



August 28, 2007

The President
The White House
Washington, DC 20500

Dear Mr. President:

The National Council of Agricultural Employers (NCAE) would like to thank you for your continued support of comprehensive immigration reform. The members of the Council will continue to work with you to seek passage of these reforms in this Congress. This letter is the NCAE's response to Mr. Barry Jackson's request in a conference call with our officers and directors on August 3 to provide you with suggestions for streamlining the H-2A temporary agricultural worker program. The goal of these suggestions is to make the H-2A program more useable for agricultural employers who may have their labor supply threatened as a result of the recently promulgated Social Security "mis-match" rulemaking.

The NCAE is the only national association representing agricultural employers solely on labor and immigration issues. Our members represent the vast majority of U.S. agricultural employment, including most major users of the H-2A program. Our members have had decades of experience with the H-2A and predecessor programs, and are well aware of the problems with the program and the urgent need for improvement.

We appreciate the fact that you and your Administration recognize the devastating potential impact of the mis-match regulation on the U.S. agricultural industry. While streamlining the administrative processes of the H-2A program will not be a substitute for congressional passage of the AgJOBS legislation which the NCAE has strongly supported for years, administrative reforms will help at least some U.S. farmers deal with the impact of the Administration's border and interior enforcement initiatives and the anticipated impact of the mis-match regulation. The NCAE was urging these reforms even before the mis-match regulation appeared, and they are long overdue.

It is vital that your Administration be starkly realistic about the impact of the mis-match regulation, and effective immigration control generally, on the U.S. agricultural industry. More than 600,000 U.S. farmers hire farm workers. Even though this is not a majority of the operations classified as farms, it is the backbone of the commercial U.S. farming sector. Farmers who employ labor account for the overwhelming majority of U.S. agricultural production.

According to the U.S. Department of Labor's (USDOL) own surveys of the U.S. seasonal agricultural work force, more than 75% of current U.S. hired farm workers are foreign born and entered the U.S. legally or illegally. More than 50% admit on this USDOL-sponsored survey that they are not legally authorized to work in the United States. This same survey shows that one in every six hired farm worker each year is a new entrant to the U.S. farm workforce, and a stunning 99% of these new entrants admit they are not authorized to be employed in the United States. Thus, the impact of compliance with the mis-match regulation will be immediate and substantial.

Presently, because of the high costs and administrative difficulty of using the H-2A program, only a miniscule fraction of U.S. employers use it. Even though FY 2006 showed the highest program use in decades, less than one percent of U.S. farm employers used the program, and fewer than two percent of U.S. hired farm worker job opportunities were H-2A certified. Even a modest increase in attempted H-2A employment will represent explosive growth for the program and the agencies that run it. It is essential that the program be significantly streamlined or the result will be chaotic for the government and catastrophic for U.S. agriculture.

It is also important that the Administration understand that although some large, sophisticated producers use the H-2A program, the overwhelming majority of users are small family farmers. In FY 2006 the average H-2A employer employed only nine H-2A workers. Nevertheless, for most H-2A users, H-2A aliens were virtually their entire workforce. Without timely and cost-efficient access to H-2A workers, these farmers' entire year's livelihood would be at risk. Many H-2A users are producers of labor intensive, highly perishable crops. A few days of delay in securing workers can render their crops unmarketable and worthless. Government programs, including the current H-2A program, are not accustomed to conforming to such exacting performance schedules. The H-2A program is plagued by untimely and uncertain performance, mistakes, and frequent changes in interpretations and procedures by the agencies which administer it. It is imperative that these problems be corrected. This will be a difficult challenge, while at the same time ramp up the H-2A program's capacity.

The streamlining measures outlined in this letter can be implemented, in our view, without any changes, or at most very minor changes, in current regulations. Thus the changes can and should be implemented immediately. The mis-match rule will begin affecting agriculture in mid-January 2008, the middle of the winter harvest season in southern states. Its effects will quickly move northward. To access H-2A workers, employers need at least the 45 day advance application period currently required by statute plus additional time for planning and preparation. Therefore, implementing the measures outlined below on an extremely urgent basis is imperative. The measures must be in place this fall.

