May 14, 2019

Submitted via email: *nma@dol.gov*.

Office of Workforce Investment, Room C-4510
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Form ETA-790B – Agricultural Clearance Order, OMB No. 1205–0134

Dear Employment and Training Administration (ETA),

Farmworker Justice and the undersigned groups submit these comments regarding Form ETA-790B, which will be attached to Form ETA-790 as proposed in the March 15, 2019 Federal Register notice at 84 FR 9561. We hereby incorporate by reference the comments submitted by Farmworker Justice and others to the Department of Labor (DOL) in December 2018 in response to 83 FR 53911 ("the December comments") as if fully set forth herein.

As in the December comments, we note that with the consolidation of information resulting from the form revisions, it is important to ensure that all forms, including Form ETA-790B, Form ETA-790, Form ETA-790A, and Form ETA-9142A, along with Appendix A and any other addenda, be made available via the Public Job Registry to ensure that all of the job and employer information in all forms is accessible to potential workers, including farmworkers and their advocates.

ETA's response: The Department appreciates the commenters' concerns regarding the use of the Public Job Registry. The Department notes that the Public Job Registry (Registry) was codified in the regulations at 20 CFR 655.144 (a) for public examination of the job orders (criteria job orders) filed in connection to an H-2A application for foreign workers. Employers wishing to use the H-2A program must file criteria job orders with the state workforce agencies (SWA). Once the Certifying Officer (CO) at the Chicago National Processing Center approves the criteria job orders, he/she uploads them to the Registry. The non-criteria clearance orders (orders that are not attached to applications under 20 CFR part 655, subpart B), are not uploaded to the Registry.

All SWAs upload all job orders (criteria and non-criteria) in their internet-based labor exchange systems, and all job orders are transmitted to the National Labor Exchange (NLx)[1].

The Department notes that employers placing non-criteria job orders with a local Employment Service (ES) office do so voluntarily. The Wagner Peyser regulations do not mandate that these employers use the Agricultural Recruitment System (ARS). Agricultural employers not wishing to place criteria nor non-criteria job orders to recruit domestic workers may recruit from any other source, as long as they comply with the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping.

[1] The National Labor Exchange (NLx) is an electronic labor-exchange network, created in 2007 in a partnership agreement between NASWA (National Association of State Workforce Agencies) and Direct Employers Association (DirectEmployers). All NLx services are offered at no cost to state workforce agency customers – both jobseekers and employers – as well as to state workforce agencies and federal partners.

Farmworker Justice is a national advocacy organization that seeks to improve the wages, working conditions, and living conditions of all farmworkers. The other signatories to these comments are organizations that provide legal and other services to migrant farmworkers and that have an interest in, and represent or serve clients who have an interest in, ensuring that growers and the federal and state governments comply with their legal obligations.

As detailed below, the omission of several questions and sections of information in the proposed Form ETA-790B will harm U.S. workers by failing to adequately inform them of applicable wages and working conditions, thereby making it less likely they would seek these available positions. We note that failure to follow our recommendations below, including restoring the indicated language in the current forms, would be arbitrary and capricious. Further, we recommend including some additional provisions and questions to strengthen the information provided to potential employees.

A. <u>Important information that has been omitted in proposed Form ETA-790B.</u>

1) Proposed Form ETA-790B does not include a statement that the housing complies or will comply with applicable local, state, and federal standards (compare with proposed form ETA-790A, Section D, Item 9).

Although proposed Form ETA-790B includes some helpful questions about housing, unlike proposed Form ETA-790A, it does not include a question regarding whether the housing complies or will comply with applicable standards (local, state or federal). This omitted provision should be included in Form ETA-790B. The form should also include information on whether the housing is provided free of charge, and if not, state the cost of the housing.

ETA's response: The Department appreciates the commenters' concerns regarding housing standards. The Department agrees with the recommendation and is proposing to add checkoff boxes for the ETA and OSHA standards in Section 9a.) of the ETA Form 790B. Additionally, the Department is proposing to add section 6a.) to reflect the availability of no cost or public housing.

