SOUTHERN MIGRANT LEGAL SERVICES

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Via www.reginfo.gov/public/do/PRAMain

RE: Agency Information Collection Activities; Submission for OMB Review; Comment Request; Agriculture Recruitment System Forms Affecting Migratory Farm Workers
85 Fed. Reg. 26499 (May 4, 2020)

Dear Ms. Rennie:

These comments are submitted on behalf of Texas RioGrande Legal Aid ("TRLA") in response to the Department of Labor's ("the Department") information collection request entitled "Agriculture Recruitment System Forms Affecting Migratory Farm Workers," 85 Fed. Reg. 26499 (May 4, 2020).

TRLA provides free legal assistance in civil matters to indigent farmworkers in Texas and, through its Southern Migrant Legal Services project, six southeastern states (Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and Tennessee). Many of these workers seek agricultural employment through their state workforce agency ("SWA"). The information currently collected by the Department in the ETA Forms 790 and 790A (also known collectively as a "clearance order") is of considerable importance to these U.S. workers as they evaluate potential clearance orders for jobs outside their home base areas. We believe that the revisions to the registration forms discussed below would further the objectives of the Wagner-Peyser Act interstate clearance system. We therefore request that the Office of Management and Budget refrain from approving this information collection request until such time as the Department has considered and responded to this comment.

I. Forms ETA 790, 790A, and 790B and the Protection of Employment Rights of U.S. Farmworkers

Though it is often submitted in conjunction with a request for temporary labor certification to import H-2A guest workers, Form ETA 790 "is intended for the recruitment of domestic, U.S. workers." 81 Fed. Reg. 56072, 56276 (Aug. 19, 2016). The same appears to be true of the proposed Form ETA 790B. These forms serve at least two important purposes in protecting the employment rights of domestic farmworkers. First, Form ETA 790 and its attachments are the primary source of the information and data that SWAs need to effectuate their regulatory responsibility to safeguard domestic farmworkers from the potential depressive effects of non-local labor employed at substandard wages and working conditions. Second, the Forms are the principal instruments used to provide U.S. workers with a complete disclosure of the terms regarding agricultural jobs offered through the Wagner-Peyser Act system.

A. Use of Forms ETA 790, 790A, and 790B by the SWAs

Since 1946, the government has scrutinized requests from agricultural employers seeking to import farm labor in order to protect the wages and working conditions of local farmworkers. *Comité de Apoyo para los Trabajadores Agricolas (CATA) v. Dole*, 731 F. Supp. 541, 544–45 (D.D.C. 1990). That scrutiny also prevents employers from using the public employment service to bring workers over long distances to employment that has conditions dangerous to their health and safety. *Gomez v. Fla. State Emp't Serv.*, 417 F.2d 569, 574 (5th Cir. 1969).

The SWAs are charged with ensuring that clearance orders neither depress local wages and working conditions nor result in migrant workers being paid unlawfully low wages or being housed in substandard accommodations. *Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535, 540 (7th Cir. 1981) (imposing "substantial responsibility" on the SWAs for the effective and lawful operation of the interstate clearance system). Complete and accurate information on the employers' Forms ETA 790, 790A, and 790B is essential for the SWAs to effectively carry out these responsibilities.

Besides guarding against depression of wages and working conditions for local workers, the SWAs are responsible for protecting the migrant workers "who shift about the country to meet the needs of those employers who voluntarily use the resources of the federal government to secure workers." *Gomez*, 417 F.2d at 571–72. SWAs review clearance orders to ascertain that they fairly and completely set out the job terms and that the employment does not violate federal or state laws. 20 C.F.R. § 653.501(c)(3)(iii), (viii). SWAs also determine whether the housing for the migrants that is described on the clearance order meets federal health, safety, and sanitation requirements. *Abraham v. Beatrice Foods Co.*, 418 F. Supp. 1384, 1387 (E.D. Wis. 1976); *see also* 20 C.F.R. § 653.501(c)(3)(vi).

