, Inc. 5:03-CV-421-BO(3) (E.D.N.C. 2003)*; and Exhibit E-7, the answer in *Inthalangsy*.

<sup>150</sup> Indeed, most H-2A employers have no difficulty forcing workers to sign voluntary quit forms when the worker is actually fired or the true reason for leaving is that there is no work. See Exhibit E-8, evidencing how most of the workforce for an H-2A tobacco grower signed a voluntary quit form on September 2, at the end of the tobacco season. Twelve workers signed on the same day, and some wrote “family problems” or “I have problems in Mexico” as the reason. A few slipped in, in Spanish, the true reason: Tobacco had ended and so had the work.

The documentation should be provided immediately with the possibility of supplementation at a later date under § 655.112(c).

The regulations are also unclear about whether original documentation or copies must be provided. In our view, originals are essential to determine compliance, especially for documents which should be signed by an individual or payroll. Copies can hide erasures and the signs of later-acquired data and signatures. Indeed, this is but another reason that on-site inspections are preferable. In the case of GTN Employment Agency, mentioned above, Wage and Hour investigated GTN Employment and collected payroll records on short notice. GTN later provided payroll records to Legal Aid of North Carolina in response to a discovery request in a civil lawsuit. GTN had more than 30 days to respond to this request. The two sets of payroll were, upon comparison, vastly different from each other. One set changed the hours worked and even the people who worked on a particular day.<sup>151</sup>

Finally, it appears that the Department envisions that many, though not all, of these audits will take place a year or more after the certification period has finished. Without U.S. or H-2A worker witnesses readily available or the ability to timely interview other witnesses and collect evidence, all of these violations would escape notice and the Department would be left with only the employer's version of events. And since the original attestations and the audit materials are supplied by the employer, it is likely that they will be congruent. In short, audits are an insufficient enforcement tool.

### **Consequences for audit violations inadequately protect U.S. workers.**

Subsection (d) § 655.112 should clearly specify that if the CO finds an employer “discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker” the CO may refer the employer for revocation or debarment. The prohibition on discrimination against U.S. workers is a pillar of the statute, and the Department must not allow those who refuse to follow their duties to U.S. workers to gain by flouting the law. While we appreciate that the Office of Special Counsel for Unfair Immigration-Related Employment Practices can use the IRCA immigration-related employment discrimination provisions to assist some victimized workers and prevent future unlawful practices regarding certain kinds of discrimination, we think the findings of the CO in this regard are and must be sufficient to revoke or debar, and allow the employer his due process rights. DOL is responsible for administering and enforcing the protections of the H-2A program. The OSC is not set up to monitor and enforce the H-2A program requirements. Moreover, the OSC procedures can be lengthy, in part due to the small size of the office, and inconclusive as to the particular requirements of the H-2A program. The CO has the necessary expertise to make this determination for purposes of the employer's future participation in the program.

In addition, we believe that ETA should consider the complementary tool of civil money penalties for lesser violations found in the audit process.

## **2. Fraud and Willful Misrepresentations (new §655.113)**

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<sup>151</sup> Exhibit E-9.

The current regulations (at §655.108) provide for referral for investigation in the event of fraud and misrepresentation, or if the employer is the subject of a criminal indictment with respect to its application. A final court/INS determination would result in the Regional Administrator (RA) terminating consideration of the application.

The new provisions require the Administrator to refer cases of possible fraud or willful misrepresentation on an application to the DHS and the Department's OIG, but fail to illuminate what constitutes "possible fraud or willful misrepresentation." This is especially troubling because the new provisions give the CO authority to determine each pending application "on its merits related to that employer or agent" should the DOJ decide not to prosecute. We are especially leery of unduly stringent definitions of "possible fraud or willful misrepresentation" because of discouraging experiences with the Department's prior determinations regarding "substantial violations."

The likelihood of criminal charges being filed against H-2A employers or their agents for fraud in their applications is remote. DOJ has not prosecuted any cases involving H-2A despite ample evidence of workers who have been harmed by such fraud. We are concerned that the bar for "possible fraud or willful misrepresentation" for this section will be interpreted by DOL to meet a criminal standard of guilt. Such a burden would be unwarranted and would seriously compromise DOL's ability to prevent egregious harm to both U.S. and H-2A workers. The end result is that few, if any, employers who engage in fraud would ever be sanctioned.

An example of such unchallenged fraud is the eight years that DOL has certified job orders for Shannon Produce Farm, Inc. in Georgia. Despite a complaint in 2000 that the farm was taking unlawful deductions and hiding underpayment through falsifying hours, DOL continued to approve job orders, even after Shannon Produce had been sued. A court ultimately found that because the fraud was directed to the government, the H-2A worker plaintiffs could not make out their own fraud claim. "The evidence proffered by the Laborers shows at most that Shannon intended to defraud the Government into allowing it to sidestep the traditional bar on hiring foreign labor." *Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 U.S. Dist. LEXIS 51950, at \*77 (S.D. Ga. July 18, 2007).<sup>152</sup>

The regulations should be clear that fraud or willful misrepresentation may be brought to the CO's attention by any person and, no matter how the information reaches the CO, it should be treated seriously.

The proposed referral-decision process could conceivably drag on for years. As proposed, the regulations are unclear as to whether the CO has the authority to make a decision about the application if the OIG or DHS are still investigating the possible fraud, or, if the investigation is complete, in what time frame the CO must act. No time limits are prescribed for the referrals to the investigating agencies, no time limits are prescribed for the investigation, and no time limits are prescribed for acting upon the results of any investigation, acquittal or decision not to prosecute.

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<sup>152</sup> See also Exhibit E-10 which demonstrates USDOL's inaction after receiving proof that Petrocco Farms was committing perjury on H-2B applications to evade the responsibilities they owed to temporary foreign workers that they employed in the field.

In our experience, many growers tend to view applying for certification to employ H-2A workers as something akin to ordering seed or fertilizer. Growers have “cancelled” their orders after certification, paid U.S. workers less than the AEWR, and overstated the period of employment or the number of workers needed and then “loaned” their workers to their neighbors or other businesses. One grower signed a contract used by an FLC to obtain a certification, stating that he needed 50 workers when he needed far fewer and after he knew the workers should receive more than \$8.00 per hour but he could only pay \$7.00 at most.<sup>153</sup> The regulations need a swift and decisive enforcement process that will effectively emphasize to H-2A employers, their neighbors and colleagues that absolute truthfulness in H-2A applications is required. Simply put, H-2A employers must say what they mean and mean what they say. While extreme remedies are obviously inappropriate for inadvertent errors in applications, the decision to utilize the H-2A program should not be taken lightly. Employers must be committed to following the law and fulfilling their promises. Workers and their important labor rights, not seed or fertilizer, are at risk.

### **3. Revocation**

The addition of a procedure for revocation (proposed §655.117) is an important and positive advancement. Revocation is an important instrument Congress intended to be used in the context of labor certification. 8 U.S.C. § 1188(e)(1). At its best, revocation would provide a fast tool to prevent further harm to U.S. or H-2A workers. The proposed regulations would allow revocation where:

1. The certification was wrongly approved;
2. The employer violated the terms and conditions of the certification; or
3. Recommended by the Wage and Hour Division.

**The proposed language concerning revocation, however, limits its effective use unless further clarifications are provided.**

Revocation should be used in situations where serious violations are harming or would harm current or future workers. The regulation should be clear that revocation may occur where the employer does not offer the job terms required in the regulations or does not comply with the job terms required in the regulations. The current language implies but does not clearly state this condition. See proposed § 655.117(a). In addition, the regulations are unclear on the level of proof the CO will require for such a showing. It does not appear that the DOL would require (and it should not require) a previous final determination of an agency or a court of law; any such requirement would render the revocation process a meaningless remedy. Requiring a final determination would mean that revocation could not be utilized in a timely fashion -- additional workers would likely arrive from abroad and be left stranded in the United States while the revocation was pending. Revocation should be utilized when an employer has an active certification and intends to bring additional workers but is unwilling or unable to provide the terms and conditions of work promised – e.g. the employer has little or no covered work

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<sup>153</sup> Exhibit E-11 Deposition of Michael Moore in *Sianipar et al v. GTN Employment Agency et al* (07-CVS-3490, Sup. Ct. Mecklenburg County, NC, 2007), pp. 20-22.

available for the workers or is unable or unwilling to pay the workers. It should also be used if a timely audit discovered that U.S. workers had been discouraged or denied employment.

In our view, New Tree Personnel Services, Inc.'s treatment of its U.S. workers from Puerto Rico in 2004 is a prime example of how and when revocation would have been useful. As explained more fully in Section VII, New Tree failed to provide the promised work to U.S. citizens from Puerto Rico in April and May of 2004. It paid those workers with bad checks or refused to pay them at all for most of the work which it did provide to them. Wage and Hour had already determined that New Tree had failed to pay the AEW to Laotian H-2A workers in a prior year. In 2004, New Tree repeatedly failed to honor its promises to Wage and Hour to pay the Puerto Rican workers. Clearly, it was highly likely that New Tree would not honor its obligation to any workers who might be issued H-2A visas on the certification, especially since the *Inthalangsy* lawsuit had exposed New Tree's charging thousands of dollars to the Laotian workers to get the jobs. Despite being informed of these problems, ETA did nothing about the New Tree certification after the U.S. workers left in June.<sup>154</sup> In the fall, H-2A workers from Thailand were admitted on New Tree H-2A visas. The Thai workers, one of the remaining Puerto Rican workers observed, were often paid late or not at all and were provided with hurricane reconstruction work in the fall of 2004 that was not covered employment.<sup>155</sup> Both the Thai H-2A workers and local workers who might have taken these construction jobs were harmed.

**The proposed language fails to allow for revocation of current job orders based on violations of the terms and conditions of prior job orders.**

Where an employer has been found by the DOL or a court of law to have violated the terms and conditions of a prior H-2A application, the Agency should be able to revoke any current labor certifications. It is inexcusable for an egregious violator to be allowed to continue to win government approval to employ vulnerable H-2A workers if that employer had previously violated core employment protections. The rebuttal procedures in proposed §655.117(b) would protect the due process rights of an employer who had truly changed his or her practices, but given the length of many investigations and court proceedings, the Agency should not be foreclosed from taking action to prevent further harm if the employer has been found to have violated an earlier certification.

Additionally, if DOL is truly concerned about undocumented labor, then the DOL should establish a MOU with ICE to alert ICE upon revocation that an employer's request for workers has been denied and to heighten inspections of that employer's I-9 forms to ensure that the employer does not "exploit the current condition of undocumented workers in this country" (73 Fed. Reg. 8538, at 8541 (quoting remarks of Senator Kennedy) in order to fill the positions it sought to obtain for H-2A workers.

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<sup>154</sup> The NC SWA and Legal Aid of North Carolina were informed by officials of DHS and the Department of State that due to irregularities in interviews in Bangkok, a temporary freeze had been put on issuing H-2A visas to New Tree in Bangkok in late 2003 or early 2004. Apparently, USDOL did not follow up with any further concerns later that year, and the consulate issued H-2A visas for New Tree later in 2004.

<sup>155</sup> Exhibit E-12 Declaration of Raul González.

**Foreign workers who are already present in the United States should be given preference for other H-2A job opportunities at least until they have had the opportunity to earn the original contract wages.**

Since an H-2A visa is good only for a specific employer, revocation of certifications where foreign workers have already arrived would leave those workers stranded, without the ability to work in the United States and possibly without the capacity to return home.

Virtually all H-2A workers in our experience must borrow money in their home country in order to come to the U.S. Some employers, under the law in *Arriaga*<sup>156</sup> and cases that follow its reasoning, do reimburse workers in the first workweek for their costs of obtaining the visa and their incoming transportation. A few H-2A employers pay these costs up front. But the vast majority of H-2A workers enter the U.S. with debt that they can only repay through work in the U.S.

It would be entirely unjust and counter-productive to not allow workers who are the victims of employer misdeeds that have triggered revocation of an outstanding order, not to remain in the U.S. to work, especially while other employers were importing other H-2A workers. The ETA should require employers with open clearance orders that have not been filled to accept the referral of H-2A workers who are already present in the U.S., and have been affected by revocation, and ETA should deny job orders to employers who refuse said H-2A workers.

For example, GTN Employment Agency, Inc. vastly exaggerated the work available on its applications for certification and had no work for some of the H-2A workers who came from Indonesia. These men arrived in debt, having paid roughly \$6,000.00 each to local recruiters, of which GTN was to receive \$1,200 as a kickback. These workers could never repay the debts resulting from the H-2A employer's fraud with their incomes in Indonesia. Yet, their H-2A visas prevented them from lawfully working elsewhere in the U.S. Since their plight was due, in part, to a failure on the part of USDOL to detect the fraud, it seems only just that workers such as these be given priority for existing work for which temporary foreign workers are authorized rather than admit additional temporary foreign workers.

