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August 29, 2022

Via reginfo.gov

Brian Pasternak
Administrator
Office of Foreign Labor Certification
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Agency Information Collection Activities for H-2A Temporary Agricultural Labor Certification Program, 87 Fed. Reg. 47230 (Aug. 2, 2022)
OMB Control No. 1205-0466

Dear Mr. Pasternak:

Texas RioGrande Legal Aid, Inc. (TRLA) writes in response to the notice and comment request from the Employment and Training Administration (ETA) of the Department of Labor (DOL) titled Agency Information Collection Activities for H-2A Temporary Agricultural Labor Certification Program, 87 Fed. Reg. 47230 (Aug. 2, 2022).

TRLA was one of several organizations that previously submitted a comment regarding this information collection. A copy of this comment, signed by more than a dozen farmworker advocacy organizations, is attached as Exhibit A.

The comment offered detailed suggestions about how Forms ETA-9142A, 790, and 790A could be improved to collect more accurate data and better protect farmworkers.

DOL ignored the prior comment, saying only that it, like the two other public comments received, was "out of scope for the Department's consideration." Supporting Statement at 10. As one of the advocacy organizations that contributed to the comment, we are at a loss to understand this response.

The comment made specific suggestions about the "practical utility" of this information collection. 87 Fed. Reg. at 47231. To give just one example, the comment pointed out, DOL in recent years changed the ETA-790 so it no longer includes a Spanish translation. *See* Ex. A at 7. Since the vast majority of farmworkers are Spanish speakers, this failure to translate robs the form of much of its utility for the very population that DOL is charged with protecting: the workers.

The comment also offered about 15 pages of suggestions of "ways to enhance the quality, utility and clarity of the information collection." 87 Fed. Reg. at 47231. These ranged from suggestions about how to reduce discrepancies in the way wage rates are reported in the ETA-790, Ex. A at 9, to additional information that could be collected to accurately identify housing locations, *id.* at 12, and clarifying the description of employers' antidiscrimination responsibilities in an appendix to Form ETA-9142A, *id.* at 18. Again, these are the suggestions of worker advocates about how these forms could be improved to collect more useful and accurate information in service of DOL's ultimate goal of protecting farmworkers.

DOL's response gives the distinct and unfortunate impression that the Department is looking for excuses to ignore the input from worker advocates, rather than using this process to improve its forms based on public feedback and thereby better protect workers. We hope this was not the Department's intent, and that the agency will take this opportunity to finally consider our suggestions.

We therefore incorporate by reference all suggestions in the prior comment, attached as Exhibit A, and request once more that the Department take this opportunity to protect these vulnerable workers.

Sincerely,

TEXAS RIOGRANDE LEGAL AID, INC.

By:

Elizabeth Leiserson

Encl. (Ex. A, Prior Comment)

Exhibit A

May 9, 2022

Via email to ETA.OFLC.Forms@dol.gov

Brian Pasternak
Administrator
Office of Foreign Labor Certification
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Agency Information Collection Activities for H-2A Foreign Labor Certification Program; Comment Request (OMB No. 1205-0466)

Dear Mr. Pasternak:

We, the undersigned organizations representing migrant and seasonal farmworkers, submit this comment in response to the invitation from the Department of Labor's (DOL) Employment and Training Administration (ETA) for public comment on the proposed extension of the currently approved versions of the Forms ETA-9142A, *Application for H-2A Temporary Employment Certification;* ETA-9142A, Appendix A, *Assurances and Obligations;* ETA-9142A, *Final Determination: H-2A Temporary Labor Certification Approval;* ETA-790/790A, *H-2A Agricultural Clearance Order;* ETA-790/790A, Addendum A, *Additional Crops or Agricultural Activities;* ETA-790/790A, Addendum B, *Additional Worksite and/or Housing Information;* and related form instructions (collectively, the "H-2A Forms"). The current forms expire August 31, 2022, and ETA seeks a three-year extension without changes. We believe that changes are necessary.

In its request, ETA seeks input on "whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility," as well as suggestions that would "[e]nhance the quality, utility, and clarity of the information to be collected." The request also recognizes that the information contained in the H-2A Forms serves "as the basis for the Secretary of Labor's determination that qualified U.S. workers are not available to perform the services or labor needed by the employer and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of H-2A workers."