B. Job Information for Migrant Workers

The Wagner-Peyser Act regulations promise "that meaningful information about prospective employment will be revealed to migrant farmworkers." *Cantu v. Owatonna Canning Co.*, No. 3-76-civ-374, 1978 WL 1784, at *3 (D. Minn. Aug. 1, 1978). For this reason, SWAs are required to provide referred workers with checklists in the worker's native language describing the wages, working conditions, and other material conditions of the job. 20 C.F.R. § 653.501(d)(6). The utility of these checklists has diminished as clearance orders have increased in length. 81 Fed.

Reg. 56072, 56278 (Aug. 19, 2016) (noting that "some clearance orders may be more than 20 pages"). It is increasingly difficult for a brief checklist to set out all the material terms of the job. For this reason, SWAs must assist job seekers in obtaining a full explanation of the terms and conditions of employment, relying on the information set out in the Form ETA 790. *Id.* This can only be done if the clearance order captures all of the essential information needed by prospective workers.

II. Needed Revisions to Form ETA 790B

The following proposed revisions are organized according to the lettered subsections of Form ETA 790B, from A through H. Where applicable, citations are also provided to identical items in Form ETA 790A, though we recognize that Form ETA 790A is not the subject of the instant information comment request.

We further note that the Department's posted responses to the comments previously submitted by Farmworker Justice and other organizations, including TRLA, indicate that certain revisions to Form ETA790B were forthcoming. The comment, with Departmental responses, is attached. Those revisions the Department promises in those responses are not reflected in the version of Form ETA 790B currently available at reginfo.gov.

A. Job Offer Information

1. Job Duties, Item A-6b on Form ETA 790B (Item A-8a on Form ETA 790A)

In evaluating potential employment opportunities, jobseekers need a complete description of the job duties. This information should be prominently displayed in Form ETA 790B. Unfortunately, in many clearance orders, these critical data are buried many pages into the body of the document.

In Item A-6b of Form ETA 790B, employers are instructed that the job duties must be disclosed in this space *or using Addendum A.* Most of the clearance orders listed on the SeasonalJobs portal are submitted in conjunction with applications for H-2A certification and use Form ETA 790A, which lists the job duties in Item A-8a. Like Item A-6b, the companion item on Form ETA 790A directs that the response should begin in the allocated space but can be continued in Addendum C. A large number of H-2A employers fail to place any substantive information in the space provided and simply refer prospective worker to Addendum C. Unfortunately, Addendum C is not organized in any systemic fashion. Job seekers often must wade through pages of extraneous material before stumbling on this essential information, a situation compounded by the lack of a "search" function for individual job orders posted in the Department's SeasonalJobs portal. Not surprisingly, more than a few U.S. workers become discouraged and simply move on without ever learning the nature of the position being offered.

To eliminate the scavenger hunt approach required with so many of the current clearance orders, Form ETA 790B needs to be revised so that employers are *required* to insert the job description in the space labeled "Description of the job duties or services to be performed," with the addendum used only if the full job description cannot be displayed in the Section A box. The

Form should warn employers that failure to place the job description in the designated space in Section A may result in the clearance order being rejected by the SWA.

2. Wage Offer, Item A-6c on Form ETA 790B (Item A-8(b) on Form ETA 790A)

SWAs must "ascertain that the wage rates listed are not less than the rate prevailing in the area of employment" and "ascertain that other terms are not less favorable than those prevailing in the area." *Abraham v. Beatrice Foods Co.*, 418 F. Supp. 1384, 1387 (E.D. Wis. 1976). Form ETA 790B should be revamped to provide SWAs with the information and data they need to better accomplish these objectives.

i. Piece Rate Equivalents

For over 70 years, the Department has sought to prevent the depression of wages and working conditions through the importation of farmworkers from outside the local area. *CATA*, 731 F. Supp. at 544–45; *Abraham*, 418 F. Supp. at 1387. This is done in part by requiring the SWAs to closely scrutinize job offers from agricultural employers who compensate workers on a piece rate, as opposed to hourly, basis. Absent suitable scrutiny, employers might seek to offset increases in guaranteed hourly wages (such as federal or state minimum wages or the adverse effect wage rate) by requiring workers to increase productivity rates. *NAACP v. Donovan*, 558 F. Supp. 218, 222 (D.D.C. 1982).