#### **4. Debarments (§655.118)**

The regulations on debarment, which are largely drawn from the penalties section at §655.110 of the current regulations, continue to be overly circumscribed and will, we predict, be as much of a barrier to vigorous enforcement as the current regulations have been. Congress clearly intended that the DOL would bar employers from the H-2A program for violating the terms or conditions of employment of either U.S. or foreign workers. 8 U.S.C. § 1188(b)(2)(A) and (B).

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<sup>156</sup> *Arriaga v. Florida Pac. Farms, LLC, supra.*

Under the current scheme, upon “reason to believe” that there has been a substantial violation, the RA is supposed to either investigate or refer the matter to ESA. If an employer commits a substantial violation, the RA is supposed to deny H-2A certification. Multiple substantial violations can theoretically result in a multiple-year bar. The proposed regulation, like the current one, requires a finding that the employer has committed a substantial violation in order for the Administrator to make a determination denying certification for up to 3 years.

Like the current regulation, the definition of substantial violation is too narrow, although there are some improvements.

“Significant” is not defined, yet it limits the authority of the Administrator to debar an employer who has taken actions injurious to workers or refused to offer jobs to U.S. workers. And the requirement that the act or omission be injurious to more than one worker employed or similarly employed seems to place an additional barrier to debarment in compelling circumstances.

In 2000, North Carolina H-2A grower L.C. Honeycutt assaulted an H-2A worker on his farm whom he believed was a leader in making a complaint to OSHA. Honeycutt **pled guilty** to the assault in district court in Sampson County, yet ETA refused to deny him a certification, reasoning that this behavior only occurred in relation to one worker and not 10% or more of the workforce. ETA thus rewarded totally unacceptable conduct in a highly dangerous way. The North Carolina SWA was well-aware of Mr. Honeycutt’s temper and proclivities and understood that it did not want to refer workers to him as though nothing had happened; it determined to deny him services, effectively ending his access to the H-2A program until he had taken steps to assure future compliance.<sup>157</sup> Especially injurious intentional acts towards one worker, such as ignoring a worker’s obvious or stated need for medical attention and allowing a worker to become gravely ill or die from his condition, evidences a serious disregard for the welfare of all workers. No employer should be allowed to bypass debarment by limiting physical abuse to a mere 9% of the workforce. The physical threat to a single worker sends a message to an entire workforce.

We note with approval the use of the word “reflect” in the parts of the substantial violation definition, as given the relatively short periods of time involved, the Administrator will often have more evidence that tends to show the employer has abused the privilege of H-2A certification than a confession of such conduct. We also commend the addition of utilizing H-2A workers in non-covered employment as grounds for debarment. Although sometimes employers do so in an attempted kindness for their H-2A workers, to keep them gainfully employed rather than idle, and a mere warning would be enough to cause them to cease the practice, other H-2A

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<sup>157</sup> See Exhibit E-13, which details ETA’s anemic response. ETA admitted that it had **never** debarred an H-2A employer. The NC Growers Association refused to renew the grower’s membership, admitting knowledge of past complaints of verbal abuse. And the SWA discontinued services until the grower could prove to their satisfaction that such problems would not recur. OSHA substantiated the workers’ complaint. Thus, ETA had conclusive proof of the underlying OSHA complaint and the criminal assault, but refused to act. This example illustrates the very real fact that some employers turn to H-2A workers because they treat workers so poorly that they cannot keep a workforce and therefore must have a more captive workforce, like H-2A workers. ETA needs both the authority to debar such employers in a timely fashion and the will to do so.

employers have shown a total disregard for the very notion of corresponding employment, and the results are unfair to similarly employed U.S. workers.<sup>158</sup>

We believe that it would serve the public interest if an additional ground for debarment were also specified – that an employer had failed to pay or comply with the terms of a civil judgment or court order in favor of any migrant or seasonal agricultural workers or H-2A workers. This would prevent an employer from exploiting a new group of H-2A workers to produce profits in order to satisfy a monetary judgment for violations of the rights of an earlier group of farmworkers, H-2A or U.S., and reduce the temptation to underpay or otherwise exploit the new H-2A workers. At a minimum, debarment should remain indefinitely until an employer has paid all wages due and owing former workers.

In what we hope is an oversight, we note that material misrepresentations of fact are substantial violations only if made by the employer, whereas the other substantial violations, apart from payment of fees, may be committed by either the employer or his/her agent. While the Department can certainly make a reasoned decision as to whether an employer was totally innocent of a material misrepresentation made by an agent, it should not foreclose debarment based upon such misrepresentations of fact by an agent with the actual or tacit approval or ratification of the employer. In fact, the proposed regulations do not include a debarment process for agents and probably should.

The regulations containing the debarment process for associations and their members do not include the “successors in interest” language included in subsection (a). It should be clear that associations and their principals will not be able to re-constitute themselves and continue business as usual.

## **5. Administrative Review (§655.115)**

DOL should make clear that workers and their representatives may intervene in administrative review proceeding under § 655.115, related to an employer’s effort to overturn a denial of labor certification or revocation. Workers may have much to offer in a case before the administrative law judge.

### **C. The Proposed Revisions to 29 CFR Part 501 Undermine Enforcement and Violate the Department’s Responsibilities Under the H-2A Statute.**

Congress expressed its intent to ensure fulfillment of the statutory goals of the H-2A program by including in the H-2A statute an express grant of authority to the Department of Labor to enforce not only the required wages, benefits and working conditions but all job terms in the employment relationship between H-2A employers and their workers, whether foreign or domestic. 8 USC § 1188(g)(2). This delegation of authority to a government authority to

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<sup>158</sup> See Section VII regarding Million Express Manpower, GTN, and Global Horizons, and Exhibit E-14, complaint in *Najera et al v. Parker Farms*, 08 CVS 200 (Sup. Ct. Robeson County, NC 2008) in which the employer repeatedly ignored the parameters of the period of certification as well as the covered employment. See also Exhibit E-15, *Medina et al v. Garland et al.*, 01CVS 569 (Sup. Ct. Watauga County, NC 2001) in which a Christmas tree farm owner assigned H-2A workers to work in his relative’s construction business.

enforce the terms of private employment contracts, and not merely the statutory or regulatory job terms, is extraordinary. It represents in part Congressional recognition of the special problems that have plagued enforcement efforts under the history of agricultural guestworker programs. The Department of Labor issued regulations to implement this Congressional intent and mandate, including the provisions of 29 CFR Part 501. The NPRM includes major revisions to 29 CFR Part 501. DOL describes the proposed changes as providing for “enhanced” enforcement (73 Fed. Reg. 8538, at 8556), but the opposite is true. The proposal would curtail enforcement authority, minimize actual enforcement, discourage workers at H-2A employers from seeking government investigations, deter U.S. workers from seeking jobs at H-2A employers, and create incentives for employers to violate their legal obligations. We are particularly concerned that DOL has knowledge of rampant, serious violations of the H-2A program employers’ obligations (some of which are detailed in these comments), but does virtually nothing to reverse this troubling record while proposing much that would exacerbate these existing problems in the administration of the program. While some penalties under the proposed regulations would increase, these modest changes in the agency’s discretion on the dollar amounts of penalties pale in comparison to the numerous revisions which would weaken existing enforcement mechanisms and facilitate the exploitation of U.S. farmworkers and H-2A guestworkers, alike.

The NPRM’s description of the proposed changes (73 Fed. Reg. 8538, at 8556-57) is incomplete and inaccurate, to a degree which undermines the integrity of the notice and comment process. Numerous substantive changes, frequently accomplished through word changes, are not mentioned at all, while other changes are mischaracterized (e.g. saying that language has been added to 29 CFR 501.33 and 501.42 to “clarify” and “assure” the exhaustion of administrative remedies before judicial review, when the new language is intended to prevent review of DOL’s failure to enforce penalties imposed by an administrative law judge). The public does not have a meaningful opportunity to comment in part because DOL has not provided effective notice of many important changes, the reasons for those changes or the impact that DOL’s expectations regarding the proposed changes’ impact. The short time frame for reviewing and analyzing the proposal also has hindered severely the opportunity for commenters with extensive knowledge of the H-2A program to disseminate detailed analyses that could be considered by less knowledgeable, but interested members of the public for their own submissions.

In addition to these procedural failures, the proposal is substantively flawed. The numerous revisions repealing the authority of the Wage and Hour Division (“WHD”) to enforce the terms and conditions of H-2A employment contracts for U.S. farmworkers violate the congressional mandate that DOL ensure that the employment of foreign workers does not adversely affect the wages and working conditions of U.S. farmworkers. These and other changes would dramatically curtail DOL’s own enforcement activities, even though the exercise of existing powers has been inadequate to achieve wide scale compliance. What is manifest throughout the proposal is not an effort to “modernize” or “enhance,” but rather an unmitigated lack of interest by DOL in enforcing worker rights under their H-2A employment contracts and the statute. The repeal of important protections would reduce the deterrent effect of the regulations and DOL oversight, and leave injured workers with limited remedies. This is not improved enforcement, to accompany greater use of the program; it is a retrenchment that will harm U.S. farmworkers, guestworkers, and responsible employers. The proposal would benefit

unscrupulous growers and farm labor contractors, who would gain a competitive advantage from failing to adhere to the terms and conditions of their H-2A employment contracts and to other program requirements, and put economic pressure on their competitors to lower wages, reduce benefits, and cut labor costs by not complying with the law and regulations.

**1. Excluding U.S. Farmworkers Who Are Not “Newly Hired” from the Protections of H-2A Employment Contracts Violates the Congressional Mandate that DOL Protect U.S. Workers from Adverse Effects.**

The proposed regulations repeal the requirement that H-2A employers offer all similarly-employed U.S. farmworkers the same wages, benefits and other protections afforded to H-2A guestworkers. Under the new regulations, only “newly hired” U.S. farmworkers would be entitled to the same job terms as H-2A workers (contrast the current 29 CFR 501.90, making regulations applicable to “the employment of *other workers hired by employers of H-2A workers* in the occupations and *for* the period of time set forth in the job order” with proposed 29 CFR 501.90, limiting application to “the employment of U.S. workers *newly hired* by employers of H-2A workers in the occupations *during* the period of time set forth in the labor certification[.]”) This is a complete reversal of DOL policy and regulations which, for more than two decades, have required H-2A employers to offer the same wages and benefits to *all* U.S. farmworkers similarly employed, not just those “newly hired” during the period of time set forth in the job order. The current policy is required to comply with the most important mandate of the H-2A Act: that U.S. workers be protected from harm. Its sudden repeal and replacement by a system which permits employers to discriminate against U.S. workers in the provision of wages and benefits is arbitrary and capricious and violates the H-2A statute.

A. Under the New Rules, U.S. Farmworkers Who Are Not “Newly Hired” Would Have No Access to WHD Enforcement Procedures.

The modified 29 CFR §501.0 (introductory section to Part 501) inserts the words “newly hired” into the second sentence and replaces the word “during” with “and for.” These small word changes mean that U.S. farmworkers already employed will have no rights and protections under the H-2A employment contract. H-2A employers will be permitted (under these regulations, at least) to hire foreign workers and provide them better wages and benefits than U.S. farmworkers. They would also have no right to recourse within DOL.

In addition to the “newly hired” language in §501.0, the proposed changes reflecting the repeal of the rights of U.S. farmworkers include:

§501.1(c) -- by moving the word “hired,” strips the authority of the Wage and Hour Division to investigate and enforce the contract rights of U.S. farmworkers who are not “hired in” corresponding employment;

§501.4 -- limits the waiver of rights to U.S. farmworkers “hired in” corresponding employment, hence purporting to allow all other U.S. farmworkers to waive *any* of the rights that they enjoy under the H-2A statute;

- §501.5 -- curtails DOL’s investigative authority. DOL may only investigate issues concerning the treatment of U.S. farmworkers who are “hired in” corresponding employment, and not other workers, including those who have worked for the employer for many years;
- §501.10 -- incorporates changes to definitions that strip the rights of U.S. farmworkers. (See discussion of definitions, earlier in these comments.)
- §501.15 – limits the investigative, inspection and law enforcement functions of the WHD, which will now reach only U.S. workers “hired in” corresponding employment;
- §501.21 – limits authority of WHD to report to ETA interference with the exercise of its powers – will only apply when an employer fails to cooperate with an investigation of the rights of H-2A workers and U.S. workers “hired in” corresponding employment. (Compare the current §501.20 with the proposed §501.21.) (On the change from any “person” to any “employer,” *see* below.)