In addition to the administrative and procedural suggestions contained herein, there are also important and urgently needed regulatory changes that will require somewhat longer timeframes to accomplish. However, they are also needed to make the H-2A program widely useable for U.S. farmers. We will be setting forth these needed regulatory reforms in a separate communication.

Department of Labor

- **Follow the Law and The USDOL's Own Regulations**

1. Require State Workforce Agency (SWA) officials to verify identity and employment eligibility of persons referred to H-2A jobs.

The Immigration Reform and Control Act (IRCA) created a statutory standard for referring workers to H-2A employers that, among other things, requires that the workers be “eligible.” The Immigration and Nationality Act (INA) at 8 U.S.C. Sec. 1188(i)(1) specifically defines the term “eligible” to mean persons legally authorized to work in the United States. 8 U.S.C. Sec. 1188(c)(3)(A)(ii) requires that H-2A certification be granted if the employer does not actually have or has been referred “eligible” workers. The USDOL and the SWAs have steadfastly refused to recognize or give any meaning whatsoever to this standard from the day it was enacted. As a result, employers have no assurance that workers referred by SWA's, and who potentially block H-2A labor certification or cause displacement of legal H-2A aliens, are themselves legal. In recent years the USDOL has even attempted to prevent employers from verifying Social Security numbers (SSNs) at the time of referral. Experience with work place audits, mis-match letters, and those occasions where employers do telephonically verify SSNs, reveal that a very high proportion of SWA referrals are not work authorized. Even without a statutory mandate, it is only reasonable that SWAs verify the work authorization of persons they refer to employers. However, given the clear statutory mandate, they must comply with the law and verify the employment eligibility of persons referred to H-2A applicants.

2. Return to past practice of permitting employers to require that applicants for H-2A jobs apply and be referred through their local SWAs.

This was the USDOL's practice for many years. It minimized disputes about whether or not potential workers applied and were referred to H-2A jobs. It is also the only way by which the SWAs can comply with their statutory mandate at 8 U.S.C. Sec. 1188(c)(3)(A)(ii) to refer for employment “able, willing, qualified and eligible workers who will be available at the time and place needed.” Several years ago the USDOL changed their practice and required H-2A applicants to eliminate language from H-2A Clearance Orders directing applicants to apply to their local SWA office. This action has given rise to even greater uncertainty, disputes, and litigation about the status of referrals than occurred under the former policy.

3. Assure USDOL and SWA compliance with the statutory provision that rental and public accommodation housing need meet only state or local standards for such housing and not farm labor camp standards. Effectuate this by permitting employers to include a copy of a currently valid Certificate of Occupancy when listing rental or public accommodation housing on H-2A applications.

USDOL and/or SWAs actively discourage employers from availing themselves of the option added to the H-2A program by the IRCA for housing employees in rental or public

accommodation housing. This discouragement takes a variety of forms, including telling employers such housing must meet federal farm labor camp standards (it does not need to), telling them such housing must be re-inspected if listed on an H-2A application, and insisting on SWA personnel inspecting such housing and independently interpreting whether the facility complies with applicable state or local standards, even though it has a certificate of occupancy.

4. Stop active and sub-rosa positive recruitment after an employer's H-2A aliens begin traveling to the place of employment.

USDOL policy requires that SWAs stop “positive recruitment” – which means active advertising of job opportunities and solicitation of applicants – when an H-2A employer’s alien workers begin traveling to the employer’s place of employment. However, in practice local SWA offices often do not comply with this requirement, claiming for example, that once the office turns on a recruitment “spigot,” they can not turn it off. In addition, some SWAs contract with non-governmental organizations (NGOs) to conduct positive recruitment of domestic workers, and claim that the prohibition on positive recruitment does not apply to these contractors. The result is that employers whose H-2A alien workers are on-site or en-route are presented with redundant (and often unproductive and unreliable) domestic workers that must be accommodated under the 50-percent rule. This leads to significant costs, inefficiencies and management burdens at a minimum, and if legal alien workers have to be repatriated because of insufficient available housing or work, can lead to labor shortages because the preponderance of workers referred by SWAs fail to stay on the job for any significant length of time. USDOL should require SWAs to stop *all* positive recruitment, directly or through contractors, when H-2A aliens begin traveling to the place of employment.