Under the Wagner-Peyser Act regulations, employers must state the hourly rate equivalent of their piece rates and provide the SWA with both the methodology for the calculation as well as any materials supporting the computation. The SWA is required to then check to determine whether the employer's estimate is reasonably accurate and will not result in a depression of the local area's prevailing wage or result in a wage that falls below statutory or regulatory minimums. 20 C.F.R. § 653.501(c)(2)(i); 45 Fed. Reg. 2498, 2499 (Jan. 11, 1980).

Previous versions of Form ETA 790 included a space where employers listed their piece rates in hourly equivalents for each activity and unit size. The current form no longer requests this information. As a result, in order to satisfy the dictates of 20 C.F.R. § 653.501(c)(2)(i), SWAs are forced to contact those agricultural employers filing clearance orders offering piece rates to obtain their estimates of the hourly equivalent, their methods for calculating these rates, and any materials the employers may have supporting the estimates. This imposes an unnecessary burden on SWAs already facing increased workloads because of a steadily increasing number of agricultural clearance orders being filed each year.

Form ETA 790B should be revised to once again require employers to state the hourly equivalents for their piece rates. In addition, the form should provide space for the employer to set out its method for calculating the hourly estimates, as well as for delineating any supporting materials. This is not an onerous requirement and is analogous to the information required of H-2B employers seeking to pay wage rates based on employer-provided surveys. *See* 20 C.F.R. § 655.10(g).

ii. Overtime Pay

Farm labor jobs often require long hours of work. A growing number of states (California, New York, Minnesota, and Maryland) require some sort of enhanced or premium pay for workers employed more than a specified number of hours in a day or workweek. In addition, the Department has proposed including reforestation and pine straw activities as agricultural labor or services under Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 84 Fed. Reg. 36168, 36176 (July 26, 2019), and these jobs qualify for overtime under the Fair Labor Standards Act. *Dep't of Labor v. N.C. Growers Ass'n*, 311 F.3d 345 351 (4th Cir. 2004) ("forestry and lumbering operations are excluded from the primary definition of agriculture"); Administrator's Interpretation No. 2012-1, 2012 WL 6495042 (Dec. 12, 2012) ("most pine straw workers are not engaged in exempt agricultural employment" under the FLSA). Because the availability of overtime pay makes a position considerably more attractive to job seekers, Form ETA 790 should expressly require employers to state as part of the wage disclosure whether and under what circumstances overtime pay is available.

In response to the previously submitted Farmworker Justice comment, the Department noted that employers may disclose information about overtime in Addendum C. That approach fails to protect the rights of domestic farmworkers. Addenda to Forms ETA 790A and 790B can extend for a dozen pages or more and are unorganized and difficult to search. Relegating this critical information about fundamental wage payment rights to a non-prominent placement in Addendum C means that far fewer U.S. workers will learn of this substantial wage benefit.

iii. Bonuses

Bonuses are common in agriculture and are offered by employers for a number of reasons, such as to reward workers for completing a harvest season, excellent productivity, or high-quality job performance. *Frederick Cty. Fruit Growers Ass'n v. Dole*, 758 F. Supp. 17, 26 (D.D.C. 1991) (describing quality, hardship, and end of season bonuses paid to fruit pickers); *see also Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1291, 1302 (M.D. Fla. 2000). Disputes frequently arise over payment of bonuses, often because the employer fails to clearly state the criteria for receiving the bonus. *See, e.g., Sandoval v. Rizutti Farms, Ltd.*, No. CV-07-3076-EFS, 2008 WL 4530525, at *1 (E.D. Wash. Oct. 6, 2008); *Robles v. Sunview Vineyards of Cal., Inc.*, No. CIV-F-06-0288 AWI SMS, 2008 WL 895945, at *6 (E.D. Cal. Mar. 31, 2008); *Valenzuela v. Giumarra Vineyards Corp.*, 619 F. Supp. 2d 985, 993 (E.D. Cal. 2008); *Wales*, 192 F. Supp. 2d at 1272; *Alfred v. Okeelanta Corp.*, No. 89-8285-CIV-Ryskamp, 1991 WL 177658, at *2 (S.D. Fla. Apr. 16, 1991); *Alzalde v. Ocañas*, 580 F. Supp. 1394, 1395 (D. Colo. 1984).