B. These Changes Are Unwarranted and Harmful.

The explanation for this comprehensive repeal of rights is contained in one paragraph of the Federal Register (*see* 73 Fed. Reg. 8538, at 8556), under “Definitions.”)

In the first sentence, DOL asserts that it is not required by statute to protect the rights of U.S. farmworkers who are already employed: “INA requires that U.S. workers hired during the H-2A recruitment period . . . must be offered and provided no less than the same wages, benefits, and working conditions that the employer offers, intends to offer, or provides to the H-2A workers.” (Therefore, the logic goes, U.S. farmworkers who are not hired during the recruitment period have no statutory rights and protection.)

Next, DOL announces that since it is not required to, it will not (any longer) enforce the contract rights of all U.S. farmworkers: regulatory language has been “modified,” to reflect that only “newly hired” farmworkers will be protected, from now on. These changes are said to “tie” DOL’s enforcement policy to what it refers to as its “statutory authority” (which is actually a mandate) to prevent adverse effect, since farmworkers who were already employed “cannot possibly be adversely affected by the subsequent hiring of H-2A workers who are paid higher wages.”

This statement is not elucidated. It is stated categorically, as if the conclusion were self-evident, when the opposite is true.

Finally, to lessen the blow, DOL suggests that these changes won’t matter, anyway, because “its experience with the H-2A program indicates that situations where H-2A workers are paid more than similarly employed U.S. workers will arise rarely, if ever, in practice.” As advocates, we have encountered such discrimination and cannot explain DOL’s “experience.”

*But regardless*, as a defense to changing current practice, this statement in the NPRM, is meaningless. Currently, offering differing terms and conditions to U.S. workers and H-2A workers is *illegal*; hence, the fact that violations “rarely, if ever, occur” (even if true) would reflect nothing more than compliance with existing law. This observation cannot be used to predict what might happen if DOL allows H-2A employers to pay their experienced U.S. farmworkers lower wages.

C. U.S. Farmworkers Will Suffer Adverse Effects if H-2A Employers Are Allowed to Employ Foreign Labor without Providing the Same Wages and Benefits to U.S. Workers.

Contrary to what DOL claims, all U.S. farmworkers are susceptible to wage depression from the importation of foreign workers, because tapping into a foreign labor market increases the labor supply. This is a matter of simple supply and demand: when supply increases, price (wages) decrease. This concept is well-understood by American workers and the American public, and Congress recognized it by requiring that DOL reject applications for the importation of foreign labor without proof that the petition would do no harm to the “wages and working conditions of [all] workers in the United States similarly employed” (not “newly hired in corresponding employment”). 8 USC 188(a)(1). (*See also* 8 USC 1188(g)(1)(B), appropriating funds for DOL to monitor the terms and conditions of employment of all domestic workers “employed by the same employers” (not “newly hired in corresponding employment”); 1188(g)(2), authorizing enforcement action necessary to assure employer compliance with the terms and conditions of all employment under the statute).

Since the program’s inception, these statutory mandates have been interpreted by DOL to require that all U.S. farmworkers working for an H-2A employer be provided the same wages and other job terms as the H-2A workers. This interpretation is correct. U.S. farmworkers who are already employed and those “newly hired” are laboring in the same market and have a right to compete freely for higher wages and benefits. They also have a statutory right to employment before a single H-2A worker is hired. What DOL is proposing is to create a dysfunctional, segmented marketplace, where all of the appropriate incentives are flipped on their head. The labor supply would be filled, on the one hand, with H-2A workers (more and more, under DOL’s proposal) and U.S. farmworkers with no tenure, all of whom would be guaranteed a higher wage; while experienced domestic farmworkers -- stripped of their bargaining power, because the floodgates are open -- have no rights. To secure higher wages, experienced domestic workers would need to abandon their jobs (and perhaps migrate) to find a different H-2A employer where they would be “newly hired.” But unless they find that new work before it starts (under new regulations which would require less positive recruitment), they would be locked out by the elimination of the 50% rule. No employer will want to “newly hire” any U.S. worker under this system. (Indeed, the proposal would create a perverse incentive for employers to lay off their previously hired U.S. workers, then hire H-2A workers without offering the jobs to the laid-off U.S. workers, and then, if pressed to hire the laid-off workers, offer them jobs as “previously hired” workers who have no right to the H-2A wages or benefits. Tanimura & Antle, a large California firm recently conducted such a layoff followed by hiring H-2A workers.<sup>159</sup>

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<sup>159</sup> See “Laid-off worker says Salinas firm didn't try to rehire him,” Robert Rodriguez, The Fresno Bee, March 14,

No U.S. employer should be permitted to import foreign workers and pay them higher wages than U.S. workers in the same job. Congress agreed, when it passed the H-2A statute, and so does the American public.

## **2. The Proposed Changes to 29 CFR 501.1(c) Violate the Statute and Weaken Enforcement.**

Section 501.1(c) describes the role of WHD in enforcing the rights of workers under H-2A employment contracts. The NPRM includes word revisions to this section which weaken and muddle the designated authority of WHD, violating the congressional delegation of authority.

First, the current regulation includes the statutory language at 8 U.S.C. §1188(g)(2), empowering the WHD “to take such actions including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, *as may be necessary to assure* employer compliance with terms and conditions of *employment under this section.*” (emphases supplied). *See also* 73 Fed. Reg. 8538, at 8558 (reciting the statutory language). The proposed rule replaces it with a bungled sentence, “The Secretary of Labor *may* take actions that assure compliance with the terms and conditions of employment *under the H-2A [word omitted]*, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. (see 8 U.S.C. 1188(g)(2).)” (emphases supplied). This is not an improvement. If the omitted word is “statute,” then the delegated authority would appear to be the same. However, if the proposal is to say “employment contract” or some other word(s), then this would represent a dilution of the authority delegated by Congress. The congressional mandate is to take such actions “as may be necessary to assure” compliance. This is not the same as stating that the Secretary “may” act.

Second, without a word in the preamble relating to joint employer liability, the published revisions to §501.1(c) (and to other changes to 29 CFR Part 501, described below) appear to weaken the investigative and enforcement authority of WHD over growers, associations and other individuals and entities which may operate as joint employers. These changes are perplexing, since the NPRM describes an increase in the number of participating FLC’s and enforcement statistics which reveal that “FLC’s are generally more likely to be found in violation of applicable requirements than fixed-site agricultural employers,” 73 Fed. Reg. 8538, at 8556. (These facts have also been observed by farmworker advocates and are discussed elsewhere in these comments.) Weakening joint employer liability is inconsistent with any promise of “enhanced enforcement.” *See* 73 Fed. Reg. 8538, at 8556.

The published rule moves the word “hired” in the second sentence of subsection 501.1(c)(2) (the sentence beginning “in general”). This reflects the “newly hired” concept described earlier, but it could also be construed to immunize H-2A growers, associations and other employers from liability for contract and other violations if they did not themselves do the hiring (e.g. if a farm labor contractor did). This change is entirely inappropriate. The identity of

the person or entity responsible for hiring is not dispositive of employer-employee status under *any* test of joint employer liability.

Rather than moving the word “hired,” the current rule should be strengthened and clarified by deleting the reference to hiring, which is surplusage, and should simply assign to WHD the enforcement of “the obligations of the work contract between the employer of H-2A workers and other workers in corresponding employment.”

Similarly, language tacked onto the end of the same paragraph to provide for recovery pursuant to FLC surety bonds (“either directly from the employer or in the case of an FLC, from the FLC directly or from the insurer ...”) could be read in the disjunctive and construed to immunize growers, associations and other joint employers from liability for unpaid back wages whenever a farm labor contractor is also involved. This language should instead read, “either directly from the employer or, in the case of an FLC, *also* from the insurer ... .”

DOL has ample evidence that agricultural employers increasingly have used farm labor contractors and other intermediaries for the purpose of attempting to evade immigration and labor law obligations. It also has substantial experience under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act demonstrating that implementing the “joint employer” concept deters violations and helps and assure victimized workers of meaningful remedies. DOL’s effort to weaken its use of the joint employer concept would magnify companies’ attempts to deny that they are “employers” and shift responsibility and liability to another entity lower on the economic chain. The proposal would lead to more violations of labor standards in the H-2A setting.

### **3. Other Changes that Curtail Joint Liability and Individual Accountability Should Be Eliminated.**

Section 501.5 prohibits interference by any “person” with WHD investigations and provides for mandatory reports of such interference to ETA. The proposed rule strikes “person” and replaces it with “employer,” which invites chicanery. Prohibiting interference by “any person” is standard regulatory language, so that enforcement agencies can carry out their mandates, unimpeded. “Person” should be retained.

At §501.16(b), the proposed rule suffers from the same drafting problem described above in relation to §501.1(c). The parenthetical beginning “whether directly from the employer” (“whether” contrasts with “either” in the proposed §501.1(c)), should be restated so that it cannot be read in the disjunctive: “either directly from the employer, or in the case of an FLC, *also* by claim against any surety ... .”

### **4. Extending Debarment Authority to WHD Will Enhance Enforcement, but the Proposed Regulations Should Be Clarified and Strengthened, and the Arbitrary and Capricious Exhaustion Requirements Removed.**

- A. ETA and WHD Should Have Concurrent Authority to Debar for Violations of the Terms and Conditions of a Labor Certification.

The NPRM describes changes to 29 CFR Part 501 which assign WHD exclusive authority to sanction and debar H-2A employers in connection with WHD enforcement activities. *See* 73 Fed. Reg. 8538, at 8557. This is a departure from the current enforcement regime, which provides for reports from WHD to ETA, so that existing labor certifications may be revoked and future certifications denied, in appropriate circumstances, *see* 29 CFR §§501.5(b); 501.16, 501.21. The NPRM says that the retooled system will “allow[] for more expeditious proceedings and efficient enforcement,” 73 Fed. Reg. 8538, at 8557, but that is not a complete picture.

In describing the changes to Part 501, the NPRM states that, under the new rules, ETA will have the authority to debar employers only in relation to “issues arising out of the attestation process.” 73 Fed. Reg. 8538, at 8557; *see also*, at 8582 (proposed revisions to §501.16(a-b)). Consistent with this framework, language has been stricken from multiple provisions of Part 501 which permit WHD to make recommendations to ETA that future certifications be denied, where WHD has substantiated violations of contract obligations, or retaliation against individuals who cooperate with WHD enforcement activities. *See* proposed §§501.3 (striking “may recommend to ETA that labor certification of any violator be denied in the future”); 501.6 (striking similar language); 501.21 (striking similar language from current §501.20). Under the proposal, only WHD would have the authority to debar an employer for this conduct.

However, the proposed rule at 20 CFR §655.118 (based on the current §655.110), regulating ETA’s debarment procedures, does not reflect the transfer of authority from ETA to WHD or a limitation on ETA’s debarment activities to “issues arising in the attestation process.” Rather, by its own terms, §655.118 may be invoked “when an employer has substantially violated a material term or condition of [a] labor certification.” *See* 73 Fed. Reg. 8538, at 8577-78. *Cf.*, 8 USC 1188(b)(2)(A) (statutory mandate requiring that certification be denied upon a determination that the employer has “violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.”) The violations identified as “substantial,” and giving rise to the most severe sanctions, are substantive, and include, specifically, an employer’s interference with investigations and enforcement activities of the WHD (ESA).

Moreover, the phrase “in connection with the attestation process,” 73 Fed. Reg. 8538, at 8582 (proposed §501.16(a)); *cf. id.*, at 8557 (“issues arising out of the attestation process”) is not elucidated. Nor is it self-evident. This could lead to problems in enforcement, even if the general proposition is that each division will debar based on the results of their own investigations.

In general, these rules are very difficult to understand, and they need to be improved, so that it is clear which division is responsible for which debarment proceedings. It also needs to be clear that *someone* has the authority to enforce the contract rights of workers, and to pursue all issues that may arise under the regulations. As it stands, the terms are defined too vaguely, or not at all. Also, the preamble cites the “coordination” of activities when debarment is considered, 73 Fed. Reg. 8538, at 8557, but there are no provisions which reflect this.

Even if the regulations are clarified, it would still be preferable for WHD and ETA to have concurrent authority over debarments. The regulations could provide (as they do, in the proposal) for a general division of responsibilities, rather than a strict delegation of powers. Concurrent authority would avoid problems that have arisen in the past, when advocates have been told that neither division had the authority to pursue an abusive employer. Concurrent authority is also the most likely to achieve “enhanced enforcement.” While the NPRM cites a GAO report as support for divided authority, what that report evidently advocates is *extension* of debarment authority to WHD. See 73 Fed. Reg. 8538, at 8557. We agree.

B. Debarment for a Substantial Violation of a Material Term or Condition of the Labor Certification with Respect to the Employment of U.S. Farmworkers or H-2A Workers Must Be Mandatory.