5. Remove language recently added to H-2A acceptance letters mandating that employers assure that their Clearance Orders are circulated to adjoining states and “traditional labor supply states”.

The language referenced in this item began appearing earlier this year, with no notice or explanation, in letters accepting H-2A applications for consideration. It states that “a valid test of the domestic labor market must include sharing the agricultural job order accepted for processing with (a) no fewer than three proximate states, (b) at least one of the traditional labor supply states – Texas, Florida, California, or Puerto Rico, and (c) any other states where the SWA believes a significant number of qualified U.S. workers would be available for work.” Interstate circulation of Clearance Orders is the responsibility of the USDOL under its Interstate Clearance regulations. Furthermore, there is no practical way for individual farmers to comply with this requirement. Finally, the states specified by the USDOL as “traditional labor supply states” are themselves states in which farmers are applying and being certified for H-2A aliens because of a shortage of U.S. workers. The only purpose served by the addition of this language can be to fuel litigation by traditional opponents of the H-2A program and harassment of program users.

- **Be Realistic About How Agriculture Works and the Demographics of the Agricultural Workforce**

6. Require advertising only in the local labor market; eliminate requirement to advertise in major metropolitan dailies unless there is no local labor market outlet available and eliminate interstate print and broadcast advertising.

USDOL's H-2A regulations require H-2A applicants to advertise their H-2A job opportunities, but the regulations do not specify the outlets in which the advertising must appear. USDOL spells out the venues for required advertising in its acceptance letters, and often requires H-2A applicants to advertise in major metropolitan dailies. Not only are these ads extremely expensive, they are universally unproductive, as large metro dailies are not outlets farm workers use to seek farm jobs, even if they were inclined to look at newspaper help wanted ads. Employers should be required to advertise only in a local daily or weekly print outlet. Furthermore, many H-2A applicants are required to place print and/or broadcast advertisements in out-of-state media. These advertisements are also expensive and unproductive. At times the USDOL's favored outlets are running several to several dozen virtually identical advertisements daily. Furthermore, the states in which out-of-state employers are required to advertise (so-called "traditional labor supply states") are states in which in-state farm employers are also filing H-2A applications and being H-2A certified because of a shortage of workers. In the face of clear national statistics showing there are virtually no employment-authorized farm workers, and employers who are being certified as having a labor shortage, continuing to require H-2A applicants to engage in duplicative out-of-state advertising and advertising in major dailies is unnecessarily burdensome and expensive and should be stopped. USDOL has the means, through the interstate clearance system, to disseminate H-2A job opportunities interstate.

7. Permit activities to be included in H-2A job descriptions that are normally performed by agricultural workers in such jobs, even though the activity may not be included in the FLSA or Internal Revenue Code definitions of "agriculture".

The INA requires that activities which are "agriculture" under either the Fair Labor Standards Act (FLSA) or Internal Revenue Code (IRC) be deemed agricultural for H-2A purposes, but gives the USDOL discretion to include other activities as well. The USDOL has refused to allow inclusion of any activities outside the two mandated definitions in H-2A job descriptions, even activities normally performed by farm workers (e.g. pressing cider on apple farms, helping stock and service a roadside produce stand which sells items not grown by the farmer, maintaining nursery stock in a shipping yard purchased from other growers to supplement the grower's inventory). This requirement is unnecessarily restrictive and ignores reality. All activities normally performed by workers whose primary employment is agricultural should be permitted on H-2A applications.

8. Allowing H-2A applications by employers operating across state lines to include all work sites of the operation, regardless of the state.