The previous version of Form ETA 790 provided a designated space in which employers could list bonuses available to workers. In its response to the Farmworker Justice comment, the Department proposed to add an Item A-6g to Form 790B requiring disclosure of "[a]ny bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such payments will be made." We support this addition but are concerned that Item A-6g is not visible on the Form ETA790B available at reginfo.gov. In addition, as phrased, this item still invites disagreements between workers and employers due to lack of clear disclosure. The instructions to Item A-6g

should be amended by inserting the underlined language: "Any bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such payments will be made and the qualifications necessary to receive the payments."

3. Frequency of Pay, Item A-8 on Form ETA 790B (Item A-10 on ETA 790A)

Many farmworkers lack savings and are dependent on regular wage payments to support themselves and their families. For these workers, a biweekly pay system is considerably less desirable than a weekly one. Form ETA 790B asks employers to state the frequency with which workers are paid. Nothing on the form alerts the employer that the frequency of pay is not merely a function of the employer's own preference.

The employer's pay schedule is constrained by the area's prevailing practices. SWAs are required to determine the prevailing practice in this regard as part of their review of clearance orders. 20 C.F.R. § 653.501(c)(2)(i). As the Department has observed, "[t]his 'prevailing' standard and measurement must be used for determinations concerning…frequency of pay." ETA Handbook 398, 53 Fed. Reg. 22076, 22096 (June 13, 1988). ETA Form 790B and the accompanying instructions should be amended to alert employers that their pay schedules are required to conform to the applicable prevailing practices.

4. Deductions from Wages, Item A-10 on Form ETA 790B (Item A-11 on Form ETA 790A)

The previous version of Form 790 contained an itemization of the most common deductions made from farmworkers' wages: Social Security, federal income tax, state income tax, meals, and "other." This itemization is absent from the current ETA 790B and ETA 790A. The Department's response to the Farmworker Justice comment regarding itemized deductions states that Item A-10 will be modified, but the nature of this modification is unclear. The level of detail in the previous Form 790 needs to be restored and expanded if farmworkers are to have "meaningful information about prospective employment." *Cantu*, 1978 WL 1784, at *3.

First and foremost, the governing regulations require that "[a]ny deductions to be made from wages" be listed in the clearance order. 20 C.F.R. § 653.501(c)(1)(iv)(F). Form ETA790B, however, directs the employer to report "none" if the only deductions made are those "required by law." This direction contravenes the regulatory text by, in effect, instructing employers not to list certain deductions.

Moreover, as a practical matter, all deductions—even those required by law—are critical to U.S. workers and difficult for workers to estimate. In deciding between competing job offers, U.S. workers often consider the amount of deductions from their generally modest paychecks. And withholdings "required by law" vary considerably from state to state. For example, some states have no state income tax (Florida, Texas, Washington), while others have such taxes and require that these sums be withheld from wages (California, New York, New Jersey, North Carolina). Some states that generally mandate withholding of state income taxes exempt agricultural employees (Alabama, South Carolina). In some states (Pennsylvania, New Jersey), farmworker employees also have unemployment insurance taxes withheld from their wages. Because of the differences between the

mandatory withholdings under the individual states' tax schemes, it is important that the precise sums withheld as "required by law" be specified.

Other deductions also should be delineated. Any rental charges should be disclosed, as well as meal charges and assessments for tools. Workers should also be apprised of any requirements under state wage payment and assignment laws that limit withholdings from their wages. For example, many states require employees to authorize any wage deductions in writing (Illinois, Kentucky, Maryland, Missouri, Oregon), sometimes in a notarized document (West Virginia). Some states limit the amount or type of voluntary wage deductions (Minnesota, Ohio, Vermont). In addition to specifying the amount of any deductions, employers should be required to state on Form ETA 790B any state law provisions regulating the manner and terms under which wage deductions may be made.

B. Minimum Job Qualifications/Requirements

In Section B of Form ETA 790B, employers are able to list minimum qualifications for their jobs. A number of these job qualifications have resulted in the denial of employment to U.S. job seekers, in some cases in apparent violations of federal regulations. The current Form ETA 790 contributes to this situation by failing to alert both the reviewing SWAs and employers as to limited circumstances under which such job qualifications can be imposed.