The proposed regulations at 29 CFR 501.20 (WHD) (as well as 20 CFR 655.118 (ETA)) violate the H-2A statute.

First, they purport to make debarment for substantial violations of the terms or conditions of a labor certification (or, with respect to the former, the “work contract”) discretionary, whereas the H-2A statute *mandates* debarment for such violations. See 8 U.S.C. 1188(b)(2)(A) (“[t]he Secretary of Labor may not issue a certification”).

Second, the regulations at 29 CFR 501.20 and 20 CFR 655.118, in combination, must encompass the full reach of the statute, and they do not. The statute prohibits approval of an application when DOL has determined that the employer has “substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.” *Id.* Failing to explicitly require debarment for violations that affect *either* domestic workers or guestworkers is arbitrary and capricious. Also, while the regulations purport to assign WHD exclusive authority to debar employers for violations of the H-2A regulations (*see* above, and proposed §501.16), §501.20 permits debarment only for “violations of a material term or condition of the work contract.” The rule should also require debarment for substantial violations of the H-2A regulations.

C. The New Exhaustion Requirement Undermines Enforcement, is Arbitrary and Capricious, and Violates the Due Process Rights of Intervening Parties.

The language that DOL proposes adding to 29 CFR 501.42 is not necessary to “clarif[y]” or “ensure[]” the exhaustion of administrative remedies pursuant to the Administrative Procedures Act. 73 Fed. Reg. 8538, at 8557. The current regulations already identify the final, appealable agency action in the clearest terms: “If the [Administrative Review Board] does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the administrative law judge shall be deemed the final agency action.”

The new language tacked onto the end (“[i]f a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the ARB issues an order affirming the decision, or declining review”), does not clarify anything, but rather undermines *all*

WHD enforcement actions (not just debarment proceedings) by rendering “inoperative” final determinations of an ALJ and requiring affirmative action by the ARB -- *which may never be forthcoming* -- before an enforcement action is filed in federal court. Since, under the proposal, ALJ orders are “inoperative” until the ARB acts, only workers can be harmed by the change. This undermines enforcement and rewards unscrupulous and abusive employers. It also violates the due process rights of interveners (*see* 29 CFR 501.33 (permitting “[a]ny person” to file administrative appeal), including workers who are owed unpaid back wages, and guestworkers and U.S. farmworkers who may be exploited by abusive H-2A employers that an ALJ has ordered debarred, and the H-2A statute, by interfering with the Secretary’s determination of whether an employer has violated a material term or condition of a labor certification and must be debarred. *See* 8 USC 1188(b)(2)(A). This language should be removed.

Finally, in writing regulations relating to administrative remedies, DOL should take special care not to imply that workers cannot pursue all available remedies, in all forums, concurrently. Affirmatively stating that they *can* concurrently pursue all remedies would be a meaningful addition to the provisions on administrative review.

#### **5. The Enhanced Penalties Are Good, but the Proposed Rule Should Further Modify the Existing Standards for a “Substantial” Violation.**

The beefed up monetary penalties in §501.19 are welcome and may have some tangible deterrent effect, but they are not adequate to achieve the “meaningful assurance” of employer compliance that the NPRM suggests. 73 Fed. Reg. 8538, at 8557. In addition to these heightened penalties, the proposed rule should eliminate the requirement that a violation be “significantly injurious to the wages, benefits or working conditions of 10 percent or more an employer’s workforce” in order to be deemed “substantial” (a predicate to debarment and other severe penalties.) This standard has been imported from the existing 20 CFR §655.110, is arbitrary and capricious, and has, in the past, prevented DOL from imposing severe penalties for egregious violations. Other modifications to the existing standards of §655.110 (e.g. elimination of additional arbitrary standards, the addition of “includes but is not limited to”) are positive changes.

#### **6. Language Buried in the Civil Penalties Provision Relating to the Lay-Off or Displacement of U.S. Farmworkers Must Be Removed.**

The proposed rule adds subsection (e) to §501.19, which purports to increase monetary penalties available for the layoff or displacement of U.S. farmworkers, by allowing a penalty of up to \$15,000 (rather than \$5,000) per worker for a willful violation. However, the new language is mischievous and must be removed. It carves out an exception, stating, “except that such layoff *shall be permitted* where the employer also *attests* that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons[.]” 73 Fed. Reg. 8538, at 8582 (emphases supplied). DOL cannot, by burying language in a section on civil monetary penalties, purport to legalize the displacement of U.S. farmworkers based on nothing more than an employer’s *unscrutinized, self-serving statement* that U.S. workers did not want, or were unqualified for, the job. Protecting the jobs of U.S. farmworkers is the most important mandate of the H-2A Act.

DOL must aggressively pursue such complaints, and may not accept an employer's self-serving attestation as a defense. *See also*, 8 USC 1188(e)(2) (on appeal of a denial of certification, the "burden of proof is on the employer to establish that [an] individual referred is not able, willing, or qualified because of employment-related reasons.")

## **7. DOL Must Investigate and Remedy Complaints of Discrimination against U.S. Farmworkers.**

In the same vein, the proposed regulations abdicate to the Department of Justice (Office of Special Counsel for Unfair Immigration-Related Employment Practices ("OSC")), the pursuit of claims of discrimination against U.S. workers based on citizenship or immigration status. 73 Fed. Reg. 8538, at 8578 (proposed §501.3). This is a murky category, which may or may not encompass all claims of unlawful displacement of U.S. farmworkers by H-2A guestworkers. In either case, the delegation of authority is inappropriate, undermines enforcement and violates the H-2A statute, which charges DOL with the responsibility of ensuring that U.S. farmworkers are not displaced by H-2A guestworkers, and does not authorize the delegation of this authority to any other executive agency. *See* 8 USC 1188. Moreover, even if delegation were permissible, it would undercut the rights of U.S. farmworkers. OSC procedures are ineffectual (farmworker advocates pursuing complaints there have been told that the office has not tried a case "in years"), and the office has no statutory authority to enforce the rights of long-term, lawful permanent residents, who make up a very substantial percentage of the U.S. farmworker population. Therefore, proposed §501.3 should be modified to empower WHD to investigate and prosecute complaints of discrimination on all unlawful grounds, including citizenship or immigration status.

## **8. Changes in Definitions**

Objections to the changes in definitions are described earlier in these comments.

### **D. The Dozens of Complaints Against H-2A Employers Demonstrate Why Genuinely Enhanced Enforcement is Needed.**

Exhibit X-1 is a summary of known complaints filed against H-2A employers, with the complaints (and as to some, settlements, declarations, answers and/or other pleadings) attached. Seventy-five (75) of the complaints were filed since 2000, reflecting growing use and abuse of the program.

These documents reflect serious violations and abuses committed by more than a hundred H-2A employers against *thousands* of H-A workers, and U.S. farmworkers employed by or seeking employment with H-2A employers.

Of course, the violations reflected in these materials are a mere drop in the bucket, since they include only those claims asserted by workers who were able to ascertain that their rights were violated and successfully sought and secured representation. They also include only complaints that were formally filed, not informally resolved, and do not include complaints (if any) filed by private lawyers, or those not known to the advocates submitting these comments.

These materials demonstrate why enhanced enforcement of the H-2A statute and regulations are necessary to protect the rights and interests of U.S. and H-2A workers. They also undermine factual claims made by DOL in the NPRM, including those in support of the unpersuasive argument for removing U.S. farmworkers who are not “newly hired” from the protection of the H-2A regulations (a repeal of rights that is unlawful, for reasons described earlier in these comments).

### **VIII. THE PROPOSED REGULATIONS ACKNOWLEDGE FLC ABUSES, YET FAIL TO ESTABLISH ADEQUATE PROTECTIONS FOR WORKERS**

Farm labor contractors (FLCs) present a significant challenge to DOL when they use the H-2A program. The current Handbook, at II-24, acknowledges this challenge. Yet the proposed regulations do not address the major problems which have arisen from farm labor contractor H-2A employers. Chief among those challenges are:

- FLCs must typically have jobs at several different sites, sometimes in far flung states, in order to provide a full season of work. This results in extreme difficulties in monitoring adherence to the program requirements.
- The rise of FLCs whose business model is one of providing H-2A workers to employers and who do not have a background in agriculture or managing workers. These FLCs understand the desperation of workers in the developing world to come to work in the U.S., but know little about the business of being a farm labor contractor or satisfying either farmers’ or workers’ needs.
- Severe undercapitalization of the FLCs, such that they are unable to meet their payroll obligations on their own and, in an effort to attract business, have priced their services so low that they cannot comply with their other financial obligations as H-2A employers.
- FLCs tend to establish business relationships with foreign recruiters that result in kickbacks to them from the fees charged by the recruiters or which ratify the recruitment fees which result in an indentured workforce.
- Widespread non-compliance with the program, discriminating against U.S. workers and treating H-2A workers so poorly that some have been declared by DHS to be victims of human trafficking.

The proposed regulations would marginalize the role of the SWAs, some of whom have been in the forefront of attempting to prevent the abuses workers have suffered at the hands of FLC H-2A employers. As set forth below, the current certification process has not hindered the extreme abuse of workers by many FLCs. The attestation process would be even less rigorous, with less opportunity for SWA involvement. The other measures proposed would be ineffective. The bond for FLCs would scarcely pay for a few workers’ tickets from Southeast Asia, for example, or for only 1 or 2 recruitment fees charged by the FLC’s agents abroad. The past has shown us that any additional attestations required of FLCs would be of little effect and the government has not demonstrated any credible reason why FLCs should take attestations more seriously in the future. In fact, the new regulations would make it easier for FLCs to obtain multi-state, very long period certifications that would make monitoring the FLC H-2A employers

even more difficult for the government. The proposed regulations as written would open the floodgates for the worst sort of abuses.

### **A. FLCs Have a Demonstrated History of Abuse of the H-2A System**

DOL specifically noted that “[t]he number of FLCs applying for labor market certifications enabling them to hire and employ H-2A workers has risen in recent years and is expected to continue to increase....” and that “FLCs are generally more likely to be found in violation of applicable requirements than fixed-site agricultural employers.” [DOL proposed regulations, Supplementary Information, 73 Fed. Reg. 85570]. This is the one observation by DOL that can be verified by worker advocates.

The abuses perpetrated by Global Horizons on its H-2A and U.S. workers have been the impetus for several lawsuits, administrative complaints and a pending action by DOL.<sup>160</sup> Global Horizons employed workers in places as far-flung as Hawaii and New York. Additionally, in California, FLC SAMCO, settled an action against it where H-2A workers claimed recruitment and reimbursement violations of the H-2A Act and regulations, as well as violations of state worker protection rights.<sup>161</sup>

But perhaps the problems inherent in facilitating the use of the program by FLCs are best illustrated by the histories of three independent FLCs in North Carolina. Since 2000, three different FLCs based in North Carolina have pursued the business of getting certifications for H-2A workers and bringing workers from Asia to fill those positions.<sup>162</sup> None had been FLCs prior to seeking H-2A workers. The results have been an unmitigated disaster for U.S. workers, for the H-2A workers, and for some of the farmers who contracted with these FLCs. One group of workers has even been certified as victims of human trafficking by DHS.

Since the proposed regulations would greatly ease the way for new FLCs to get into the business of providing H-2A workers to farms, the histories of these three are instructive. Several patterns and common facts have emerged.

First, these FLCs were seriously under-capitalized. They compounded this by offering their services to growers at unrealistically low prices in an attempt to undercut competing H-2A providers or FLCs. They promised growers that they would assume all the employer responsibilities, knowing that they lacked the assets or cash flow to follow through with those promises. Their “business plans” relied upon receiving a sizeable kickback from the fees foreign labor recruiters charged their workers to get the visas. They also relied upon the H-2A workers

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<sup>160</sup> See Exhibit R-32, a summary of Global Horizon’s flouting of H-2A law and regulations with exhibits.

<sup>161</sup> Exhibit X-1-69, Correa, et al. v. SAMCO, et al.

<sup>162</sup> The Asian-American contractors discussed in this section are not the only problematic farm labor contractors to receive certification to employ H-2A workers in North Carolina. Another farm labor contractor who received certification, a former farmer, has repeatedly violated the terms of his certifications and engaged in highly problematic employment practices. This section focuses on New Tree Personnel Services, Inc., Million Express Manpower, Inc., and GTN Employment Agency, Inc. because they best illustrate the realities of the international labor market today and the implications of the proposed policy changes which would favor entities such as these.

bearing all the costs of transportation and visa charges. To ensure that the H-2A workers did not leave their employ, they confiscated workers' passports and plane tickets.