2) *Proposed Form ETA-790B should include more detailed information regarding the location of farmworker housing.*

Proposed Form ETA-790B also excludes a question on the current Form 790 regarding directions to the housing, which we believe should be added back in. This provision would help to ensure that U.S. workers, the SWA, and outreach workers are able to locate the housing. We propose requiring employers to list the GPS coordinates of all housing units, which will enable the use of online GPS mapping services such as Google Earth to ascertain the location of housing.

The Form ETA 790B should include the longitude and latitude coordinates of the worksite and worker housing. H-2A housing is primarily located in rural areas, often outside of city limits. Traditional street addresses are often not useful for locating these housing sites - farm-to-market roads, county roads, and other rural roads often lack numbered street addresses that can be easily used for navigation. It is in recognition of this fact that clearance orders have traditionally included driving directions. However, driving directions are often inadequate, and oversight could be improved by the requirement that Form 790B contain the latitude and longitude coordinates of the housing and worksite(s). This would solve several issues raised by inaccurate or misleading addresses and driving directions.

Addresses on the current 790 form are often missing or inaccurate. Employers commonly use street numbers or road names that are inaccurate, are informal addresses, or do not match information in online mapping databases. For example, the attached 790 for Pecos Pecan lists the worksite location as 331 Belding Road, Ft. Stockton, TX, but there is no Belding Road in Fort Stockton, Texas that can be found in any online direction service, such as Google Maps or Mapquest. Other clearance orders contain no street address at all, such as the attached order for F Venegas Shearing which lists a worksite as "6 miles east of Ozona Interstate 10 Taylor Box Road."

Finally, the use of longitude/latitude coordinates would empower SWAs to verify that worker housing exists by using Google Maps satellite view or similar technology. At present, SWAs do not visit each housing site to give a preoccupancy inspection. For example, in Texas, approximately 60% of housing is uninspected by the SWA prior to occupancy, largely due to the public accommodation exemption from preoccupancy inspection. Even where SWAs are not required to or unable to inspect housing prior to occupancy, they could verify the existence of housing at the address given longitude and latitude coordinates. This cannot be done currently for housing sites that lack street addresses.

ETA's response: The Department appreciates the commenters' concerns, and is proposing to add the following statement in Section D1 of the ETA Form 790B: "Provide detailed instructions on how to get to the housing." The Department notes that asking employers to provide the longitude and latitude coordinates of the housing would be beyond the scope of this ICR.

3) *Failure to require information regarding overtime rate of pay where applicable (see current form ETA-9142A, Section G, Item 1a).*

Proposed Form ETA-790B does not include a question regarding the rate of overtime pay. As we noted in our December comments, this question also appears to have been omitted from other proposed ETA forms. While many agricultural jobs are not eligible for overtime pay, it is important for the job order to provide that information to potentially interested U.S. workers as that may impact their interest in the position—that is, jobs that pay overtime will be more attractive to U.S. workers than jobs that do not. Moreover, some state laws do require overtime pay for farmworkers, including California, where a recently passed law will be phasing in overtime pay for farmworkers beginning this year. The availability of overtime is a material provision of a job offer and an employment contract.

ETA's response: The Department appreciates the commenters' concerns regarding overtime. The Department is proposing modifications to the Form ETA-790B and General Instructions that will permit employers to use the new Addendum C to disclose any other conditions about the wage offer, including if any overtime is required and any overtime and bonus payments, based on the unique specifications of each job opportunity and activity.

While the Department agrees and commends employers paying overtime to its employees, current regulations at 20 CFR 653.501 (c)(2) require the SWAs to assure that employers placing clearance job orders pay not less than the prevailing wages among similarly employed farmworkers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. The overtime question is not in the current 790, and therefore is not one that the Department deleted in the proposed 790B.

4) *Removal of specific wage deductions (see current Form ETA-790, Item 17).*

Proposed Form ETA-790B does not include a specific breakdown of wage deductions. While the proposed ETA-790B does include a section asking for "all deductions from pay not required by law and, if known, the amount(s)" (Section A, Item 10), it fails to list the required deductions from pay of U.S. workers, which include withholding for federal and state income tax and social security.