USDOL's policy requires employers whose operations straddle a state line to file separate labor certification applications for each state in which the workers work, and requires separate schedules of work in each state. This policy is totally impractical. Employers with operations which straddle state lines should be permitted to include all of the employment in a single application, and to pay the applicable Adverse Effect Wage Rate (AEWR) for each state, if different, for the work performed in that state, or simply pay the highest of the applicable AEWRs for all employment.

9. Accept and certify H-2A applications for farmers with work sites within commuting distance of the international border who are requesting more workers than the number of beds the employer has available.

There are many agricultural operations in Texas, Arizona, New Mexico and California that are within commuting distance of Mexico and which have traditionally relied heavily on daily border crossers for their work force. Although the H-2A regulations merely require employers to offer housing to workers who are unable to return to their usual place of residence on a daily basis, USDOL policy has been to refuse to accept and certify H-2A applications requesting more labor certifications than the number of beds the employer has available. This is unfair and unreasonable to employers employing workers within commuting distance of the border. Presently it requires employers to build housing, or engage rental or public accommodation housing, which will stand unused merely to qualify for certification. USDOL should change its procedure to accept and certify H-2A applications for workers who will be employed within commuting distance of the border upon the assurance that the applicant will offer housing to all domestic and alien workers who are recruited from outside the commuting area.

- **Be Fair to Farmers Who Commit to Hiring Legal Workers**

10. Remove language added to H-2A acceptance letters several years ago creating potential FLSA liability and implying an interpretation of the FLSA contrary to the Department's public statements.

Since well before the enactment of the IRCA and the most recent statutory reform of the H-2A program, the USDOL's H-2A regulations have required reimbursement of inbound transportation and subsistence cost for H-2A workers only if and when the worker completes at least 50 percent of the H-2A period of employment for which the worker was hired. Some farm worker advocates and opponents of the H-2A program have argued in Federal courts that under the Fair Labor Standards Act that transportation and subsistence costs incurred by workers remotely recruited by H-2A employers are primarily for the benefit of the H-2A employer, and are required to be reimbursed at the end of the first pay period to the extent that failure to do so would otherwise cut into the FLSA minimum wage. [See the next item pertaining to the *Arriaga v Florida Pacific Farms* litigation.]

The USDOL's former Wage and Hour Administrator, Ms. Maria Echaveste, stated in writing to Members of Congress and H-2A employers several years ago that the USDOL had made no decision as to whether the costs of inbound and return transportation and subsistence of remotely recruited workers were primarily for the benefit of the employer within the meaning of the FLSA, and therefore required to be reimbursed by employers at the first pay period to the extent that such costs would otherwise constitute an illegal deduction. The Echaveste letter and a subsequent letter by then-Secretary of Labor Robert Reich, remain the sole official published explanation and position of the USDOL on this issue. Nevertheless, several years ago the USDOL began including, and continues to include, in H-2A acceptance letters language that directly contradicts the statements of the Wage and Hour Administrator and the Secretary of Labor, stating that "the costs of travel to the worksite by both U.S. and H-2A employees hired at a distant location" are for the benefit of the employer, and that the FLSA obligation to reimburse all workers for such costs at the first pay period overrides the requirement in the H-2A regulations to reimburse such costs to workers who complete 50% of the work contract. The USDOL has never proposed regulatory changes, or issued Opinion Letters or General Administrative Letters on the subject. However, the language in the acceptance letters has been cited explicitly in lawsuits brought against H-2A employers by opponents of the H-2A program which resulted in substantial financial liability, including penalties and interest, being imposed on the defendants. If the Department believes that the transportation reimbursement obligations of H-2A employers is other than as set forth in the H-2A regulations, it should amend the regulations through notice and comment rulemaking, thereby exposing its interpretation to legal challenge. If it does not, it should remove the language from acceptance letters. In any event, H-2A acceptance letters are not the appropriate venue to setting out new interpretations of non-H-2A labor statutes.

Requiring employers to employ remotely recruited applicants, and to reimburse inbound transportation and subsistence costs to job applicants who are required to make no substantial commitment to the employer (i.e. irrespective of how little work is actually performed by the worker), is unfair to H-2A employers and invites flagrant abuse. Also these requirements have led to substantial increases in absconding rates by foreign workers in those states where the requirements have been imposed by the courts.