1. Uniform Application

Job qualifications are permissible only if they satisfy two criteria. First, any job qualification must apply to all job applicants, H-2A workers as well as U.S. jobseekers. 20 C.F.R. § 655.122(a). Anecdotally, we have encountered numerous instances in which H-2A guest workers, many of whom never worked on commercial farms before coming to their current H-2A job assignment, lack the experience required by the clearance order. Many guest workers also lack the "verifiable" job experience or job references increasingly required by H-2A employers. Form ETA 790B should be amended to require employers to attest under the penalty of perjury that, should H-2A workers be sought for these positions at any point in the future, the same job qualifications or requirements will apply.

2. Compliance with Prevailing Practice

Second, job qualifications or requirements can be no more demanding than those generally imposed on U.S. workers in the area of intended employment. While the H-2A regulations only require that job qualifications be normal and accepted, 20 C.F.R. § 655.122(b), SWAs are held to a higher standard, partly as a remedial effort to redress their past failures to protect the wages and working conditions of domestic farmworkers. *NAACP v. Brennan*, 360 F. Supp. 1006, 1014 (D.D.C. 1973). SWAs must ensure that the wages and working conditions offered by the employer "are not less than the wages and working conditions among similarly employed farmworkers in the area of intended employment." 20 C.F.R. § 653.501(c)(2)(i).

A large percentage of agricultural clearance orders now contain job qualifications that have never been scrutinized by the SWAs as required by the Wagner-Peyser Act regulations. For example, Form ETA 790B encourages employers to include an experience requirement by providing a designated box for this purpose (*Item B-2*). The Department has, however,

acknowledged that most H-2A jobs "normally would not require much, if anything, in the way of … experience on the part of the workers." ETA Handbook 398, 53 Fed. Reg. 22076, 22096 (June 13, 1988). Although few SWAs have conducted recent prevailing practice surveys regarding experience requirements, those that have conducted such reviews have confirmed that non-H-2A employers rarely, if ever, impose such requirements. *See In re R. Hart Hudson Farms, Inc.*, Office of Admin. Law Judges, Case No. 2015-TLC-00013 (Feb 2, 2015).

Nonetheless, many employers have taken advantage of the "work experience" box to impose experience requirements on U.S. workers. Most of these requirements range from one to three months, but SWAs have accepted and the Department has certified clearance orders mandating much longer periods of prior work experience. *See, e.g.*, ETA Case Numbers H-300-19192-814770, Statewide Harvesting and Hauling, Inc., and H-300-19228-106282, Everglades Harvesting & Hauling, Inc. (24 months); H-300-19029-906344, Randall Rivere Farms, Inc., and H-300-18352-988892, Landscapers Paradise, LLC (12 months).

To the extent that it lists specific job qualifications, such as prior work experience, Form ETA 790B should be amended to clearly state that such provisions are permissible only if the SWA has determined that the job qualification is the prevailing practice among similar situated farmworkers in the area of intended employment.

3. Productivity Standards

Employers who compensate workers by piece rates frequently establish minimum productivity standards. Oftentimes, workers must meet these minimum levels of production to retain employment. ETA Handbook 398, 53 Fed. Reg. 22076, 22096 (June 13, 1988). In recent years, productivity standards have been required even by employers who compensate their workers on an hourly basis. *See, e.g.*, ETA Case Numbers H-300-19323-155450, Everglades Harvest & Haul, and H-300-20042-315018, Chino Harvesting.

For the benefit of both the SWAs and the employers, the instructions to Form ETA 790B should be supplemented with three pieces of relevant information regarding the use of productivity standards: first, that productivity standards can only be as demanding as those prevailing among similarly situated workers in the area of intended employment, 20 C.F.R. § 653.501(c)(2)(i); second, that the burden is on the employer to show that its production standards are no higher than those normally required by employers of U.S. farmworkers in the area, ETA Handbook 398, 53 Fed. Reg. 22076, 22096 (June 13, 1988); and third, that no production standards at all may be imposed unless the SWA determines that use of such job qualifications is the prevailing practice in the area of intended employment.