ETA's response: The Department appreciates the commenters' concerns, and is proposing to modify the Form ETA-790B, Section A.10 to include any deductions to be made from wages, pursuant to 20 CFR 653.501(c)(1)(iv)(F).

5) *Omission of pay period designation (see current Form ETA-790, Item 17).*

One of the most frequent complaints the signatories to this letter receive from workers is that they are not being paid in a timely manner and do not know when they are supposed to be paid.

This is important information for the worker to know whether he is being paid the promised wage rate, the FLSA minimum wage, or another applicable wage rate. It is also necessary for the worker to ascertain whether he is earning at least these wage rates when being paid on a piece rate. Making these determinations is extraordinarily difficult when the worker does not know what the workweek is or when he is supposed to be paid. This situation is exacerbated by the common phenomenon of employers not paying their workers on regular pay dates for regular pay periods—for example, when one check is for three days' work, and another check, not paid for a month, is for eight days' work. The FLSA requires that a FLSA-covered employer designate a seven-day period as the workweek for FLSA compliance purposes. See 29 C.F.R. § 778.105. There is no good reason not to furnish this information on the clearance order that is used to recruit and that sets forth material terms of the contract for workers.

ETA's response: The Department appreciates the commenters' concerns, and is proposing to modify the Form ETA-790B, by adding Section 6g, to include the following 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." The Department notes that Section A8 of the Form ETA-790B asks for the frequency of pay.

6) *Incomplete specification of hours and work schedule (see proposed Form ETA-790B, Section A, Item 5).*

Many, if not most, agricultural employers employ workers in multiple crop or agricultural activities, such as tobacco cultivation being combined with sod harvesting. Other crops or agricultural activities, such as tobacco in Kentucky and Tennessee, employ workers in several phases of a crop's cultivation. These crop activities and phases often have radically different labor needs. For example, in tobacco in the Southeast, our experience is that, when planting and topping tobacco in the spring and early summer, workers typically work only five to six days per week, for six to eight hours per day. Later in the cultivation cycle, however, such as in the hanging and stripping phases, workers typically work much longer hours—late into the night, up to 12 to 14 hours per day, up to seven days per week.

In other words, the estimates of days and hours of work per week (proposed Form ETA-790B, Item 5) and expected hourly work schedule vary widely for some crop activities and for different phases of the growing/harvesting season of a particular crop. In contrast to the proposed ETA-790A, which lists the expected hourly work schedule (Section A, Item 6), the proposed Form ETA-790B does not include even this basic information. Furthermore, it does not contemplate variation on the daily hours worked and fails to adequately inform workers of possible schedule variations. Also, unlike the proposed Form ETA-790A, the proposed Form ETA-790B does not require that employers list an estimate of hours for each day of the week.

This lack of information and clarity inhibits U.S. workers from making decisions about employment based on full and transparent information about the material terms of the job. This shortcoming can be remedied by having the ETA-790B state, in Item 5 and in a new Item 6, as well as in Addendum A, the anticipated days and hours of work and hourly work schedule for each crop, agricultural activity, or phase of crop production, where different production phases have different labor needs that are encompassed in one clearance order. SWAs and USDA's Agricultural Extension Service should be in a position to easily furnish DOL with the

information necessary to make these determinations.

ETA's response: The Department appreciates the commenters' concerns, and as stated in the responses to the ICR for OMB # 1205-0466, the Department proposes to reorganize the information collection in a worksheet style format with column headings to make it much easier for employers, particularly those with operations involving more complex work itineraries, to add crop varieties or agricultural activities on the Addendum A.

