

**MINUTES
MIGRANT AND SEASONAL FARMWORKERS BOARD MEETING**

March 19, 2008

The Migrant and Seasonal Farmworkers Board Meeting was held at the Virginia Employment Commission Administrative Office in Richmond, Virginia.

The following Board Members were present: Kenneth Annis, Chairman; Ruth Brown, Veronica Donahue, Lou Hart, Hart Hudson, Sharon Saldarriaga, Christian Schweiger, J. M. Scott, Teresa Velle, and Peter Von der Lippe. The following Board Members were absent: Mario Moreno, Vice-Chairman; Tupper Dorsey, Richard Hall, Thomas Kellum, and Kelly Robinson. Staff in attendance from the Virginia Employment Commission were: Dolores Esser, Nicholas Kessler, Shelby Robinson, Coleman Walsh, Richard Primmer, Joyce Fogg, Jack Turner, Michelle Abraham, and Evelyn Lewis. The following guests and speakers were present: Tim Freilich, Virginia Justice Center for Farm and Immigrant Workers; Bruce Clark, U. S. Department of Labor; and Elaine Trugillo, Labor Services International, LLC.

Call to Order

Chairman Kenneth Annis called the meeting to order at 10:00 a.m.

Welcome and Introduction

Chairman Annis welcomed all in attendance and extended greetings to the guests, board members, and all those present. He stated that three new Board members were attending their first MSFW Board meeting and asked that each person attending the meeting introduce themselves and provide a brief description of their occupation and how they support the Board. The three new Board members are Ruth Brown of Exmore; Louis Hart of Charlottesville; and Teresa Velle of Charlottesville. They were warmly welcomed by all in attendance.

Approval of Agenda

A motion was made by Chairman Annis to approve the agenda. It was moved by Peter Von der Lippe, seconded by Christian Schweiger, and approved by a unanimous vote.

Approval of Minutes

A motion was made by Chairman Annis to approve the minutes. Christian Schweiger moved that the minutes of the November 14, 2007, meeting be approved. It was seconded by Peter Von der Lippe, and the minutes were approved by a unanimous vote.

Legislative Update

Tim Freilich, Legal Justice with the Virginia Justice Center for Farm and Immigration Workers provided a legislative overview update. Mr. Freilich stated that for the first time, more than ten percent of Virginians were born outside of the United States. Between 250,000 to 300,000 of those

immigrant individuals are undocumented. The Commonwealth Institute reports that the undocumented population in Virginia pays an estimated \$154,000,000 to \$174,000,000 in state income taxes, sales and excise taxes, and property taxes each year. Undocumented individuals working on the books in Virginia, pay an additional \$114,000,000 to \$137,000,000 in social security and medicare taxes. When the employers match this, they have to pay \$4,000,000 to \$5,000,000 in unemployment insurance taxes on their behalf. The taxes paid by undocumented workers in Virginia come to a total of \$260,000,000 to \$311,000,000 per year. When the payroll taxes paid by the employer of undocumented workers that are working on the books, the totals are between \$379,000,000 to \$453,000,000 per year, paid by the undocumented workers of Virginia. This is the first time that the specific numbers for Virginia have been available.

Mr. Freilich stated that 130 bills were introduced at the 2008 General Assembly Session targeting immigrants and/or immigrant communities in Virginia. Only 14 of those bills passed. Mr. Freilich distributed a report containing the Virginia legislative bills that were not passed during this year's session. The report contained the following information:

- The following bills will not become law this year:
 - **SB 441 (Howell) - Protecting the victim and witnesses of crime**
This bill would have afforded crime victims and witnesses protection from routine inquiries by law enforcement into their immigration status. With increased local police enforcement of civil violations of immigration law, this measure sought to preserve the trust between immigrant communities and law enforcement by setting a uniform statewide policy. Local police and sheriffs departments remain free to adopt such policies locally, as has already been done in Prince William and Fairfax Counties and the City of Alexandria, among others.
 - **HB 14 (Peace) - Denying undocumented students admission to public colleges**
This bill would have denied undocumented students admission to Virginia's public colleges and universities, even at out-of-state rates. Had it become law, it would have squandered Virginia's investment in the K-12 education of many Virginia's most promising immigrant students. It would have denied many students the chance to go to college, and would have led to increased school dropout rates and gang membership.
 - **SB 652 (Hanger) - opening narrow window of opportunity for in-state tuition**
This bill would have opened a small window of opportunity for undocumented students who have paid Virginia income taxes for three years or more to qualify for in-state tuition at Virginia's public college and universities.
 - **HB 1472 (Cole) - Authorizing Virginia small businesses to discriminate**
This bill would have authorized businesses to discriminate in employment against lawfully present immigrants who speak a language other than English in the workplace.
 - **HB 91 (Albo) - Giving police wide discretion to arrest anyone driving without license**
As introduced, this bill would have required police to arrest any person caught driving without a driver's license. Many saw this bill as an invitation to racial profiling and bias-based policing.