Second, these FLCs' expertise was in the international labor market of Southeast Asia, not standard farm labor contracting activities. They understood that there was a ready supply of workers in Laos, Thailand, and Indonesia for whom unskilled work at U.S. wage rates, or even a fraction of required wages, was very enticing. They knew that many workers had experience working abroad in countries like Taiwan, Korea, and Israel, and so would be willing to pay a substantial sum for the privilege of coming to the U.S. to work if the visa period was sufficiently long to justify the investment. They and their agents promised workers that their visas would be good for three (3) years or would be valid for one (1) year and renewable for two (2) succeeding years. They also were familiar, in the case of Thailand and Indonesia, with existing labor brokers who could recruit workers, and were willing to share a portion of the recruitment fees with them. Workers from Thailand paid the most-- ten thousand dollars (\$10,000) to twelve thousand dollars (\$12,000) to the labor brokers to obtain the jobs and the visas – but workers from Indonesia paid at least six thousand dollars (\$6,000), and workers from Laos paid almost that much. Since these FLCs' income was increased with each incremental worker recruited, the FLCs had incentive to overstate the number of workers actually needed by growers. In each case, the FLC overstated the actual number of workers required.

Third, their failed business plans and greed drove them to commit numerous violations of the law. They discriminated against U.S. workers, whose presence interfered with their core scheme of making money from H-2A workers; they underpaid their workers or failed to pay them at all for the work they did perform; they failed to pay their workers for their transportation to and from Asia; they made impermissible charges and deductions from workers' pay; they housed workers in vastly substandard housing; and they assigned H-2A workers to jobs and worksites which were not certified for H-2A workers, some in other states. The last violation – assigning workers to other jobs and worksites which are not certified – is one that seems inherent in any scheme which would make it easier for FLCs to obtain certifications for H-2A workers. If the FLC is the employer on the application, growers have demonstrated a casual attitude toward “cancelling” their contracts with FLCs, thereby leaving the workers, be they U.S. or H-2A, with little or no work.

### **1. Aaron Louangxonikone and New Tree Personnel Services**

In 2000, Southone (Aaron) Louangxonikone, a native of Laos who had a janitorial business called New Tree Personnel Services, Inc. (New Tree), based in Raleigh, and a FLC license, began to advertise to growers that he could provide H-2A farm workers from southeast Asia<sup>163</sup>. New Tree secured several contracts with North Carolina growers. These contracts provided that New Tree would be responsible for workers' compensation, housing, transportation, payroll, and supervision<sup>164</sup>. The farms were charged an override of only \$.97 cents per hour for the labor of the workers to defray the cost of all the responsibilities New Tree

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<sup>163</sup> See Exhibit NCFLC-1, the flyer used by “Aaron” Louangxonikone to attract business for New Tree Personnel Services, Inc.

<sup>164</sup> See Exhibit NCFLC-2, contract between New Tree Personnel Service and Melinda H. Vaughn, president of Tom's Creek Landscaping, Inc..

assumed.<sup>165</sup> Grower Randy Bailey described New Tree offer as “pretty much a turnkey contract”. When asked what he meant by that, Mr. Bailey stated “Turnkey means it includes everything.”<sup>166</sup>

The cost of the workers’ roundtrip tickets to the U.S. from Laos exceeded two thousand dollars (\$2,000).<sup>167</sup> Thus, a worker would have to work more than two thousand (2,000) hours in order for New Tree to earn enough money from its override just to reimburse the worker for his transportation. This would have been next to impossible on a seasonal H-2A visa and would have left nothing for New Tree to cover other expenses, like housing, workers compensation insurance, and transportation to the worksite, or even salary for Louangxonikone. Clearly, New Tree could not be financially viable if it complied with its responsibilities as an H-2A employer and only received income from its override.<sup>168</sup>

a. Workers From Laos –2000-2003

”Aaron” Louangxonikone recruited workers from Laos. He promised a visa that would be good for three (3) years. The workers paid their round trip airfares from Vientiane, Laos to Raleigh, North Carolina and the costs of their passports and both the H-2A visa and a Laotian “exit” visa.<sup>169</sup> Louangxonikone had arranged housing for them in suburban Raleigh.<sup>170</sup> They travelled from Raleigh to work at Bailey Farms in Granville County and at Tom’s Creek Nursery, near Denton, North Carolina.<sup>171</sup> Thus, New Tree incurred substantial transportation costs, reducing further any profit for its farm labor contracting activities.

Louangxonikone charged each worker a “lawyer’s fee” of \$3,000, supposedly to defray the costs of the applications. The “lawyer’s fee” was deducted from the wages of the workers in installments.<sup>172</sup> In 2002, USDOL Wage and Hour Division investigated New Tree and found that the workers were not being paid the AEW. Because the “lawyer’s fee” charges were not listed on the books and because Wage and Hour did not interview the workers, Wage and Hour failed to learn of the deductions.<sup>173</sup>

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<sup>165</sup> Exhibit NCFLC-3, *Bracero et al v. New Tree Personnel Services, et al.*, 3:05-CV-02074 (E.D.N.C. 2005) Deposition of F.R.Civ.P. 30(b)(6) witness Randy Bailey for Bailey Farms, pp. 50-51. (Bailey admits that payment to New Tree was \$8.50 per worker hour, a total of \$.97 more than the 2002 North Carolina AEW of \$7.53).

<sup>166</sup> *Id.*, p. 14.

<sup>167</sup> Exhibit NCFLC-4, the airplane ticket receipt for the plaintiff in *Inthalangsy v. New Tree Personnel Services, Inc.*, 5:03-CV-421-BO(3) (E.D.N.C. 2003), shows a cost for the roundtrip ticket of \$2113.60. With an override of \$.97, and New Tree getting this override for 40 hours of work each week (\$.97 x 40 hours/week = \$38.80/week), it would take over 54 weeks for New Tree to recoup that cost. Since H-2A visas are temporary and seasonal, the visa stay was not long enough to cover costs of transportation alone.

<sup>168</sup> New Tree’s financial viability was even more threatened if it had to employ U.S. workers, for whom it would have to pay the employer’s share of FICA and Medicare taxes. In 2004, in fact, New Tree had to accept U.S. workers and almost immediately lacked the funds to pay them. See A, 2, *infra*.

<sup>169</sup> See Exhibit NCFLC-5, complaint in *Inthalangsy v. New Tree Personnel Services, Inc.*, ¶¶’s 14-18.

<sup>170</sup> Exhibit NCFLC-6, housing certificates for inspected housing in Raleigh

<sup>171</sup> Exhibit NCFLC-5 ¶¶’s 6-7.

<sup>172</sup> Exhibit NCFLC-7, a record of the payments plaintiff Padith Inthalangsy made on the “lawyers fee”. Also see Exhibit NCFLC-5 ¶21, Complaint in *Inthalangsy*. and Exhibit NCFLC-8 ¶21, Answer of New Tree, wherein New Tree admitted that it made deductions for the lawyer’s fee.

<sup>173</sup> This illustrates the core problem with the after-the-fact document-driven audits proposed in the new regulations. Such audits are unlikely to reveal common violations.

b. U.S. Workers Accept the Jobs and Suffer

In late 2003, New Tree received certification for two orders for work cultivating and harvesting a variety of Asian vegetables from March 30, 2004 to January 30, 2005, one with Turner Farms for 70 workers and another with Thunder Swamp Farms for 60 workers.<sup>174</sup> Both orders specified that motel type housing would be provided.

The Puerto Rico Department of Labor conducted positive recruitment on the orders and in early April sent many workers on the Turner and Thunder Swamp orders.<sup>175</sup> Both New Tree and Turner Farms were openly displeased at the prospect of a Puerto Rican workforce. According to William Weeks, a farmer employed by New Tree to recruit other farmers to use its services, the NCESC “double-crossed” them “by sending Puerto Ricans when he wanted Orientals.”<sup>176</sup> The U.S. citizen workers, having paid for plane tickets from San Juan to Raleigh, learned shortly after their arrival that, contrary to the clearance orders, New Tree had little work for them.<sup>177</sup> By early May, local merchants were refusing to cash their New Tree paychecks because of problems with insufficient funds to back those checks.<sup>178</sup>

After learning of the Puerto Ricans’ plight, Mary Lee Hall, an attorney with Legal Aid of North Carolina’s Farmworker Unit, called Matthew Jones of Thunder Swamp Farms, thinking that he might agree to hire and pay the workers directly. Mr. Jones declined, saying that Puerto Ricans were “sorry” workers.<sup>179</sup> Later the same day, Mr. Jones called Ms. Hall to explain that his real problem with Puerto Ricans was that they were not Asian. Mr. Jones explained that, in his opinion, only Asian workers could properly work in Asian vegetables, and workers of other races could not.<sup>180</sup>

The Puerto Rican workers fared no better at Turner Farms.<sup>181</sup> In the end, neither their attorneys nor Wage & Hour were able to get them the wages they were owed.<sup>182</sup> The Puerto Rican workers were stranded in North Carolina, with no pay, no work, and no housing. They

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<sup>174</sup> Exhibits NCFLC-9 and NCFLC-10

<sup>175</sup> See Exhibit NCFLC-11, *Bracero* complaint, pp. 13-22. Forty-two workers brought suit, representing the majority, but not all of the Puerto Rican workers who came to North Carolina in 2004 on the New Tree orders.

<sup>176</sup> Exhibit NCFLC-12, pp. 23-24 deposition of William Weeks in *Bracero*, July 17, 2006.

<sup>177</sup> Various reasons were given for the lack of work for the Puerto Rican workers. William Weeks, a farmer employed by New Tree to recruit other farmers, and the father-in-law of Matt Jones of Thunder Swamp Farms, claimed that when the Puerto Ricans arrived Aaron went to Jones and to Gene Turner of Turner Farms and promised that he would provide the Puerto Rican workers to them for free. According to Weeks, neither Jones nor Turner ever had to pay New Tree for the labor of the Puerto Rican workers Exhibit NCFLC-12, pp.28-31 Weeks claimed that Thunder Swamp only had a little work, picking up plastic, for the Puerto Rican workers because that year Jones only grew soybeans. *Id.* p. 20. However, Jones signed a contract with New Tree, which was submitted to ETA, stating that he needed 60 workers for vegetables that spring (Exhibit NCFLC-10) and claimed to have terminated the Puerto Rican workers because they were inadequate workers for Asian vegetables (see Exhibit NCFLC-17, Declaration of Mary Lee Hall). Gene Turner sent a document purporting to terminate the Puerto Rican workers who had worked at his farm as of April 30, 2004. Exhibit NCFLC-13.

<sup>178</sup> Exhibit NCFLC-11, ¶ 33. See also Exhibits NCFLC-14, NCFLC-15, and NCFLC-16, declarations of merchants and criminal records regarding New Tree’s worthless checks.

<sup>179</sup> Growers have often stated a disdain for all workers of Puerto Rican ethnicity.

<sup>180</sup> Exhibit NCFLC-17

<sup>181</sup> See Exhibit NCFLC-13.

<sup>182</sup> See Exhibit NCFLC-18, declaration of Jennifer Lee, with attachments.

had each paid between \$298 and \$421 for their one-way fares to North Carolina.<sup>183</sup> Although the *Bracero* plaintiffs were awarded judgments in their favor,<sup>184</sup> to date they have not been able to recoup any of their unpaid wages or other damages from the FLC who falsely certified that he was financially viable.

c. H-2A Workers from Thailand Suffer on Failed Contract

However, the problems perpetuated by New Tree did not end when most of the Puerto Rican workers left. A few Puerto Rican workers were taken by Louangxonikone to Raleigh, where they continued to work for him on other farms. Despite DOL's knowledge of New Tree's insolvency and the demonstrated lack of work at Thunder Swamp and Turner Farms, visas were issued that fall in Thailand for a large group of H-2A workers to enter the U.S. to be employed by New Tree at those same farms. One of the Puerto Rican workers who remained as a bus driver observed that the Thai workers were not always paid for their work and that his own pay was often weeks late. After Hurricane Dennis hit the Florida Panhandle, Louangxonikone obtained a contract cleaning up and rehabilitating some buildings in the Pensacola area. The Puerto Rican bus driver drove the workers to Florida where, again, he observed that the workers did not receive their pay.<sup>185</sup>

**2. Seo Homsombath and Million Express Manpower, Inc.**

In 2005, Seo Homsombath, a relative of Aaron Louangxonikone, began his own H-2A farm labor contracting business in earnest. Homsombath, also a native of Laos, had arranged for the workers to be recruited from Thailand by a large international labor recruiter and contractor there named Million Express Manpower, Ltd. Homsombath admitted to USDOL that two labor recruiters in Thailand had furnished some of the capital to start his business, which he called Million Express Manpower, Inc. (Million, Inc.)<sup>186</sup>

Million, Inc. originally had three principals: Homsombath, another Laotian friend of his, and Roy Raynor. Raynor, a long-time state employee,<sup>187</sup> was an employee of the North Carolina Employment Security Commission (NCESC); later NCESC fired him for his involvement in the company and with Homsombath. According to Raynor, the labor recruiters in Thailand would make their money from the workers, and a portion of the fees would then be paid to Million, Inc.