7) *Changes to questions regarding job experience, training and working conditions (compare current ETA Form 790, Item 16 with proposed ETA Form 790B, Section B).*

A section that has been changed in both the proposed Form ETA-790A and the proposed Form ETA-790B is section B, which includes questions regarding job experience, training, and working conditions (found in item 16 on the current Form ETA-790). These questions are critically important to the recruitment of U.S. workers as they set forth purported requirements for the job and share important details about the working conditions. Without accurate information, U.S. workers might not understand that they are qualified for a job or may mistakenly believe themselves unable to perform the work, hindering their desire and understanding of their eligibility to apply for these jobs.

One key change was to Item 4 for proposed Form ETA-790B (Item 16.2 on the current form ETA 790A), which identifies potential working conditions as involving extensive walking and extensive sitting, among others. On the proposed ETA-790B, these two conditions are combined into one question as "extensive sitting or walking." Clearly, these two potential workplace conditions involve very different possible physical challenges for different workers, yet potential applicants will not know whether the job involves extensive walking or whether it involves extensive sitting. The new Form ETA-790B must again separate out these two very different working conditions to ensure that domestic applicants are fully informed of their eligibility for the work given any potential physical challenges.

The proposed Form ETA-790B also fails to include the job condition that "OT/holiday is not mandatory," which is included under Item 16.2 on the current form ETA-790. Again, for

domestic applicants, full information about the job requirements and conditions is integral to an ability to assess whether the job is suitable. Lack of information about whether overtime or holiday work is mandatory can impact a U.S. worker's determination of whether they will be able to satisfy the demands of the work schedule. As an example, for workers who may have family or childcare responsibilities outside of work, a requirement to work overtime or holiday hours could mean that they would not be able to satisfy the job's requirements as to hours, given that most child care facilities do not provide holiday or extended hours. Thus, whether overtime or holidays are mandatory is information critically important to the ability of domestic workers to assess their ability to meet the job's requirements. Failure to include this information impedes DOL's ability to accurately certify whether there is an available domestic workforce.

One additional change on the proposed Form ETA-790B is the framing of the questions regarding experience and training. The proposed form ETA-790B creates a presumption that these jobs do require training and work experience by failing to pose an initial question asking if such training or experience are required, and instead asking the "number of months required." Jobs as agricultural laborers are generally unskilled, so a presumption that a certain skill level or training is required is inaccurate and misleading.

Finally, Form ETA-790B should require employers to assure and certify that any wages, piece rates, productivity standards, and other job requirements comply with applicable law to ensure that the job's requirements are legal and that prospective domestic workers are fully apprised of the terms and conditions of the work.

ETA's response: The Department appreciates the commenters' concerns regarding:

- extensive walking and extensive sitting,
- OT/holiday is not mandatory,
- prospective domestic workers being fully apprised of the terms and conditions of the work.

In response to the comments regarding walking and extensive sitting, the Department is proposing modifications to the Form ETA-790B by adding "Extensive sitting" and "Extensive walking" to Section B4 (i) and B4(j), respectively.

In response to the comments regarding overtime, as stated previously, the Department is proposing modifications to the Form ETA-790B and General Instructions that will permit employers to use the new Addendum C to disclose any other conditions about the wage offer, including if any overtime is required and any overtime and bonus payments, based on the unique specifications of each job opportunity and activity.

In response to the domestic workers being fully apprised of the full terms and conditions of the work, the Department notes that, pursuant to 20 CFR 653.501(d)(6), "ES office staff must assist all farmworkers, upon request in their native language, to understand the terms and conditions of employment set forth in intrastate and interstate clearance orders and must provide such workers with checklists in their native language showing wage payment schedules, working conditions, and other material specifications of the clearance order".

Regarding the commenters' concern about the failure to include whether overtime or holidays are mandatory and thus "impeding DOL's ability to accurately certify whether there is an available domestic workforce", the Department notes that the use of ETA Form 790B is only for those employers wishing to use the ARS system to recruit domestic workers. As stated previously, the use of ETA Form 790B is for non-criteria job orders, and the Department does not certify whether there is an available domestic workforce, other than assisting employers in meeting their workforce needs.

8) Lack of information regarding prevailing practice and farm labor contractors (see current ETA Form 790, Question 20).