- **HB 436 (Miller, J.) - Giving police wide discretion to make misdemeanor arrests**
This bill would have given police officers unlimited discretion to choose whether to arrest a person observed committing a class 1 or class 2 misdemeanor, or to write that person a summons to appear in court. Under current law, officers must write a summons unless they reasonably believe that the person will not show up for court, is a danger to self or others, or will not cease committing the criminal act. This bill would have opened the door to racial profiling and bias-based policing.
- **HB 433 (Miller, J.) - Increasing penalties for driving without a license**
This bill would have mandated the seizure and forfeiture to the state of a person’s car upon the car owner’s arrest for a third offense of driving without a license.
- The following bills will become law on July 1, 2008:
 - **HB 820 (Albo)/SB 609 (Stolle) - Requiring pre-conviction jailhouse inquiry into immigration states**
These identical bills expand the current law (requiring post-conviction inquiry into the immigration status of inmates committed to jails and prisons) to mandate that all sheriffs make inquiry of every person taken into custody.
 - **HB 440 (Rust)/SB 623 (Stolle) - Establishing rebuttable presumption against bail**
These identical bills establish a rebuttable presumption against bail for any person not lawfully present in the United States who is charged with one of a certain number of crimes, including driving under the influence.
 - **HB 926 (Byron)/SB 782 (Obenshain) - Terminating business for pattern or practice of violating federal immigration laws**
These identical bills require the State Corporation Commission to terminate the existence of a business when the directors or officers are convicted of a pattern and practice of violating federal immigration laws.
 - **HB 1298 (Frederick)/SB 517 (Cuccinelli) - Regarding public contract hiring**
These identical bills will require all public bodies to include in written public contracts a term or condition that binds public contractors to comply with federal immigration law.
 - **HB 350 (Cole), HB 430 (Miller, J.), HB 445 (Rust), SB 427/428 (Barker) - Zoning**
These bills will enhance the powers of zoning administrators to address “overcrowding” issues or increase penalties for violations.

Proposed Federal Regulations Impacting H-2A Program

Coleman Walsh distributed a handout of the *Federal Register* Proposed Changes for the H-2A Program. He reported that in November 2007, the U. S. Department of Labor issued a Training and Guidance Letter to all state workforce agencies announcing some very significant changes to the H-2A Program. From the VEC perspective, the most significant of those changes is the requirement for all state workforce agencies to verify the legal status of applicants before they are referred to an H-2A Program. Many state workforce agencies are responding back to the Department of Labor

that they do not have the legal authority to make the changes that are being proposed in the absence of legislation or regulations. In response to that, both the Department of Labor and the Department of Homeland Security published notices for proposed rulemaking on February 13, 2008 in the *Federal Register*, and the effect of those proposed rule-making notices would be embedded in federal regulation provisions of the guidance letters that the Department of Labor issued in November. Interested parties have until March 31, 2008 to file comments with the Department of Labor and the Department of Homeland Security with respect to these proposed regulations. Commissioner Esser has briefed the Secretary of Commerce and Trade about these regulations and proposed changes. The VEC is currently in the process of developing comments to share with the Secretary and Governor's Policy Office. The principle concern for the VEC is the requirement to verify the employment status of applicants being referred. The proposal does not require the states to use the Department of Homeland's Security's E-Verify System, but strongly encourages that it be done. One of the areas of concern that state workforce agencies have with this is that the E-Verify System has a well documented accuracy problem that are creating a lot of issues and concerns for individuals who are in fact U. S. citizens or lawfully in the United States ineligible.