We write to suggest revisions to the forms used by employers petitioning for H-2A temporary visa workers. The recommended revisions would provide clarity to employers about the obligations that they undertake by requesting certification and the rights of the workers whom they hire. We also request changes that would facilitate ETA's application of existing regulations

in the adjudication of H-2A certification applications. These modest changes would help to ensure that the H-2A temporary visa program serves its statutory purpose of providing basic protections for both H-2A workers and United States workers in corresponding employment.

I. Interest of the Commenters

The signers of this comment include farmworker-serving organizations, including unions and legal services organizations, as well as other groups whose staff have assisted both U.S. and foreign farmworkers regarding the H-2A program for decades. In our experience working with farmworkers, we have found that the current forms related to the H-2A program are often difficult to navigate, incomplete, inaccurate or contain unlawful job terms or qualifications.

The forms at issue in this information collection have unique practical utility: In addition to serving the traditional function of providing the federal agency with information needed to administer its programs—in this case ensuring that employers requesting H-2A certification are complying with program requirements—the H-2A Forms are an essential tool used by both employers and workers to clarify the terms of employment. These forms provide the essential information necessary for workers to enforce their legal rights.

Advocates routinely monitor job offers for both the domestic farmworkers and H-2A workers that we serve. One of the primary ways that workers and advocates access job information is through clearance orders posted on the Department's Seasonal Jobs portal. Advocates use the information from these clearance orders in a number of ways: we educate workers about terms of their job contracts, conduct outreach to reach workers in need of assistance, and identify employers and contractors. Workers do not always retain a copy of the contract; therefore, what is available online is very important. Information on these forms also becomes necessary when workers are litigating cases or assisting in government investigations.

II. The Flawed Structure of the H-2A Program Imperils Workers

By making improvements to the H-2A Forms, the Department can take a much-needed step toward helping both H-2A workers and U.S. workers in corresponding employment to vindicate their limited rights and to combat the rampant abuses found in the H-2A program. As recognized by the Department's regulations, the H-2A Forms themselves can serve as the employment contract between the employer seeking certification and the agricultural worker.[1] As a result, they are some of the most important, and sometimes the only, documents memorializing the terms and conditions of a worker's employment. This role of the H-2A Forms—memorializing

[1] 20 CFR 655.122(q) (noting that in the absence of a contract, the job order and application will serve as the contract).

workplace rights and employer obligations to workers—is critical in part because the very structure of the H-2A program severely undermines H-2A workers' agency and empowerment in several ways.

First, by making the H-2A worker's immigration status entirely dependent on a single employer, the H-2A program gives employers an unprecedented level of control over workers' lives.[2] If an H-2A worker is fired or leaves a job, they will fall out of status and be forced to leave the country, meaning that H-2A workers have a strong incentive to never challenge an employer's decisions or complain about workplace mistreatment. H-2A workers live in employer-provided housing, rely on employer transportation to the worksite, and often receive (and are charged for) meals from their employers. Often living and working in rural areas, they are isolated both socially and geographically, unable to independently access the necessary resources and assistance to vindicate their rights.

Second, the population of workers that comes to the United States on H-2A visas is inherently vulnerable. As agricultural workers, H-2A workers are excluded from many federal workplace protections, like the right to overtime under the FLSA or the right to organize under the NLRA. H-2A workers are also excluded from protection under the Migrant and Seasonal Agricultural Worker Protection Act. The vast majority of H-2A workers—around 90%—are from Mexico.[3] Most of these workers come from poor rural areas, and many come from indigenous communities in Mexico. Most do not speak English, and there are many who have difficulty communicating even in Spanish. For example, one survey of H-2A workers found that nearly 20% of them spoke an indigenous language, and none had ever received workplace information in that language.[4] And many workers arrive having paid illegally-charged recruitment fees, leaving them in significant debt and exacerbating their reliance on their employer.

Third, H-2A workers and their advocates face a major lack of transparency from the U.S. government. For example, U.S. Citizenship and Immigration Services fails to recognize a visa beneficiary's independent interests in an employer's visa petition, and the agency therefore refuses to provide information directly to H-2A workers about their visas. Additionally, the government's failure to adequately collect and disclose information about recruiters, contractors, and other agents hired by the farms where H-2A workers are employed presents tremendous barriers for workers who seek to hold unscrupulous actors accountable for abuses.

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[2] *See, e.g.*, Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2011), http://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6- No-Way-To-Treat-AGuest-H-2A-Report.pdf.

[3] Department of State, *FY2020 NIV Detail Table* (2021), https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY20NIVDetailTable.pdf.