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<sup>183</sup> See Exhibit NCFLC-19, declaration of Rafael Rivera Rosario of the Puerto Rico Department of Labor.

<sup>184</sup> Exhibits NCFLC-20 and NCFLC-21, judgments against New Tree Personnel Services, Inc, in the amount of \$60,000 and the other defendants jointly and severally in the amount of \$109,416.40, respectively. The amount of these judgments underscores the total inadequacy of ETA's proposed bond for farm labor contractors even for damages that can be suffered by U.S. workers employed by such contractors.

<sup>185</sup> Exhibit NCFLC-22, Declaration of Raul González. Of course, the hurricane reconstruction or debris removal work was not covered employment on the Thai workers' H-2A visas.

<sup>186</sup> Exhibit NCFLC-23, Statement of Seo Homsombath given in Wage and Hour investigation 6/22/05, in which he states that he received \$10,000 from Chanoksuda and \$15,000-\$17,000 from Million Express Manpower, Ltd. Homsombath also says that he was not charging the farmers a per worker fee, hoping to gain their business the following year. The Homsombath statement contains other assertions that show a remarkable lack of curiosity about how much the Thai workers paid the recruiting companies and who paid for their plane tickets to the U.S.

<sup>187</sup> Exhibit NCFLC-24, deposition of Roy Raynor, in *Bracero*, *supra*, October 26, 2006, pp. 8-9.

Raynor himself made an agreement on the “side” with the recruiters for his twelve hundred per worker and posited that Million, Inc. might get as much as four thousand or more per worker.<sup>188</sup>

Raynor’s compensation from Million, Inc. was to be twelve hundred dollars (\$1,200) per worker allegedly for teaching the Thai workers “how to pick pickles.”<sup>189</sup> He admitted that he travelled to Thailand in 2006 to retrieve his fees from the labor recruiters and brought back eighteen thousand dollars (\$18,000) in cash, but claimed it was only a small part of what he was owed.<sup>190</sup>

Each of the workers recruited in Thailand in 2005 in fact paid the equivalent of ten to twelve thousand dollars (\$10,000-\$12,000)<sup>191</sup> in order to get an H-2A visa, which they were told would be renewable for three (3) years.<sup>192</sup> The workers were from northeastern Thailand, a very poor and undeveloped part of Thailand. Most had previously worked abroad in other countries and been able to get ahead after paying off their recruitment fees. They were familiar with renewable guestworker visas, and considered an opportunity to work in the United States, the richest country in the world, a once-in-a-lifetime opportunity. Most were subsistence farmers. The costs charged by the recruiters represented ten to twenty years of their annual incomes in Thailand, so they mortgaged their farms and those of their relatives in order to pay for the opportunity to work in the U.S.<sup>193</sup> Without working abroad, they would never be able to repay those debts. In fact, Million, Inc. touted the workers’ debt as an advantage of a Thai H-2A workforce in marketing its services to North Carolina farmers, as the indebted workers could not afford to leave their employment and would be eager to please.<sup>194</sup>

A first group of Million, Inc. H-2A workers from Thailand fled the North Carolina farms en masse in the summer of 2005 upon discovering that the work and conditions were not as promised. A second group of thirty (30) workers was recruited in Thailand in August of 2005.<sup>195</sup> Seo Homsombath personally visited Thailand and met with the workers shortly before they left for the U.S. Mr. Homsombath and the recruiters asked these workers for an additional fee in order to ensure that they would not “escape” from their employer. They were unable to come up with additional cash and so were coerced into signing a contract in Thailand which obligated them to turn over their passports to Homsombath upon arrival in the U.S.<sup>196</sup> This group arrived in North Carolina, at a motel in the town of Benson, in late August of 2005, as the tobacco harvest season waned. Shortly after arrival, Homsombath collected their passports and return tickets and left them without any form of identification.<sup>197</sup> Throughout their employ with Homsombath, the workers were carefully monitored by Homsombath and his son and forbidden

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<sup>188</sup> Id. pp. 298-307.

<sup>189</sup> Id., p. 301.

<sup>190</sup> Id. pp. 302-305. Raynor also claimed to have separated from Million in 2006, and Homsombath did not acknowledge him as a partner in his statement to DOL.

<sup>191</sup> See Exhibit NCFLC-25, a bank statement showing the transfer of 400,000 baht to the account of Tsai Rong-Fa, the President of the Thai labor recruiting company, Million Express Manpower, Ltd.

<sup>192</sup> See Exhibit NCFLC-26, complaint in *Asanok et al. v. Million Express Manpower, Inc. et al.* 5:07-CV-00048-BO (E.D.N.C. 2007), ¶¶ 1, 2, 56-58.

<sup>193</sup> Id. ¶¶ 56-58, 61-64.

<sup>194</sup> See deposition of William Weeks, Exhibit NCFLC-12 at p. 47.

<sup>195</sup> Among these were the plaintiffs in *Asanok*, Exhibit NCFLC-26

<sup>196</sup> Exhibit NCFLC-26, ¶¶ 66-74.

<sup>197</sup> Id. ¶¶ 78-79,

to move about freely. The workers were threatened with deportation and Thai visitors to the motel were forbidden.<sup>198</sup>

At the same time, unbeknownst to the H-2A workers, the NCEC discontinued services to Million, Inc. and Homsombath because of his discrimination against U.S. workers – the state agency had witnessed several instances in which Million, Inc. and Homsombath failed to interview and accept U.S. worker referrals.<sup>199</sup> As a result, Million, Inc. was unable to get any additional certifications.

Homsombath's undercapitalization or cash flow problems led him to cease renting the motel's restaurant and moving the worker who was the cook to a small outbuilding behind his home. There the cook prepared food outside and the workers were fed under a carport. Homsombath also relinquished several of the motel rooms, increasing the number of workers in the remaining rooms. Eventually, Million, Inc. moved all the workers to Homsombath's property, where they crowded into the building behind his home and a tool shed, sleeping on the floor.<sup>200</sup>

Since the original workers had left the farms on the clearance orders, Homsombath was unable to place the new group of workers there, and, instead, the group of 30 that arrived in August worked at various farms which had not been certified as the place of employment. After Hurricane Katrina devastated New Orleans and the Gulf Coast, Homsombath and Louangxonikone took the workers to New Orleans to do disaster clean-up work. They housed the workers in abandoned or condemned motels while they worked to clean and de-construct those facilities. Most of the workers were not paid for any of their work in New Orleans, and were unable to buy food.<sup>201</sup> Homsombath and Louangxonikone threatened them with deportation if they complained and guns were displayed to persuade workers to be obedient. Finally, in early November, twenty-two of the workers were able to escape. They were subsequently granted status as victims of human labor trafficking by U.S. Citizenship and Immigration Services. Their civil litigation against Homsombath, Million, Inc. and the recruiters in Thailand continues.<sup>202</sup>

### **3. Leeta Kang and GTN Employment Agency**

Leeta Kang, of Charlotte, North Carolina, began a farm labor contracting business, GTN Employment Agency in 2005. Ms. Kang's previous experience was working in advertising and running a photo shop and a digital sign shop.<sup>203</sup> Her husband owned an importing business

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<sup>198</sup> Id. ¶ 85

<sup>199</sup> Exhibit NCFLC-27

<sup>200</sup> Exhibit NCFLC-26, ¶¶ 83-84

<sup>201</sup> Exhibit NCFLC-28, Declaration of Hector Linares and Exhibit FLC-26, ¶¶ 90-97.

<sup>202</sup> While the Asanok plaintiffs are very grateful that their T-visa applications were approved by USCIS, they have suffered enormously. It is doubtful they will ever be able to collect any judgment they may be able to secure in their civil litigation to compensate them for their suffering as victims of labor trafficking. Indeed, no monetary amount could compensate them for that harrowing experience.

<sup>203</sup> Exhibit NCFLC-29, deposition of Leeta Kang, November 8, 2007, in *Sianipar et al v. GTN Employment Agency et al.* 07-CVS-3490, (Superior Ct., Mecklenburg County, NC, 2007) pp. 7-10.

called Global Trading Network.<sup>204</sup> He visited Indonesia during his travels abroad and made an arrangement with labor recruiters there.<sup>205</sup>

The Kangs, who had no experience with farming, started GTN Employment Agency without a formal written business plan.<sup>206</sup> They calculated that they could start the business with capital of \$20,000-\$30,000, which would allow them to hire 50 H-2A workers their first year.<sup>207</sup> Their start-up budget included: \$7,000 for vehicle insurance and used vehicles to transport workers to the work site; \$3,000 for renting housing for 50 workers; \$3,000 for fees for filing the clearance orders and petitions; \$7,000 for workers compensation insurance; and \$10,000 for furniture for the housing. Their plan was to gain business by undercutting the fees charged by the largest established H-2A provider in North Carolina, the North Carolina Growers' Association, which charges growers a fee for each worker sought for their farms.<sup>208</sup> The Kangs planned to compete, like Seo Homsombath, by not charging the grower any fee per worker, and by providing housing and other services.<sup>209</sup> A part of their business plan was that each worker would actually pay GTN \$1,200 for his job.<sup>210</sup>

Leeta Kang turned to a friend who was a small-time FLC in Roseboro, North Carolina, for help in contacting local farmers.<sup>211</sup> Together they persuaded several North Carolina farmers that she could provide them with H-2A workers from Asia. In 2006, Ms. Kang filed clearance orders for work at the farm of Mike Moore, to harvest squash, and the farm of Art Bridgmen, to cultivate and harvest Asian vegetables. She and her friend promised that GTN would take care of everything – submit the paperwork, complete recruitment, arrange travel to the U.S., provide the housing, the workers compensation, the transportation, the supervision, and the payroll services.<sup>212</sup>

Mr. Moore, who signed a contract with GTN for fifty (50) workers from August 15 to November 15, 2006, stated under oath that he told Ms. Kang he needed far fewer workers than fifty, “twenty at the most.”<sup>213</sup> When asked why he then signed a contract calling for fifty (50) workers, Moore said, “So (Leeta Kang) kept wanting me to sign for the 50 people, and I said, I might not need any today. I might need 20. She said, it’s not a problem. She said ‘I’ve got to

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<sup>204</sup> Exhibit NCFLC-29, pp. 14-15

<sup>205</sup> Exhibit NCFLC-29, p. 14. In 2005, GTN Employment Agency applied for 25 H-2A workers from Mongolia whose visas were not approved. The Kangs received \$5,000 from the recruiting agency in Mongolia in that effort. *Id.* p. 64.

<sup>206</sup> Exhibit NCFLC-29, pp. 33-34. “It was just a matter between my husband and I. We were discussing and we scribbled on the note pad. You know, of course, we have that, but we don’t have any spreadsheets or any formal...”

<sup>207</sup> Exhibit NCFLC-29, p. 25

<sup>208</sup> NCGA charges growers for workers’ incoming and outgoing transportation and subsistence. GTN had no apparent source for those funds for those required expenses.

<sup>209</sup> Exhibit NCFLC-29, pp. 35-36

<sup>210</sup> Exhibit NCFLC-29, pp. 29-30

<sup>211</sup> Exhibit NCFLC-29, pp. 35

<sup>212</sup> Exhibit NCFLC-30, Deposition of Michael Moore, *Sianipar et al v. GTN Employment Agency, Inc. et al*, 07 CVS 3490, October 3, 2007 pp.22 (“all I have to do is let them know what I needed, when I needed it . . .”) and Exhibit NCFLC-31, Deposition of Art Bridgmen, *Sianipar et al v. GTN Employment Agency, Inc. et al*, 07 CVS 3490, October 10, 2007, pp. 26-27 (She said that she would take care of the transportation, she would take the people out to buy groceries. She would take care of the housing. She would have trained workers. . . She’d have somebody there to help supervise...”)

<sup>213</sup> Exhibit NCFLC-30, p. 33

have the workers over here to be flexible.’ So I signed for 50 people.”<sup>214</sup> Mr. Bridgmen, who normally employs 10 workers, experienced the same pressure from the Kangs to “increase the number of people. . . ‘Well, why don’t you sign for 25’, this kind of thing. ‘some of them are gonna leave, some of them will have work other places, like that, Sign for 25 people.’ I says, ‘No, I don’t’ want to sign for 25 people. I’ll sign for as many as 15.”<sup>215</sup> Kang represented to both farmers that GTN Employment Agency would have work available for the workers in other places.<sup>216</sup> However, the clearance orders for work on the Moore and Bridgmen farms were the only ones filed by GTN that year.