Implications of Proposed Federal Regulations on H-2A Program

Michelle Abraham distributed a handout and reviewed the implications of proposed federal regulations on the H-2A Program. The overview of issues in the U. S. Department of Labor (USDOL) H-2A NPRM consisted of the following:

- USDOL proposes to modernize the existing H-2A Temporary Agriculture Worker Program by improving the application process and strengthening worker protections. This proposal seeks to address a number of criticisms about the current program, including that it is so cumbersome and prone to delays that many agriculture employers refuse to use it. The proposed regulatory reforms are the first in 20 years and would help provide our Nation's farmers with legal workers in a timely fashion while ensuring protections for both U. S. and H-2A workers. The proposal contains the following:
 - Processing Improvements – The U. S. agricultural economy requires a reliable and timely workforce. A farmer's inability to secure sufficient workers on time all too often means that crops rot in the field. Congress established very tight H-2A processing times for that reason, yet the Department consistently fails to meet the deadlines required by law. The Department must improve its process to come into compliance with the law, and to ensure that farmers have the workers they need to provide the U. S. economy with a safe and reliable domestic food supply.
 - Applications – Eliminate the duplication of activities currently performed by the State Workforce Agencies (SWAs) and the Department's Employment and Training Administration (ETA). Employers would file their H-2A applications directly with DOL instead of filing simultaneously with both the SWA and DOL.
- Implement an attestation-based labor certification process in place of the current cumbersome process. Employers will be required to attest, under threat of penalties, including fines, revocation of certification, and program debarment, that they have fully complied with all program requirements. DOL will institute an auditing program to

ensure compliance with program requirements. This reform builds on our successful re-engineering of the labor certification process in the Permanent Labor Certification Program (PERM) in 2005.

- Housing Inspections – Increase the amount of time states have to conduct required housing inspections in response to delays often caused by SWAs overwhelmed by employer requests for pre-certification housing inspections. This reform creates consistency between the housing inspection process under H-2A and the housing inspection process under the Migrant and Seasonal Workers Protection Act, which protects U. S. farm workers.
- Wage Rate – Revise the methodology for determining the Adverse Effect Wage Rate to more accurately measure market-based wages by occupation, skill level, and geographic location. Use of the BLS Occupational Employment Survey data on wages would make the H-2A program consistent with the wage calculation methodology successfully used in other temporary worker programs administered by the Department. This reform ensures accurate wage information is available in more than 500 localities as opposed to the current 18 regions, resulting in more precise wage calculations that will increase protection for U. S. workers from competition by illegal workers.

It is critical for the H-2A wage rate to reflect market conditions as accurately as possible. Rates that are too low threaten to drive down the wages of U. S. workers, while rates that are too high encourage agricultural employers to instead resort to illegal workers, practice that both Congress and the Supreme Court have noted also threatens the wages and working conditions of U. S. workers.

- Application Fee – Increase the fee to an amount sufficient to recover the reasonable costs of processing applications. The current fee was set 20 years ago and has not been updated since. Significantly, the Department does not currently have authority to retain or use application fees, which are instead sent to the Treasury. The Department is sending draft statutory language to Congress giving DOL the authority to retain the fee as a means of funding the H-2A program and ensuring that fees are used to improve program performance and enhance workers' rights.
 - Employment Eligibility Verification – SWAs must verify the employment eligibility of any worker referred to an employer in response to an H-2A job order. In Training and Employment Guidance Letter (TEGL) 11-07, issued November 14, 2007, ETA recommended that the SWAs use the Department of Homeland Security's E-verify system to ensure that the workers being referred to employers are eligible for employment. This clarification is consistent with existing statutory requirements.
- Enhanced Worker Protections
- Recruitment – Employers would be required to substantially increase the amount of time they spend recruiting, thus giving U. S. workers additional time to apply for jobs before the employer resorts to hiring H-2A workers.

- Foreign Labor Contractors – Would be required to maintain a surety bond (in an amount based on the number of workers employed) throughout the effective period of the labor certification. DOL will make a claim against the surety bond to secure any unpaid wages or other benefits due to workers under the labor certification.
- Prohibition on Cost-Shifting and Limits on Foreign Recruiters – Employers would be prohibited from passing along to workers any of the costs incurred as a result of participating in the program, including the cost of preparing and filing an application, attorney fees, and recruiting costs. In addition, employers that utilize foreign recruiters must also contractually prohibit them from passing on such costs.
- Maximum Fines
 - Willful failure to meet a condition of the work contract, or discrimination against a U. S. or H-2A worker, or interference with an investigation would increase from \$1,000 to \$5,000.
 - Willful failure to meet a condition of the work contract that results in displacement of a U. S. worker would increase from \$1,000 to \$15,000.
 - Violations of housing or transportation safety and health standards causing serious injury or death would be established at \$50,000 per worker and \$100,000 for willful or repeat violations.
- New Enforcement Tools
 - Random and targeted auditing of applications to ensure employer compliance with program requirements.
 - Revocation of approved certifications for an employer’s violation of program requirements.
 - Clarification and improvement of ETA’s authority to debar employers for program violations. Separate authority for WHD to also debar employers for program violations.
- Other Changes
 - Logging – The proposed rule will clarify that logging is an activity included in the H-2A program. Loggers are currently admitted under the H-2B program, but have to comply with many H-2A-type program requirements. To reduce confusion about logging standards, the Department proposes to make logging eligible for the H-2A (rather than H-2B) program and accordingly, apply all H-2A requirements.
 - Christmas Trees – To conform to a recent Federal Circuit Court decision, the proposed rule will clarify that Christmas tree production on a farm is agricultural work for purposes of the Fair Labor Standards Act (FLSA). Christmas tree production is already eligible for the H-2A program and the change to the FLSA definition will not affect the H-2A designation.