[4] Centro de los Derechos del Migrante, *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program*, p.31 (2020), https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf.

By stacking the deck against the worker, the H-2A program creates a working environment ripe for exploitation. This past December, federal prosecutors announced that they had uncovered a massive human trafficking scheme in Georgia run by a group of defendents who had collectively sought certification for more than 70,000 H-2A workers.[5] The allegations in the case, Operation Blooming Onion, are horrific. They include workers being forced to dig for onions with their bare hands for no pay, living in crowded, dangerous housing, and facing frequent threats of violence and retaliation. Two workers died. Unfortunately, Operation Blooming Onion is not an isolated case; we and other advocates have seen countless other violations of workers' rights resulting from the vulnerability of the workforce and the lack of accountability in the H-2A program.

The H-2A Forms are also an essential resource for U.S.-based farmworkers who are seeking to overcome barriers to employment. When creating the H-2A program, Congress recognized that it would pose a significant threat to the livelihood and wellbeing of U.S. farmworkers and thus imposed a statutory mandate to prevent adverse effects for those workers.[6] Unfortunately, the federal government has fallen short in complying with this critical statutory protection. Domestic farmworkers are forced to compete with a workforce that is completely subject to the control of the employer and that is therefore often more willing to endure working conditions and abuses that U.S. workers will not accept or tolerate. Moreover, H-2A workers, overwhelmingly young men, are almost always here in the U.S. without their families and have no outside responsibilities that may take them away from working whenever the employer desires. As advocates, we have seen how this dynamic creates tremendous incentives for employers to displace U.S. farmworkers and replace them with H-2A workers.[7] The H-2A Forms provide vital information that the government should use to more effectively enforce its mandate to protect U.S. farmworkers, and they also provide U.S. farmworkers directly with information about job opportunities.

III. Unnecessary and Unsupported H-2A Job Requirements Have Proliferated

One serious issue that the Department must address, whether through the H-2A Forms or some other means, is the rising number of unnecessary and unsupported H-2A job requirements listed in H-2A clearance orders. We have seen firsthand how these job requirements exclude U.S. workers who are otherwise willing and able to perform agricultural work. This violates the

[5] *See* Lautaro Greenspan, *'This has been happening for a long time': Modern-day slavery uncovered in South Georgia*, ATLANTA JOURNAL CONSTITUTION (Dec. 3, 2021), https://www.ajc.com/news/this-has-been-happening-for-a-long-time-modern-day-slavery-uncovered-in-ga/SHBHTDDTTBG3BCPSVCB3GQ66BQ.
[6] 8 U.S.C. § 1188(a)(1).
[7] *See, e.g.*, Miriam Jordan, *Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More*, N.Y. TIMES, (Nov. 12, 2021), https://www.nytimes.com/2021/11/12/us/black-farmworkers-mississippi-lawsuit.html.

Department's statutory mandate to prevent adverse effects on the U.S. workforce from the H-2A program. U.S. workers are only required to be "minimally qualified" to perform jobs for which H-2A workers are requested.[8] However, many employers now include experience requirements, lifting requirements, and productivity standards in job orders.[9] They also include other vague, overreaching requirements that, if violated, may result in termination.[10] The ETA-790/ETA-790A form should clarify for applicants that the scope of legally permissible material job requirements, including experience requirements and productivity standards, is limited.

For example, to determine whether a particular qualification is appropriate for an H-2A job, the Immigration and Nationality Act ("INA") states that "the Secretary [of Labor] shall apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops."[11] The Department of Labor's (DOL) implementing regulations for the H-2A program also require job terms to be "bona fide and consistent with the normal and accepted qualifications."[12] The H-2A statutes and regulations do not provide explicit definitions for what is "normal and accepted," but DOL has clarified in guidance that, for the purposes of the H-2A program, normal means "situations which may be less than prevailing, but which clearly are not unusual or rare."[13]

"Normal and accepted" is not the sole legal standard that is applied in adjudication of certification applications. The State Workforce Agencies (SWAs) who are responsible for assessing H-2A job orders are also bound by regulations under the Wagner-Peyser Act. Wages, working conditions, and job qualifications may only be accepted by the SWAs if they are "prevailing."[14] Under those regulations, the SWA must ensure that the wages and working conditions in the job order are "not less than the prevailing wages and working conditions" of similarly situated farmworkers.[15] Yet nowhere in the current ETA Forms does the Department explain these requirements or request information on prevailing practices.