In addition to overstating the number of workers needed, Kang overstated the period of employment. Moore testified that the latest he had ever had work was November 9, but that a killing frost frequently happens in October, ending the squash harvest.<sup>217</sup> The Moore/GTN clearance order specified that work would be available until November 15, 2007. Art Bridgmen told Kang, “I wanted them from the first or middle of October until Christmas. She filled out the form differently.”<sup>218</sup> The dates of need for the 2006 Bridgmen Farms/GTN order were August 30, 2006 to January 15, 2007.

GTN also illegally restricted their employment opportunities to younger men, by specifying in their contract with the Indonesian recruiters that they would accept only men.<sup>219</sup> Kang promised this benefit to Moore and Bridgmen. Moore had always employed women workers successfully,<sup>220</sup> while Bridgmen “told her we didn’t really could use females (sic), because the napa cabbage is pretty heavy . . . It’s just too much for a female . . .”<sup>221</sup>

A group of about 15 Indonesian GTN Employment Agency H-2A workers arrived in North Carolina in October of 2006. Upon arrival, they learned that there was no work at one of the farms, because Mike Moore had decided not to grow a fall squash crop.<sup>222</sup>

Kang demanded that the workers give her their passports and return airplane tickets shortly after their arrival.<sup>223</sup> She admitted that one of the reasons for taking the passports and tickets was to ensure that the workers stayed and worked.<sup>224</sup> She also said she believed that if the workers did not return to their country at the conclusion of their visa, GTN’s name would be

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<sup>214</sup> Exhibit NCFLC-30, p. 22.

<sup>215</sup> Exhibit NCFLC-31, pp. 52-54.

<sup>216</sup> “...GTN...seemed like...they had work in other places and that had plenty of other contracts that they were doing. They made it out to be a pretty big outfit.” NCFLC-30, p. 28. “...she was gonna ...take them to other farms and work. . . as her business grew, that she would bring them in for the whole year and work them in the sweet potatoes and the blueberries and stuff like that.” *Id.* p.32. See also, NCFLC-31 p.25, 31

<sup>217</sup> NCFLC-30 at 33.

<sup>218</sup> NCFLC-31, p. 31

<sup>219</sup> NCFLC-32.

<sup>220</sup> NCFLC-30 at p.40

<sup>221</sup> NCFLC-31 at p.28,

<sup>222</sup> NCFLC-33, complaint in *Sianipar et al. v. GTN Employment Agency et al*, 07CVS3490 (Superior Court, Mecklenburg County, NC, ¶71; NCFLC-30, p. 50.

<sup>223</sup> *Id.* ¶¶ s 73, 83.

<sup>224</sup> NCFLC-29, pp.102-104

on a “blacklist” and would not be able to get more H-2A workers, so keeping workers’ passports and return tickets was one measure to ensure that the workers followed the terms of the visas.<sup>225</sup>

The workers who arrived in early October were taken by Kang to a trailer owned by Art Bridgmen.<sup>226</sup> Kang deemed the housing she had procured, several rental trailers near Fayetteville, North Carolina, too inconvenient to use.<sup>227</sup> However, another reason for the change was undoubtedly that the Bridgmen housing was free.<sup>228</sup> It was not, however, inspected or approved by the North Carolina Department of Labor and it was too small for the number of workers it housed.<sup>229</sup> Bridgmen’s contract promised work for fifteen workers from August 30, 2006 to January 15, 2007, yet most of the workers were idle at least half of the time for the first few weeks.<sup>230</sup> For the little work available, Kang paid the workers less than the AEW.<sup>231</sup>

Kang removed several workers from the camp, placing one in work in a Chinese restaurant and taking the other, Andre Sianipar, to her digital sign shop in Charlotte, where one Indonesian worker was already working.<sup>232</sup> Sianipar waited for work and shared a small room at the back of the shop with the other Indonesian.<sup>233</sup> Two additional Indonesian H-2A workers arrived around the middle of October. Kang took them to her shop as well, where they shared a mattress on the floor with Sianipar for ten days, waiting for work that did not materialize.<sup>234</sup> On the tenth day, after Kang refused to assist them or return to them their passports and return tickets unless they signed a release against her company, and they or their families paid her two thousand dollars (\$2,000), they escaped through the back door of the store.<sup>235</sup> After several attempts, the legal services lawyers representing the three were able to convince Kang to surrender their passports and return tickets to their rightful owners.<sup>236</sup>

## **B. The Proposed Regulations Expressly Recognize FLCs as Potential H-2A Employers but Fail to Provide Protections that Will Address Abuses**

DOL is aware of the complaints, and concerns about FLCs, and acknowledges that fact in the proposed regulations. However, rather than dealing with this reality by limiting the circumstances under which an FLC can submit an application, or imposing new or discrete recruitment, reporting or hiring requirements addressing these violations, the new regulations, for the first time, explicitly recognize that FLCs are included, under all circumstances, in the definition of an employer entitled to submit an application for H-2A workers. [Proposed 20 CFR 655.100(b), 73 Fed. Reg. 8563.]

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<sup>225</sup> Id. pp.130-133

<sup>226</sup> NCFLC-33, ¶ 72; NCFLC 29, p. 85-89.

<sup>227</sup> NCFLC-29, pp. 85-86.

<sup>228</sup> NCFLC-31, p. 34. See also, NCFLC-34, Art Bridgmen’s statement to USDOL, 11/9/06

<sup>229</sup> Bridgmen had one trailer, which had been permitted in the past for 7 occupants. 14 Indonesian H-2A workers lived in the trailer. NCFLC-31, pp. 58-60.

<sup>230</sup> Id. p. 65.

<sup>231</sup> NCFLC-33, ¶ 74.

<sup>232</sup> Id. ¶¶ 78-79

<sup>233</sup> Id. ¶80.

<sup>234</sup> Id. ¶¶81-85.

<sup>235</sup> Id. ¶¶86-89

<sup>236</sup> Id. ¶90.

There is currently no statutory or regulatory provision that prevents FLCs from being certified as an H-2A employer. However current regulations define an employer as a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment...” 20 CFR 655.100(b). In the past, when dealing with applications submitted by FLCs, DOL’s Office of Foreign Labor Certification processing centers have required that the FLC have a business office in the state where the intended place of employment is located where U.S. workers can be referred. This is consistent with the recognition in the H-2A Program Handbook which notes that “[t]he H-2A program and the implementing regulations are primarily constructed for the use of employers who own and/or operate a fixed-site establishment and who are seeking workers from out of the area to come to that fixed site.” 53 Fed. Reg. 22099. It goes on to emphasize the fact that:

A farm labor contractor seeking H-2A certification must comply with all the other requirements of the regulations...including the requirements that there be a precise anticipated starting date of employment and that the anticipated number of days and hours per week for which work will be available must be stated.

53 Fed. Reg. 22099.

While not a comprehensive solution to the problem of fly-by-night FLCs, current regulations, as construed by the Handbook, at least provide a means of monitoring positive recruitment and compliance with the 50 Percent Rule.

The current exhortation in the ETA handbook is that:

SESA and Regional Office staff should be careful to look behind any applications filed by farm labor contractors to ensure that the contractor is operating in accordance with MSPA requirements and that the job opportunities for which workers are being sought are bona fide and all the conditions associated with them comply with applicable laws and regulations. Consultations with ESA and with known fixed site growers in the area of intended employment are recommended for this purpose.

ETA Handbook No. 398, II-25. Unfortunately, under the proposed regulations, the certifying officer would only look at the attestation and no input would be sought from the SWA staff, much less would SWA staff be instructed to consult with the fixed site growers on an FLC’s itinerary to gauge whether or not the job offers were bona fide.

### **1. The Proposed Regulations Do Not Expressly Require FLCs to Have a U.S. Presence**

The current regulations include FLCs in the definition of employers, even if they do not have a location in the United States.

Employer means a person, firm, corporation or other association or organization:

(1) Which has a location within the U.S. to which U.S. workers may be referred for employment, **or qualifies as a farm labor contractor (FLC) under this subpart;**

[DOL proposed regulations, 20 CFR 655.100(b) emphasis supplied, 73 Fed. Reg. 8563].

The proposed regulations do require that the FLC “have a place of business (physical location) in the United States to which U.S. workers may be referred.” Proposed Regulations 20 CFR 655.101(a)(4), 73 Fed. Reg. 8566. Does this distinction mean that the FLC need not have its own business in the United States, but need only have a place of business to refer workers to that is located here? Indeed that is pattern followed by some FLCs which has resulted in workers being referred to local supervisors or other agents completely separated from the employer/FLC.

As dramatically demonstrated by the administrative and court cases filed against Global Horizons, farm labor contractors who are allowed to import workers for contracts for two or more states and in far flung locations need more oversight and scrutiny, not less. See Exhibit R-32, for a description of the abuse of Thai workers and displacement of U.S. workers as a result of Global’s contracts in Washington.

In 2002 Global Horizons, operating out of an office in Los Angeles without any actual agricultural presence in rural California, submitted an application for a labor certification under the H-2A program. The application identified jobs in Holt, California, an isolated community hundreds of miles from Los Angeles. Workers were referred by the California SWA and through telephone contact offered employment. Most were never allowed to begin work. Those that were offered work were given only intermittent assignments, most not connected to farm work. Workers complained that they were not paid the AEWR rate promised nor provided housing. Their local supervisor was powerless to resolve the issues. Work ended well before the three-quarter guarantee but they were discharged without being paid the guaranteed rate. One U.S. worker filed suit, and was offered a settlement conditioned only on dismissal of the lawsuit, which he accepted.<sup>237</sup>

The existence of a specific location to which workers can be referred for work is critical to any recruitment effort, yet FLCs need not have such a location. Nor is there any other place in the proposed regulations that substitutes for this requirement.

## **2. The “New” Requirements for FLCs Provide Neither New Protections for Workers Nor Additional Oversight of FLC Activity**

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<sup>237</sup> Exhibit NCFLC-37, Zepeda v. Global Horizons

A new subsection 20 CFR 655.106 [73 Fed. Reg. 6572], entitled “Assurances and obligations of Farm Labor Contractors” lays out six subsections, nearly all of which are currently imposed on all employers who submit an application for a labor certification under the H-2A program, either by operation of the current H-2A regulations or the obligations imposed by the Agricultural Worker Protection Act. 29 USC 1801, *et seq.* Subsections (a) and (b) merely require that the FLC provide evidence of the existence and scope of the license required by 29 USC 1811. While subsection (c) requires that the FLC provide “...the name and location of the fixed-site agricultural business, the approximate beginning and ending dates of when the FLC will be providing the workers, and a description of the crops and activities the workers will perform...” [DOL proposed regulations 20 CFR 655.106, 73 Fed. Reg. 6572], this information is already required under the reporting and disclosure requirements imposed upon FLCs when recruiting U.S. workers (see 29 USC 1821). Additionally, recruitment provisions in both current and proposed regulations anticipate the identification of each job location or the “intended area of employment.” (see 20 CFR 655.103(d) contrasted to DOL proposed regulation 655.102(f) and (g), FR 8567). Similarly, subsections “(e)” and “(f)” of the proposed regulation merely reiterate the assurances H-2A employers must make regarding recruitment, housing and transportation under current regulations. And, as with the other assurances under the proposed regulatory scheme, the FLCs need only attest to compliance.

The proposed regulation does include one new requirement, which is the procurement of a bond. Proposed Regulations, 20 CFR 655.106(d) (73 Fed. Reg. 6572) and 20 CFR 501.8 (73 Fed. Reg. 6579). The bond is payable to the Administrator, Wage and Hour Division, for any sums owed to the Administrator, for wages and benefits owed to H-2A and U.S. workers. The bond rates of \$10,000 and \$20,000 (*id.*) are clearly inadequate even for workforces of under 50.<sup>238</sup>

Recent judgments and settlements for violations of the AEW, three-quarter guarantee and the failure to hire U.S. workers are well in excess of that amount. The SAMCO settlement was for over \$80,000.<sup>239</sup> Global Horizons’ liability for reimbursement expenses alone is \$44,000. Additionally, payment from the surety appears to be limited to reimbursing the Administrator of the Wage and Hour Division, for funds awarded as the result of an administrative or judicial complaint, and provide no guarantee for judgments obtained by workers in civil actions or through their State SWA complaint process.

The bond proposed is pathetically inadequate, considering the amounts of money the Thai, Indonesian and Laotian H-2A workers in North Carolina paid for the opportunity to come to work in agriculture in the U.S. or even for their transportation to the job. Any bond should be tied to the number of workers sought and the length of the contract and the estimated expense of travel. Given the precarious financial status of some of the farmers who engaged the North Carolina FLCs, bonds would be useful for all H-2A employers. The country from which workers are coming should be considered in setting the bond as well and, at a minimum, the bond should be at least as much as the maximum recruitment charge allowed by the law of the country for each worker visa sought by the employer.