H-2B Issues

Richard Primmer, Manager of the H-2B and Prevailing Wage Programs, Virginia Employment Commission, provided an update on the H-2B and Prevailing Wage issues. He stated that there are

issues with the seafood industry and the guest worker program; however, he first explained how the H-2B guest worker program works. The report consisted of the following information:

- The H-2B nonimmigrant program permits employers to hire foreign workers to come to the U. S. and perform temporary nonagricultural work, which may be one-time, seasonal, peak load, or intermittent. There is a 66,000 per year limit on the number of foreign workers who may receive H-2B status during each fiscal year (October through September).
- Qualifying Criteria
 - The job and the employer’s need must be one time, seasonal, peak load, or intermittent.
 - The job must be full time and less than one year.
 - There must be no qualified and willing U. S. workers available for the job.
 - The employer must pay at least the prevailing wage for the occupation.
- H-2B Process
 - The employer files a completed ETA 750-A form in duplicate to the Foreign Labor Certification Unit. Multiple openings of the same job and rate of pay may be on the same application. The employer should file for H-2B at least 60 days, but not more than 120 days, before the worker is needed. There must be an explanation on why the employer has a temporary need and this must be on company letterhead and signed by the employer.
 - The application is reviewed for the qualifying criteria and the employer is instructed to publish newspaper advertisements in conjunction with a 10-day job order. Once the recruitment process is completed and documented, the application is sent to the U. S. Department of Labor for a final determination.
- The standards for determining a temporary need are:
 - A job opportunity is temporary if the nature of the employer’s need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary.
 - Part-time employment does not qualify for H-2B certification; only full-time employment can be certified.
 - A labor shortage, however severe, does not establish a temporary need under the H-2B classification.
 - USCIS regulations state the employer’s need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year.
 - An employer’s seasonal or peakload need of longer than 10 months, which is of a recurring nature, must be supported by compelling evidence. (*Vito Volpe Court Decision*)
 - An employer’s need for temporary labor or services must be justified under one of the following regulatory standards: one-time occurrence, intermittent, seasonal, or peakload.
 - The justification of the regulatory standards are as follows:
 - One-Time Occurrence – Employer must establish that it has not employed workers to perform the services or labor in the past and it will not need the workers to perform the services or labor in the future; or

- It has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary workers.
- Intermittent – Employer must establish it has not employed permanent or full-time workers to perform the services or labor; but
- Occasionally or intermittently needs temporary workers to perform the services or labor for short periods.
- Seasonal – Employer must establish the services or labor to be performed is traditionally tied to a season of the year by an event or pattern and is of a recurring nature; and
- The periods of time during each year in which the employer does not need the services or labor. Employment is not seasonal if the period of need is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.
- Peakload – Employer must establish it regularly employs permanent workers to perform the services or labor at the place of employment.
- It needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand.
- The temporary additions to staff will not become part of the employer's regular operation.

Commissioner Esser stated that she and Mr. Primmer have met with the Secretary of Commerce and Trade and several of the seafood industry dealers. The seafood industry relies heavily on the returning workers. That is why they were making a plea to the Governor. We received 10,000 requests in Virginia last year for H-2B. If we received 10,000 requests and the ceiling is 66,000 for the nation, that is when you see the difference of what is occurring with the employers about not knowing what they are going to do as the seafood season opens.

There are bills pending in Congress with hopes of getting them passed this year; however, time is running out for the seafood industry employers. If Congress does pass a bill for the extension, some of the employers may be able to get some employees before the end of the year. Governor Kaine sent a letter to the Congressional Delegation asking them to support anything that could be done. The Virginia Liaison Office is also making contact with other states that have positions with the seafood coalition of legislators. One of the issues is the whole immigration package. There is a dilemma that the guest worker programs have been placed in the immigration package. We are therefore trying to convince those that did this to look at some of the guest worker programs differently than the immigration program.