C. Worksite Information

Additional language should be added to Item C-1 to emphasize the need to provide detailed information regarding the job location. Among other things, detailed information is needed to determine whether different prevailing wages or AEWRs must be paid when the employment covers two or more counties or states. Exact addresses or geographic coordinates must be provided; simply listing a description such as "Springfield area" is insufficient. *In re Billy R.*

Evans, Office of Admin. Law Judges, Case No. 2008-TLC-00023, at 3 (Apr. 4, 2008) ("[T]he employer must provide certain information in order for the DOL to make its certification determination on the acceptability of the application.").

D. Housing Information

1. Housing Address/Location, Item D-1 on Form ETA 790B (Item D-1 on Form ETA 790A)

Previous versions of Form ETA 790 required employers to provide detailed directions to housing sites. In response to the Farmworker Justice comment, the Department has stated that Form ETA 790B would be amended to state: "Provide detailed instructions on how to get to the housing." This information is needed because in many rural areas, there are no street addresses. Precise directions will assist SWAs in performing pre-occupancy housing inspections and enable SWA outreach workers to more easily access the farmworker occupants of the facilities.

The Department further stated in response to the Farmworker Justice that asking employers to provide geographic coordinates for the housing "would be beyond the scope of this ICR." The Department failed to explain its reasoning for this statement. It further failed to explain why it could not adopt even a middle ground of encouraging employers to provide coordinates or location screenshots from phone-based mapping applications when possible.

2. Type of Housing, Item D-6 on Form ETA 790B (Item D-6 on Form ETA 790A)

For decades, Form ETA 790 included the Department's form for employer-provided housing, Form ETA 338. Form 338 is still used by some SWAs when inspecting farmworker housing.

The venerable Form ETA 338 contains considerably more information regarding the housing being offered than the current ETA Form 790B. Instead of merely summarizing the type of structure and its capacity, Form ETA 338 provides the dimensions of each sleeping room and describes in detail the bathroom, shower, cooking, and laundry facilities. It assures the potential occupant that the water supply has been tested and that the site is equipped with a fire extinguisher and a first aid kit. The form also authorizes SWA and ETA officials to conduct post-occupancy inspections of the facility. Use of Form ETA 338 or its equivalent would both provide job seekers with a much more complete picture of the living accommodations being offered and serve as a useful checklist for SWA inspectors and outreach workers when conducting pre-occupancy inspections or monitoring the property once the workers are in residence.

3. Additional Housing Information, Item D-9 on Form ETA 790B (Item D-10 on Form ETA 790A)

Many employers use this space to announce that they do not offer housing for non-working family members because family housing is not the prevailing practice in the area. The instructions for Form ETA 790B should admonish employers that in some states, family housing may be required by state fair housing laws, even in instances when family housing is not the

prevailing practice. *In re Cal Farms, Inc.*, Office of Admin. Law Judges, Case No. 2014-TLC-00085 (Apr. 28, 2014).

E. Provision of Meals

In the past, most employers seeking workers through the interstate clearance system provided kitchen facilities. In recent years, an increasing number of the housing facilities included in clearance orders lack cooking facilities and, in the case of H-2A workers, require employers to "provide each worker with three meals a day." 20 C.F.R. § 655.122(g). The maximum charge for these meals is established by the Department. 20 C.F.R. § 655.173.

A number of employers meet their obligations under 20 C.F.R. § 655.122(g) by arranging meals through a caterer. On some occasions, the caterer is unwilling to provide three meals for the permissible meal charge, forcing the workers to purchase some of their meals from other vendors. In other instances, no formal arrangements are made, and workers are left to try to purchase three meals from commercial restaurants. For example, this past year, the Florida SWA accepted and the Department certified a clearance order from Keystone Forestry Services of Monticello, Florida (ETA Case Number H-300-19290-093395) which simply left workers to purchase meals from local fast food establishments, stating, "Workers can get meals at Hardees, Arbys, McDonalds, and Mr. Roboto." Not surprisingly, the workers were unable to obtain a noon meal because the worksite was a considerable distance from the fast food outlets.

To avoid such situations, Section E should be revised to advise employers that if they opt to furnish meals to their employees, the workers must actually receive the promised three meals at appropriate intervals throughout the day. The instructions to Form ETA 790B should also admonish employers that their obligations cannot be satisfied by leaving the workers to try and purchase three meals on their own at area restaurants for no more than the daily allowable charge.