Regarding the lack of information on whether it is a prevailing practice to use farm labor contractors and the removal of Question 20 from current Form ETA-790—whether it is prevailing practice to use farm labor contractors to recruit, supervise, transport, house, and/or pay workers for these crop activities and, if so, what is the farm labor contractor wage for each activity—we adopt the comments submitted in December by the Florida Rural Legal Services (FRLS) as well as our own December comments. Farm labor contractors (FLCs) have long played a central role in the farm labor market in Florida, Texas, and other states and this information should be provided to all workers. In our experience, some U.S. farmworkers prefer to work through FLCs, whereas other U.S. workers avoid jobs where FLCs are involved. Providing more information about the involvement of FLCs in a job opportunity facilitates informed decision making by U.S. workers.

ETA's response: The Department appreciates the commenters' concerns regarding the lack of information on whether it is a prevailing practice to use farm labor contractors and the removal of Question 20 from current Form ETA-790—whether it is prevailing practice to use farm labor contractors to recruit, supervise, transport, house, and/or pay workers for these crop activities and, if so, what is the farm labor contractor wage for each activity. The Department notes that, pursuant to 20 CFR653.501 (c)(3)(v), "the employer, if acting as a farm labor contractor ("FLC") or farm labor contractor employee ("FLCE") must have a valid Federal FLC certificate or Federal FLCE identification card and when appropriate, any required State farm labor contractor certificate."

Pursuant to 20 CFR 653.501(d)(2), "The ES office may place an intrastate or interstate order seeking workers to perform farmwork for a specific farm labor contractor…". Therefore, the individual placing a non-criteria job order must be either the farmer, or the farm labor contractor. There must be an employer relationship with respect to employees as indicated by the fact that it hires, pays, fires, supervises, and otherwise controls the work of such employees. The invidual who places the job order is consider the employer.

B. <u>Questions and provisions of proposed Form ETA-790B that we support.</u>

1) The proposed Form ETA-790B includes specific and detailed conditions of employment and assurances for the agricultural clearance order.

We support the requirement that the employer provide certain assurances under penalty of perjury. This additional requirement to certify compliance with applicable laws and conditions of

employment under penalty of perjury sends an important message to employers regarding their

responsibilities and obligations under the law. Our sustained experience deposing employers demonstrates that many are shockingly ignorant of their obligations and all too readily attempt to shift that responsibility to their agents or attorneys. Moreover, it provides workers an important detailed description of the terms and conditions of their employment—a document that they can turn to for enforcement if there are violations of those guarantees.

2) The proposed Form ETA-790B includes information on meals and transportation (Proposed Form ETA-790B, Sections E and F).

Another area of improvement on the proposed Form ETA-790B that we support is the new set of questions requesting specific information about the transportation and meals to be provided. While transportation is addressed on the current Form ETA-790, the question is a broad one asking for a description of transportation arrangements. The more specific questions on the proposed ETA-790B ensure employers are providing sufficient details regarding their specific transportation arrangements for both transportation from the housing to the workplace and to and from the place from which the workers come to the place of employment. Not only does this detail provide workers and DOL greater transparency about the relevant working conditions and terms, but it also enables DOL to ensure that adequate insurance and FLC licenses are obtained when required. The proposed ETA-790B also includes detailed questions regarding meals for workers, both at the place of employment and during inbound and outbound travel. The inclusion of questions about meals is key for qualifying U.S. workers to understand their rights and obligations, including what their own financial responsibilities with respect to meals will be.

Thank you for your consideration of these comments. Please also note that, except as expressly set forth herein, we have not analyzed, and we take no position with respect to, whether this proposed agency action complies with applicable procedural and other legal requirements.

Sincerely,

Farmworker Justice

Columbia Legal Services
Justice at Work (formerly Friends of Farmworkers)
Justice in Motion
Legal Aid Society of MFS
Michigan Immigrant Rights Center
Michigan Migrant Legal Assistance Project Inc.
New Mexico Legal Aid
Texas RioGrande Legal Aid, Inc.