Filing Location Changes for H-2A and H-2B Orders

Jack Turner, Monitor Advocate, Virginia Employment Commission, reported that the *Federal Register* Notice dated March 5, 2008, stated that the locations, of the future non-electronic applications to be filed, will be changed. Presently, there are two National Processing Centers being used. For all processing east of the Mississippi, the applications would be sent to the Atlanta, Georgia National Processing Center. For all processing west of the Mississippi, the applications would be sent to the Chicago, Illinois National Processing Center. With the changes, there will be a total consolidation throughout the U. S. in which the temporary programs applications will go to Chicago, and the permanent programs applications will go to Atlanta. This will be effective June 1, 2008. If an application is sent to the wrong place, the application will be returned to you and you will be given 15 days to act upon it.

The contact information for the processing centers is as follows:

- U. S. Department of Labor
Employment and Training Administration
Atlanta National Processing Center, Harris Tower
233 Peachtree Street, NE, Suite 410
Atlanta, Georgia 30303
Telephone: (404) 893-0101
Facsimile: (404) 893-4642
Help Desk e-mail: plc.atlanta@dol.gov

- U. S. Department of Labor
Employment and Training Administration
Chicago National Processing Center
844 North Rush Street, 12th Floor
Chicago, Illinois 60611
Telephone: (312) 886-8000
Facsimile: (312) 353-3352
Help Desk e-mail: plc.chicago@dol.gov

VEC Update

Commissioner Dee Esser reported that due to federal budget constraints, the VEC had a mass layoff on Friday, March 14, 2008. There were 157 employees layed off, and 80 vacant positions that will not be filled. A letter was sent from the Secretary of Commerce and Trade to the Congressional Delegation and General Assembly informing them of this and that there will be additional cuts this year, in an attempt to get the agency into the budget jurisdiction that is provided to us by the U. S. Department of Labor. The Virginia Employment Commission is funded totally with federal dollars paid by employers, and at this time, Virginia ranks next to last in the percentage of money withheld. We get \$.27 cents back on every dollar that our employers pay. This is what's creating a problem for us.

Commissioner Esser and Deputy Commissioner Nicholas Kessler have established a very good relationship with the Virginia Liaison Office, who worked with the Congressional Delegation trying to make impacts through them on different things at the federal level and getting them up to speed on different issues such as this funding issue, veterans issues, state legislation, or any issue that the agency deals with.

Old Business

Commissioner Esser informed Chairman Annis that she provided him with a copy of the revised MSFW Board's letterhead stationary, in which he had requested, for review.

Sharon Saldarriaga inquired on a motion that was made at a previous meeting to adopt a statement regarding the AgsJOB bill. From the previous meeting, it was decided that this was a mute statement, and no action was asked. After discussion, the decision was made to bring this topic up for discussion at the fall meeting.

New Business

Commissioner Esser stated that at the next MSFW Board meeting, elections will need to be conducted for the Chair and Vice-Chair positions.

Mr. J. M. Scott tendered his resignation from the MSFW Board. Mr. Scott has relocated to Charlotte, North Carolina. Chairman Annis and the Board members extended accolades to Mr. Scott for his continuous support to the Board. Chairman Annis requested that the Board send a letter of appreciation to Mr. Scott.

Items of Interest from Commissioner Dolores Esser

Commissioner Esser did not have any additional items of interest to report.

Joyce Fogg inquired on setting the new dates for the Board meetings for the year. After discussion, it was decided to meet on the third Wednesday every three months. The confirmed meeting dates will be June 18 and September 17. The December meeting date will be postponed until January 2009. The General Assembly will be in session, and this would be a good time to meet. Ms. Fogg will send an e-mail message to the Board relaying this information.

Items of Interest from the Board Members

Sharon Saldarriaga stated that **?????** will be speaking at VCU on March 19, at 7:00 p.m. on the topic of Immigration.

Ms. Saldarriaga distributed the Telamon Corporation's *Guide to Serving Farmworkers in Virginia*. The VEC has this guide on its website, and it has been distributed electronically.

Chairman Annis stated that agriculture is up against difficult times. On the Eastern Shore, one of the biggest employers has closed. One of the biggest tomato growers has shut down. Things have changed because of the high cost of fuel.

Public Comments

There were no public comments.

Adjournment

Chairman Annis motioned that the Migrant and Seasonal Farm Workers Board meeting adjourn. The motion was moved by Christian Schweiger, and seconded by Louis Hart. By unanimous vote, the meeting adjourned at 12:11 p.m.