F. Transportation and Daily Subsistence

Many farmworkers do not have vehicles of their own and therefore rely on their employer for transportation to remote jobsites. Sometimes transportation is provided directly by grower. *Barrett v. Adams Fruit Co., Inc.*, 867 F.2d 1305 (11th Cir. 1989); *Guerra Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1083 (D. Ariz. 2010); *Alegre Gonzalez v. Tanimura & Antle*, No. CV06-2485-PHX-MHM, 2008 WL 4446536, at *1 (Sept. 30, 2008); *Medrano v. D'Arrigo Bros. Co. of Cal.*, 336 F. Supp. 2d 1053, 1055 (N.D. Cal. 2004). More often, growers hire farm labor contractors to, *inter alia*, provide workers with transportation between their homes and the jobsite. *Aimable v. Long & Scott Farms*, 20 F.3d 434, 437 (11th Cir. 1994); *Castillo v. Givens*, 704 F.2d 181, 184 (5th Cir. 1985); *Soliz v. Plunkett*, 615 F.2d 272, 274 (5th Cir. 1980); *Coastal Growers Ass'n v. Marshall*, 598 F.2d 521, 523 (9th Cir. 1979); *Acosta v. Valley Garlic, Inc.*, No. 1:16-cv-01156-AQI-EPG, 2017 WL 3641761, at *1 (E.D. Cal. Oct. 24, 2017); *Aguilar Murillo v. Servicios Agricolas Mex, Inc.*, No. CV-07-2581-PHX-GMS, 2012 WL 1030084, at *2 (D. Ariz. Mar. 27, 2012); *Jean v. Torrese*, 278 F.R.D. 656, 659 (S.D. Fla. 2011); *Lie v. Dara*, No. 01-3167, 2002 WL 992812, at *2 (E.D. Pa. May 15, 2002); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269, 1275 (M.D. Fla. 1999); *State Farm Mutual Auto Ins. Co. v.*

Martinez-Lozano, 916 F. Supp. 996, 998 (E.D. Cal. 1996); *Alviso-Medrano v. Harloff*, 868 F. Supp. 1367, 1369 (M.D. Fla. 1994); *Campbell v. Miller*, 836 F. Supp. 827, 829 (M.D. Fla. 1993); *Stewart v Everett*, 804 F. Supp. 1494, 1497 (M.D. Fla. 1992); *Alba v. Gonzales*, No. CV91-1143 HB, 1992 WL 454048 (D.N.M. Mar. 5, 1992); *Saintida v. Tyre*, 783 F. Supp. 1368, 1371 (S.D. Fla. 1992); *Vega v. Gasper*, No. EP-84-CA-259-B, 1991 WL 104277, at *2 (W.D. Tex. Apr. 30, 1991).

While the Wagner-Peyser regulations do not require daily transportation to be provided to local workers, employers may nonetheless be obligated to offer such transportation if it is the prevailing practice in the area. 20 C.F.R. § 653.501(c)(2)(i). SWAs are required to determine whether it is the prevailing practice in the area for employers to have farmworkers furnished and, in most instances transported, by farm labor contractors. ETA Handbook 398, 53 Fed. Reg. 22076, 22097 (June 13, 1988). Previous iterations of Form ETA 790 required employers to state whether the use of farm labor contractors was the prevailing practice in the crop activity; if so, the employer was obligated to offer farm labor contractors the area's prevailing override for farm labor contracting services, including providing workers with daily transportation to the jobsite. With the removal of the information regarding use of farm labor contractors, Section F should include a directive that employers are obligated to provide daily transportation to the jobsite, directly or through farm labor contractors, where this is the prevailing practice in the area and crop activity. This will be the case in many areas such as California, Texas, and Florida, where the majority of farm operators are furnished farmworkers, including H-2A guest workers, through farm labor contractors.

G. Referral and Hiring Instructions

The purpose of the H-2A regulations is to ensure that U.S. workers are given a preference over foreign workers for agricultural jobs in this country. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982). For this reason, employers may not impose restrictions or obligations on U.S. workers that it does not also impose on foreign workers. 20 C.F.R. § 655.122(a). These principles apply to referral and hiring procedures, as well as employment practices.