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<sup>238</sup> The bond amount may be increased by the Administrator, after notice and formal hearing, in the event the FLC employs more than 50 workers.

<sup>239</sup> Exhibit X-1-69.

It should have been intuitively obvious to the most casual observer that none of the NC FLC ventures was economically feasible unless the contractors were deceiving workers, flouting their responsibilities and receiving funds from other parties. In fact, the North Carolina Employment Security Commission tried to be vigilant when such applications were filed and was suspicious that North Carolina farmers would be unwilling to pay enough so that workers from Asia would receive the AEW, free housing, and transportation to and from their countries of origin. The proposed regulations would remove SWAs and their staff with real-life experience with farmers, FLCs, and workers from the certification process. Each of these applications was approved under the certification process because the contractors met the documentary requirements. The letters/contracts with growers required by DOL to accompany these applications were obviously not sent in good faith. Apparently, ETA required these “contracts” or agreements to ensure that there was a bona fide job opportunity, as required by the Handbook. But, as each of these cases illustrates, growers felt free to renege on those agreements and not provide the job opportunities. As a result, both U.S. and H-2A workers suffered.

It is also clear that the proposed audit process would be ineffective in even discovering the extent of the problems, including fraud, after the fact. Ms. Kang doctored the payroll documents, providing materially different sets to DOL and Legal Aid for the same time period.<sup>240</sup> Mr. Louangxonikone kept deductions for “lawyer’s fees” off the books. Only a thorough investigation, including worker interviews conducted with sensitivity, will bring these discrepancies to light.

Since there is no requirement that an FLC have a track record as an FLC before applying for certification to employ H-2A workers, the proposed regulations simply make it easier for contractors like Kang, Louangxonikone, and Homsombath to enter the business of importing workers from developing countries who are desperate to earn money to improve their families’ standard of living. While most traditional FLCs are also in the business of providing workers who are poor with a job which will provide them with income, they do not succeed long if they are not also able to provide growers with the needed labor at the right time and to provide workers with acceptable working conditions. FLCs that enter the business with no record of satisfying either growers or workers are, at best, experimenting with the most vulnerable workforce of all.

As the histories of all the FLCs mentioned above show, attestations were not taken seriously. Workers were moved to unpermitted housing, taken to work at non-certified sites, paid less than the AEW or not at all, and had other charges deducted from their wages. There is no reason to believe that a longer set of attestations for FLCs would have produced changes in their behavior. Economics are at the base of the problems – the economics of the international labor market, which the proposed regulations do not attempt to influence, simply overwhelm any promise to adhere to the regulations.

In fact, the proposed contract language between H-2A employers and foreign recruiters is worse than useless – it is a tacit approval of a denial of responsibility for recruitment systems

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<sup>240</sup> See NCFLC-35

that each of these contractors knew was at work.<sup>241</sup> Those recruitment systems, from which Million Express and GTN were to benefit financially<sup>242</sup> are a key component of the reason these FLCs were attracted to the business of providing H-2A farmworkers – they knew that they would have many eager workers who were willing to invest in recruitment fees for the privilege of coming to work in agriculture in the U.S. The vast majority of these workers clearly did not come to the U.S. intending to work in other fields, as evidenced by Homsombath and Kang each recounting a tale about only a single worker who did not begin the work provided on the farm. In fact, the debt that the workers incurred because of the recruitment systems utilized by the FLCs, coupled with the confiscation of their passports and return tickets, made them highly vulnerable to labor trafficking. This dynamic exists whenever large recruitment fees are charged, and, as we argue elsewhere, the only appropriate solution is to make the employer liable for the acts of his or her agents.

### **3. Proposed Language to Forbid Payment for International Recruitment Will Not Protect Either U.S. or Foreign Farmworkers**

Foreign workers are charged high costs to obtain H-2A jobs, forced to borrow money at usurious rates to pay to obtain the jobs and travel to them, misled about the earnings opportunities under the H-2A program, threatened with physical harm to themselves or family members, and warned that they will not be granted a visa in a following season if they challenge unfair or illegal conduct. Deeply indebted foreign workers are vulnerable to exploitation and often cannot earn enough money during the contract to pay off their debts. It is encouraging that DOL recognizes that such abuses must be addressed. Nonetheless, DOL does not propose effective methods to prevent such abuses.

The proposed language in 20 CFR 655.105(n) to require all H-2A employer applicants to “contractually forbid any foreign labor contractor whom they engage in international recruitment of H-2A workers to seek or receive payments from prospective employees” does *nothing* other than implement what appears to be a cynical attempt by DOL to insulate H-2A employers from liability for recruitment fees under *Arriaga v. Florida Pacific Farms, LLC*.<sup>243</sup> As DOL knows, the court in *Arriaga* absolved the grower defendants of any liability for the recruiting fees charged by their recruiters because the growers had “explicitly instructed” its recruiter “not to charge recruitment fees.”<sup>244</sup>

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<sup>241</sup> As set forth above, Seo Homsombath personally met with the Thai workers in Bangkok shortly before they came to the U.S. to demand that they pay higher fees to the recruiter to ensure that they would not “escape.” Since they were unable to raise any additional money, the workers were coerced into signing an agreement to give their passports to him upon their arrival in the U.S. Kang’s husband met with the Indonesian recruiters, and with one of the recruits, Andre Sianipar, in Indonesia, and the Indonesian recruiter also came to Charlotte. Clearly, these contractors knew or should have known of the type of fees the workers were paying. William Weeks said that the workers’ debt was touted to growers by New Tree and Million Express as an advantage of an H-2A workforce, as it ensured the workers would want to work hard.

<sup>242</sup> As noted above, Million Express had received money from the recruiters to launch its business. Its principal Roy Raynor had received \$18,000 for his services from a Thai recruiter, ostensibly out of the amount that Million Express was to receive later. GTN had an agreement with its Indonesian recruiters that it would receive \$1,200 for each worker.

<sup>243</sup> 305 F.3d 1228, 1244-46 (11th Cir. 2002)

<sup>244</sup> *Id.*, at 1245.

DOL's proposed rule requires that the H-2A employer applicants to "contractually forbid any foreign labor contractor" from seeking or receiving payments from prospective employees, amounting to an instruction that would absolve employers of liability for such fees under Arriaga. DOL's approach is inappropriate because it ignores economic reality - the recruiters can't and won't work for free! As Michael Bell, the owner/operator of Manpower of the Americas ("MOA"), the largest recruiter of H-2A workers in Mexico said in a newspaper article in June 2007, "with fees, transportation costs, and administrative costs, getting an H-2A worker to the United States from Mexico costs about \$1,000". San Antonio Express News, June 25, 2007, article by Sean Matteson, p. 3. According to Mr. Bell, "his company [MOA] charges about \$150 per person for processing, a fee covered by either workers or their employers." *Id.* (italics added).

In light of the obvious economic reality that H-2A recruiters like Mr. Bell and MOA frankly describe to the San Antonio Express-News, if the employer applicants for H-2A workers are not paying the recruiting fees/processing fees charged by the recruiter, then the recruiter has no economic choice but to require the H-2A worker to pay that recruiting fee. The only thing that DOL's proposed "contractual prohibition" in Section 655.105(n) will accomplish with respect to any possible change of this economic reality is to allow the H-2A employer applicant to avoid any liability for those recruitment/processing fees when the inevitable happens. If DOL were seriously interested in preventing any adverse effect on U.S. workers by denying any employer-shifting of the costs of recruitment to the H-2A workers, DOL would simply require that the H-2A employer attest as part of the attestation required by proposed regulation 20 CFR 655.105(n) that the he/she is directly paying the entire recruiting/processing fee charged to any foreign labor contractor whom they engage to perform international recruitment of H-2A workers. This attestation along with employer identification in the H-2A application of the recruiter(s) involved (together with addresses and telephone numbers) would provide some reasonable assurance that the employer was not impermissibly shifting the costs of recruitment to the H-2A workers.

#### **4. The Proposed Regulations Prejudice Legitimate FLCs and Eliminate Protections in the Current Regulations for Employees of FLCs**

While making explicit the recognition of FLCs as H-2A employers, the proposed regulations undermine prior attempts to ensure that traditional recruitment through the use of FLCs is not sidestepped by growers seeking H-2A certification. Current regulations, in a variety of locations, require that growers use FLCs in the recruitment of U.S. workers. These mandates have all been eliminated from the proposed regulations. (See *e.g.* 29 CFR 655.102(d), 29 CFR 655.103(d)(3), 29 CFR 655.103(f).) These requirements are the only protection that U.S. workers have against an unscrupulous grower who would abandon a long-standing relationship with an FLC and his/her crew of regular, seasonal U.S. workers, in favor of submitting an H-2A application. Of particular concern is the elimination of the override protection.

When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the

employer shall make the same level of effort as non-H-2A agricultural employers and shall provide an override which is no less than that being provided by non-H-2A agricultural employers.

29 CFR 655.103(f). This protection is nowhere to be found in the Proposed Regulations. In essence, this means that growers in communities where FLCs are the primary direct-hire, employers may cut their costs by filing an H-2A application, thereby eliminating their relationships with FLCs and the obligation to contact – or pay for – the FLCs that their competitors rely upon. This hurts U.S. workers by taking jobs out of the job market. It hurts competition by eliminating a cost for employers who import H-2A workers.

### **C. Conclusion**

While acknowledging that FLCs have a record of violations in the H-2A program, the DOL does nothing more than reiterate obligations imposed by current regulations or the AWPA, and impose a limited bond requirement which will be grossly inadequate given historical undercapitalization of FLC entities.

Again, DOL acknowledges a trend in agricultural labor – toward the use of FLCs and away from direct hire – and does its best to eliminate any aspects of the current regulations that might interfere with that sector’s use of the H-2A system. While this might be good for FLCs, and it might encourage use of the H-2A program, it will not further the purpose of the H-2A Act which is “that U.S. workers rather than aliens be employed wherever possible.” *Elton Orchards, Inc. v. Brannan*, 508 F. 2d 493, 500 (1<sup>st</sup> Cir. 1977).

## **VIII. CONCLUSION**

The Department of Labor, the Department of Homeland Security and other agencies are constrained in their operation of the H-2A temporary foreign agricultural worker program by statutory requirements that the DOL and DHS, in their proposed regulations, would, in numerous ways, contravene. The Government is also constrained by the evidence it has acquired during more than twelve decades of this nation’s use of agricultural guest worker programs, including extensive documentation of the current program, which effectively began sixty-five years ago. DOL’s proposed regulations would adopt policies and procedures that have been demonstrated to produce the very results that the statute prohibits. An objective review of the historical record, including findings following numerous governmental investigations, reveals that the choices the Government proposes to make in exercising its limited discretion are arbitrary and capricious. This proposal would result in a repetition of the exploitation of temporary foreign workers and the undermining of wages and working conditions for U.S. workers as exposed repeatedly in the Bracero and H-2A programs. The substantial harm to foreign and domestic workers would not be the only damage from these proposals. The agricultural labor market would be distorted and made far less efficient. The reputation of the United States of America also would be tarnished substantially by the inevitable mistreatment the H-2A program would inflict on the citizens of foreign countries. The momentous, mistaken changes that the Government proposes have been developed and offered in a process that has failed to provide the public or stakeholders with a

meaningful opportunity to participate in this administrative policy setting. The Administration should collaborate with the public, stakeholders and Congress on a meaningful process to develop policies that are worthy of the United States of America. These proposals are unworthy of this nation and should be withdrawn.

Sincerely,

Advocates For Basic Legal Equality, Inc. (OH)  
California Rural Legal Assistance, Inc.  
California Rural Legal Assistance Foundation  
Columbia Legal Services (on behalf of clients) (WA)  
Community Legal Services (AZ)  
Equal Justice Center (TX)  
Farm Labor Organization Committee, AFL-CIO (FLOC)  
Farmworker Justice  
Farmworker Legal Services of Michigan  
Florida Legal Services, Inc.  
Friends of Farmworkers, Inc. (PA)  
Global Workers Justice Alliance  
Legal Aid Bureau, Inc. (MD)  
Legal Aid Services of Oregon  
Legal Aid Justice Center -- Immigrant Advocacy Program (VA)  
Legal Aid of North Carolina Farmworker Unit  
Michigan Migrant Legal Assistance Project, Inc.  
Migrant Farm Worker Division, Colorado Legal Services  
The North Carolina Justice Center  
Northwest Workers' Justice Project  
Pinos y Campesinos Unidos del Noroeste (PCUN)  
Southern Poverty Law Center  
Texas RioGrande Legal Aid, Inc.  
United Farm Workers