11. Issue an Opinion Letter or other guidance addressing the 11th Circuit's opinion in Arriaga v Florida Pacific Farms expressing the view that transportation, subsistence and consular fees of remotely recruited workers are for the mutual benefit of employers and employees.

NCAE, and the agricultural industry generally, have urged the Department of Labor for years to articulate a definitive position on the issues in *Arriaga v Florida Pacific Farms, LLC* [305 F.3d 1228 (11th Cir. 2002)] This decision has imposed substantial additional costs on H-2A employers in the 11th Circuit and has put the H-2A program further out of reach of farmers. Because it removes any meaningful work obligation by the worker in exchange for receiving the transportation reimbursement, it threatens the very integrity of the H-2A program as a reliable source of legal labor. The USDOL has sat on the sidelines and failed to address the *Arriaga* issues. This inaction has led to an increasing volume of litigation. The cowardice of the

USDOL in this matter is inexcusable. The USDOL must articulate the position that the obligations of H-2A employers to reimburse inbound costs incurred by remotely recruited workers are limited to those set forth in the H-2A regulations, which have been in force since 1987, and do not extend beyond that.

12. Issue an Opinion Letter or other guidance consistent with the Fourth Circuit's determination that the production of cultivated Christmas trees is "agricultural" under the FLSA, and therefore not subject to overtime.

In a case brought by the Department against North Carolina H-2A employers, the USDOL has ignored the 4th Circuit Court decision asserting that the production of cultivated Christmas trees is "agriculture" within the meaning of the Fair Labor Standards Act, and therefore not subject to overtime. [*Department of Labor v. North Carolina Growers Assn., Inc.*, 377 F.3rd 345 (4th Cir. 2004)] USDOL continues to require Christmas tree producers in states outside the 4th Circuit to pay overtime. This, in combination with the high adverse effect wage rate (AEWR) applicable to H-2A employment, has made the H-2A program economically unavailable to many Christmas tree growers.

13. Permit employers to substitute rental or public accommodation housing which meets standards for such housing and is certified for occupancy after acceptance and/or certification of H-2A applications if the specified housing becomes unavailable, or to expand housing capacity to comply with the 50-percent rule.

The INA [8 U.S.C. Sec. 1188(c)(4)] permits employers, at the employer's option, to offer rental or public accommodation housing that meets applicable state or local standards for such housing. USDOL requires the specific rental or public accommodation housing facilities to be described on the Clearance Order, which must be filed 45 days in advance of the date workers are needed. If an employer finds at the time of occupancy that the specified housing unit is not available for some reason, and must house workers temporarily or permanently in a different unit, or needs to find additional housing to accommodate workers referred under the 50 percent rule because the original housing is filled, under current policy the employer is considered out of compliance with the H-2A regulations, even if the substitute housing also complies with applicable state or local standards and is certified for occupancy. (Applications can be amended to add additional housing, but this is a time consuming process in which whether or when approval is obtained is uncertain. The need for substitute housing generally arises on very short notice.)

14. Accommodate employers' requests for pre-application housing inspections in order to provide more time for identifying and correcting problems and assure timely response to requests for inspection.

Within the current H-2A application time frames there is often insufficient time to schedule a housing inspection and correct problems without delaying labor certification and/or setting back the employer's date of need. Some SWAs either refuse, or simply do not, schedule inspections of H-2A employer's housing until an H-2A application has been filed. In addition,

some SWAs do not have sufficient housing inspection capacity, and fail to inspect employer's housing within the application time frame, causing a delay in the employer's certification. USDOL, which ultimately provides the resources for the SWAs' farm worker housing inspection function, should require SWAs to inspect housing upon request, even before an H-2A application is filed, and to set and enforce standards for timely inspection of H-2A housing prior to the certification date.

15. Provide an effective process for rapid approval of de minimus variances from OSHA Sec. 1910 farm labor housing regulations in situations where the health or safety of workers will not be endangered.