Thus, if the employer accepts collect telephone calls from prospective H-2A workers, it must also do so for domestic job seekers. The employer cannot insist on interviews for U.S. applicants unless it also requires interviews of all H-2A workers. If the employer insists that SWAs read the entire clearance order and all addendums to U.S. job seekers, the same must be done with respect to foreign worker applicants. Form ETA 790B should be amended to require employers to attest under the penalty of perjury that any hiring or referral practices, including job qualifications or requirements, apply equally to the U.S. workers presently sought and any H-2A workers who have been or will be sought for the same positions.

H. Other Material Terms and Conditions of the Job Offer

1. Worker's Compensation and Unemployment Insurance Information

Previous versions of Form ETA 790 required employers to state whether the proffered employment was covered by worker's compensation and unemployment insurance. This

information is of considerable importance to domestic farmworkers because many of them rely on unemployment insurance between harvest seasons. A job with worker's compensation and unemployment insurance is considerably more attractive to U.S. workers.

Information regarding worker's compensation and unemployment insurance should be restored to Form ETA 790B. This is not an onerous requirement; the Migrant and Seasonal Agricultural Worker Protection Act requires agricultural employers and farm labor contractors to disclose this information in writing to all of their migrant workers. 29 U.S.C. § 1821(a); 29 C.F.R. § 500.75(b).

2. Strike and Work Stoppages

For decades, ETA Form 790 required employers to state whether there was a strike or work stoppage underway at the place of employment. This information must also be disclosed to migrant workers pursuant to the Migrant and Seasonal Agricultural Worker Protection Act. 29 U.S.C. § 1821(a)(7); 29 C.F.R. § 500.75(b)(7). These provisions are intended to inform prospective workers of the existence of strikes at the worksite, which may result in some prospective workers declining to become potential strike-breakers. *Alvarez v. Longboy*, 697 F.2d 1333, 1337 (9th Cir. 1983). To ensure that U.S. job seekers are aware of all material terms and conditions of the job, ETA Form 790B should be revised to once again include this information.

3. Information in Spanish

Currently, Form ETA 790B does not require that information be provided in Spanish, although some employers use Addendum C to provide the material terms in Spanish. While SWAs have long been required to provide checklists in the worker's native language regarding the job orders, 20 C.F.R. § 653.501(d)(6), these are merely summaries and frequently omit important job terms. According to the most recent report from the National Agricultural Worker Survey, seventy-five percent of farmworkers are most comfortable speaking Spanish. Form ETA 790B should be modified to require all employers provide the requested information in both English and Spanish.

At a minimum, the form itself should be bilingual, as the prior Form ETA 790 was. By at least writing the questions in both English and Spanish, the Department will greatly increase the chances that a Spanish-speaking worker will understand critical items of the Form ETA 790B, while placing no additional burden whatsoever on the employer.

I. Additional Concerns

The H-2A regulations require the Department to maintain an electronic file of all agricultural employers seeking temporary labor certification. 20 C.F.R. § 655.174. In recent years, the Department has met its obligations in this regard by posting each employer's clearance orders on an internet website, first the I-Cert Portal and, more recently, SeasonalJobs.dol.gov.

When the current version of ETA Form 790 was adopted, the Department altered its posting practices. In the past, the Department posted the clearance orders in their entirety, including all attachments. With the advent of the current Form ETA 790, the Department began posting only a

portion of the clearance order, excluding the order's first page. While page one of the current Form ETA 790 is labeled as for SWA use only, there is vitally important information for job seekers also included on the first page. Most notable is the name of the employer—information that does not appear anywhere else in the posted clearance order. The first page also includes the SOC occupation code for the job, which may determine the prevailing wage for certain positions. Because of the importance of this information to job seekers, the Department should either post all of Forms ETA 790, 790A, and 790B, or revise the forms so that the employer's name and the SOC occupational code are included in the portion of the clearance order placed on the SeasonalJobs website.

Thank you for your attention to and consideration of these comments.

Sincerely,

Texas RioGrande Legal Aid

/s/Gregory S. Schell
Gregory S. Schell
Attorney at LawAdmitted only in Florida and Maryland

Enclosure (May 2019 Comment by Farmworker Justice et al. with Department Responses)