The lack of housing is one of the major limitations to use of the H-2A program. Most housing that is not rental or public accommodation housing must meet Occupational Safety and Health Administration (OSHA) Sec. 1910 farm labor camp standards. The OSHA regulations permit granting of *de minimus* variances from these standards where the health or safety of workers will not be endangered, but in practice such variances are nearly impossible to obtain, and take months or years to secure. This problem must be corrected to assure that all available and suitable housing stock can be utilized.

16. Assure that SWAs make genuine good-faith efforts to direct work-authorized applicants for agricultural jobs to unfilled H-2A and non-H-2A job orders before referring them to employers whose H-2A workers are already on site or en route to the place of employment.

This historic policy of the USDOL has been ignored in recent years. It should be re-imposed and vigorously monitored. The USDOL should require SWAs who refer workers to jobs already filled by H-2A aliens, or where the workers are en route, to certify in writing that the SWA has exposed the workers in question to all open agricultural job orders (listing the specific job orders offered), and that the applicants have refused referral to the open orders.

17. Assure that the number of USDOL/ESA Wage and Hour labor standards compliance inspections of non-H-2A employers in a state is in at least reasonable proportion to the number of H-2A employers in the state; i.e. do not disproportionately target H-2A employers for compliance inspections.

Although USDOL has steadfastly denied it, it is patently obvious to H-2A and non-H-2A users alike that the quickest and surest way to trigger repeated labor standards compliance inspections is to file an H-2A application. Most non-users have never had such an inspection. Virtually all users get such an inspection, and most have had multiple inspections. Egregious non-H-2A violators often go un-inspected, even when reported. Compliance inspection should not be a punishment for using the H-2A program.

18. Do not count Saturdays, Sundays, and Federal holidays in the 5-day period required for submission of a response to a notice of refusal to accept applications for consideration.

This request is simply a matter of fairness and reasonableness, and would require only the very minor regulatory change of substituting “business days” for “calendar days” in the applicable regulations.

- **Cut Red Tape and Bureaucracy and Litigation “Gotchas”**

19. Return to past practice with respect to processing and advertising of master applications, and foster, rather than discourage, use of H-2A grower associations.

The average H-2A user is a small, family farmer who employs only nine H-2A workers. In many farming areas a large number of farmers have approximately the same needs for workers to perform approximately the same jobs for approximately the same periods of time. Growers’ associations have been created in many H-2A using areas to assist farmers in the daunting administrative functions associated with preparing and filing H-2A applications and complying with post-application obligations. Where many growers have similar needs for workers, current H-2A regulations permit associations to file “master” applications – a single application for workers in a specific occupation listing multiple employers. Recent USDOL policy changes have made it more difficult and/or expensive for associations to use master applications, and it appears that USDOL is trying to discourage their use. For example, earlier this year, USDOL began requiring associations that file master applications to list the names of every participating employer in the required advertising for the application rather than just listing the name of the association. (Master applications can have dozens, or even a hundred or more, individual employers, making for ads which are several inches long.) Some SWAs insist on unbundling master applications for the purpose of domestic worker recruitment, and making referrals to individual farmers rather than to the association office, which has the capacity to process these referrals. Other USDOL practices and policies discouraging associations have been discussed and sometimes imposed on associations. For efficiency in its own operations as well as making the program more user friendly for employers, the USDOL should eliminate these policies that are burdensome to associations and employers, and that discourage the filing of master applications. Instead, the Department should encourage the use of associations and the filing of master applications, and actively seek ways to collaborate with associations.

20. Use of association names on joint employer applications and stopping the recent practice of arbitrarily changing the names of employers on such applications.

Joint employer associations, where workers can be employed by any member of a grower association and move among participating farmers as needed while engaging in H-2A certified agricultural activities, are essential to the workability of the H-2A program in agricultural commodities and activities characterized by short term, intermittent labor needs by individual farmers. As has been the case with associations filing master applications, the USDOL in recent years has put increasing obstacles in the way of such associations, including this year arbitrarily substituting an individual’s name, or an individual employer’s name, for the association’s name

on such applications, both before and even after issuing labor certifications. This action potentially exposes the named individuals to substantial legal liability. This practice, and all practices which impede the use of joint employer associations, should be stopped.

21. Remove language added earlier this year to H-2A acceptance letters pertaining to joint employers.

The above referenced language was suddenly added to acceptance letters earlier this year with no announcement or explanation by the USDOL. The purpose for and meaning of this language is unclear. It is unclear what new obligations, if any, it imposes on employers. If it merely reiterates an obligation already included in the H-2A regulations, it is unnecessary. If it imposes a new obligation, it is improper simply to include it in an acceptance letter, and instead should be promulgated by notice and comment rule making. We are concerned that the language could be exploited by opponents of the H-2A program to foment harassment lawsuits on program users.

22. Eliminate recently imposed requirements to provide documentation of seasonality, dates of need, and number of workers.

This year the USDOL has sporadically and inconsistently imposed substantial requirements on H-2A applicants to submit documentation and records on employment and payrolls for past years to substantiate that the workers requested are temporary or seasonal, and to support dates of need and numbers of workers requested. These requirements have been imposed even in cases where the activities performed are clearly seasonal, e.g. in the production of ornamental nursery stock. Not only have the data requests been confusing and burdensome to comply with, it is clear that the adjudicators who receive this documentation do not have the training and experience to understand and interpret the data when they get it. The result has been to impose great burdens and costs on employers, as well as delay and confusion in the adjudication process. Many FY 2007 H-2A applications were delayed weeks – in many cases even a month or more – after this requirement was imposed. USDOL cannot deal with the current volume of paper work it receives on a timely basis, and should be seeking ways to reduce rather than increase the complexity of the application and supporting documents. The recently imposed new documentation requirements should be eliminated, and employers should be permitted to simply attest that the job opportunities for which workers are requested will not be filled during the remainder of the year in those instances where it is not clear from the nature of the activity itself that it can not be conducted on a year round basis.

Department of Homeland Security and Department of State

The principal improvement needed with respect to DHS and DOS functions is improved timeliness. Even when the USDOL issues certifications on time, there are by statute only 30 days in which to adjudicate H-2A petitions and communicate approval to the consulate, for the employers to present the aliens, and for the consulates to adjudicate applications and issue visas. Currently this process can take up to seven or eight weeks, almost all of which is waiting time. The performance standard needs to assure visa issuance (or denial decisions) not less than five

days before the date of need, in order to allow time for workers to travel to the job site and be ready to start work on the date of need. This standard would be very achievable with implementation of the following procedures:

1. Re-establish procedure for identification of H-2A petitions in Service Center mail rooms and expedited delivery to adjudicators.

For years there was a simple process in place of marking a big “H-2A” in green magic marker on the outside of envelopes containing H-2A petitions, and including a similarly marked sheet on the top of the package inside. This practice enabled Service Center mail rooms to rapidly identify incoming H-2A petitions and immediately route them to the appropriate adjudicators. Currently it appears that valuable days are lost simply delivering H-2A petitions from the mail rooms to the adjudicators. The former process for easy identification and same-day delivery should be reinstated.

2. Designate one or more adjudicators in St. Albans and Laguna Nigel to receive H-2A petitions and train them on idiosyncrasies of H-2A petitions.

H-2A petitions are rare items in normal Service Center petition intake. Because of the idiosyncrasies of H-2A petitions, there is an inordinately high rate of adjudication errors, because adjudicators are not used to seeing these petitions. During most or all of the year, the daily volume of incoming H-2A petitions is small enough that they could all be adjudicated by one adjudicator on the day received. We recommend that one or more adjudicators be designated to adjudicate the day’s intake of H-2A petitions on an expedited basis before proceeding to other work, and be specifically trained in the idiosyncrasies of H-2A petitions to reduce the volume of mistakes.

3. Assure adjudication of unnamed beneficiary H-2A petitions on day of receipt.

Virtually all H-2A petitions are for multiple unnamed beneficiaries. Therefore, there is very little to adjudicate on such petitions, and if they are expeditiously routed to a designated H-2A adjudicator, as recommended in points 1 and 2 above, could be adjudicated the day received, with time left over most days.

4. Fax approval notices to consulates (and CSC, if applicable; see #6 below) and to employers.

Currently it can take a week or more after receipt or an adjudication action for the hard copy of the receipt notice or approval notice to be printed, put in an envelope, and mailed. For years, adjudicators faxed approval notices directly from the Service Centers to the consulates. This was stopped when the Consular Service Center (CSC) process was initiated. We strongly recommend that H-2A receipt notices and approval notices be faxed by the adjudicators to the CSC, the applicable consulate, and the employer. This could be an automated process.

5. Eliminate Consular Service Center (CSC) step, or assure immediate (3-day) turn around and improve accuracy.

Until last year approved petitions were faxed directly to the consulate and employers made their own appointments for interviews directly with the consulates. Last year the DOS added the CSC process. Although apparently intended to improve timeliness and efficiency, it has had the opposite result. It routinely adds weeks to the process of securing visa appointments and interviews. Furthermore, the incidence of communication errors between employers, the CSC and/or the consulates is extremely high. Either the CSC middleman must be eliminated and direct faxing of approvals to consulates resumed, or DOS needs to assure a three-day performance standard for scheduling appointments and eliminate the high incidence of clerical errors.

6. Allow employers to schedule visa appointments upon receipt of faxed receipt notice from the Service Centers, and authorize consulates to process visa applicants and issue visas upon receipt of a faxed approval notice from a Service Center, without waiting for hard copies.

Consulates scheduled appointments and issued visas for years based on receipt of faxed documents directly from Service Centers. Returning to this policy (along with the implementation of the preceding process recommendations), would significantly improve the timeliness of the visa issuance process. So long as this policy required receipt of the fax directly from the Service Center, there would be no compromising of security. This practice should be reinstated.

7. Give priority to H-2A visa applicants when necessary to assure H-2A visa issuance not less than five days before the date of need, or within five days of receipt of request if received fewer than five days before the date of need.

We recognize capacity limitations at consulates. However, given the urgency of timing of H-2A needs, it is reasonable to delay less urgent visa categories such as tourists when necessary to assure timely issuance of H-2A visas.

8. Allow employers the flexibility to make appointments for a specific number of applicants, and not require naming applicants until the time of submission of the visa application.

When large numbers of workers are being marshaled from remote rural areas of Mexico, it is inevitable that some of those recruited fail to follow through on their commitments or encounter scheduling difficulties that make it impossible to be available for the specific admission date anticipated at the time of recruitment. DOS needs to recognize that reality and not require employers to name applicants until the time visa applications are submitted. This policy will still allow sufficient time to perform required computer checks on the applicants.

9. Assure issuance of visas the same day as the interview, in order not to require aliens to remain overnight in expensive and dangerous surroundings.

Employers and/or their agents should be permitted to submit visa applications and supporting documents several days in advance of interviews so that background checks, etc. can be performed before the interview day. Approved visas should be distributed at the end of the day on which interviews take place. This was the typical practice at Mexican consulates until a few years ago, and is still the standard at some consulates, but practice varies widely. If H-2A workers must remain in consular cities in hotels overnight or for several days it is expensive for the aliens (and ultimately for their employers, who have to reimburse such expenses), but more importantly they become prey to all sorts of criminal elements, not the least of whom are alien smugglers who try to recruit them away with outlandish promises. It is a situation that has become a serious problem and needs to be avoided.

We will be happy to discuss any or all of these points with the relevant administration officials in greater detail, and to assist in any way we can to make the H-2A program more effective in meeting the needs of U.S. farmers for a legal, affordable and sufficient workforce.

Sincerely yours,



Sharon M. Hughes CAE
Executive Vice President

Cc: Barry Jackson, Deputy Assistant to the President
Michael Chertoff, Secretary of Department of Homeland Security
Condoleezza Rice, Secretary of State
Elaine L. Chao, Secretary of Labor