The burden is on the employer to provide evidence and justification to demonstrate job qualifications are bona fide, per 20 C.F.R. § 655.122(b), and "prevailing," per 20 C.F.R. §

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[8] *Bernett v. Hepburn Orchards, Inc.*, 1987 WL 16939 (D. Md. 1987).
[9] The requirements can be simultaneously specific and broad. We have seen requirements such as: lifting ability of 75 pounds, the ability to operate agricultural equipment 'with or without direction', understanding and operating GPS systems, holding a valid driver's license and the ability to obtain a CDL license, the ability to drive a manual-gear semi-truck, the ability to work on holidays, the ability to work in 100+ degree temperatures 'with or without reasonable accommodations.'
[10] *See, e.g.*, ETA-790A, H-2A Case Number: H-300-22031-866773, Certification Determination Date: March 1, 2022 (including requirements such as "Workers assigned to bunk beds in employer-provided housing may not separate bunk beds" and "Workers may not leave paper, cans, bottles and other trash in fields, work areas, or on housing premises.").
[11] 8 U.S.C. § 1188(c)(3)(A).
[12] 20 CFR § 655.122(b).
[13] ETA Handbook 398.
[14] 20 C.F.R. § 653.501(c)(2)(i).
[15] § 653.501(c)(2)(i).

653.501(c)(2)(i). The employer should bear the burden of demonstrating the necessity of particular job order requirements, as DOL has already determined the employer does for particular performance requirements.[16]

If an employer includes job order requirements related to experience, performance, or productivity, they should be tied only to safety or technical requirements, rather than concerns about efficiency or profitability. For example, in one appeal of an OFLC H-2A certification denial, a DOL administrative judge found that an apple orchards' one-month experience requirement was acceptable due to the employer's testimony about safety hazards and the level of difficulty of the task and the OES description for apple orchards.[17] However, the judge found that the one-month experience requirement for other vegetable farms was not reasonable because the only reason provided by the employer was "to do things quickly and efficiently."[18] Similarly, performance requirements are not acceptable if they are solely related to increased profitability. The judge emphasized that "vague and generalized statements" about experience requirements are insufficient for the employer to demonstrate its need for temporary workers. [19]

IV. Recommendations for Form ETA 790/790A and Accompanying Forms

As explained previously, we routinely review Agricultural Clearance Orders (Form ETA-790) and H-2A Agricultural Clearance Orders (Form ETA-790A) in our work advocating on behalf of H-2A and U.S. farmworkers. Our extensive experience with the forms informs the following recommendations for improvements. We begin with a few threshold issues before focusing on particular fields in the forms.

1) General ETA-790/790A Issues

As an initial matter, the Department must prioritize language access in the processing and posting of ETA-790/790A clearance orders. The Department is subject to the requirements of Executive Order 13166, which directs every federal agency to "examine the services it provides and develop and implement a system by which [Limited English Proficient] persons can meaningfully access those services consistent with, and without unduly burdening, the

[16] *See e.g. In re Westward Orchards; Strathmeyer Forests; In Jay R. Debadts & Sons Fruit Farm.*
[17] *In re Westward Orchards*, 2011-TLC-00411, at 28. In the absence of a prevailing practice finding by a SWA, alternative sources of information for normal and accepted practices among non H-2A employers of the same or comparable occupations and crops include Occupational Employment Statistics (OES) codes and descriptions or other evidence to corroborate the need for particular requirements.
[18] *Id.*
[19] In *Snake River Farmers' Ass'n, Inc. v. U.S. Dept. of Labor*, a federal district judge defined the normal and common standard as, "situations which may be less than prevailing, but which clearly are not unusual or rare. The degree to which a practice is engaged in (or a benefit is provided) should be measured to be close to what is viewed (and measured) as 'prevailing,' but the degree of proof needed to establish its acceptability for H-2A purposes is not as formal or stringent as 'prevailing' calls for." 1991 WL 539566, *9 (D. Idaho, Oct. 1, 1991).

fundamental mission of the agency."[20] The overwhelming majority of H-2A workers come from Spanish-speaking countries,[21] and nearly two-thirds of U.S. farmworkers speak Spanish as their primary language.[22] To ensure that all workers are aware of their rights—and to effectuate the positive recruitment of U.S. workers that is required under the H-2A program—the Department must ensure that Spanish-speaking workers are able to access and review the clearance orders in their native language. We know that English-only clearance orders have presented particular barriers for U.S. farmworkers in Puerto Rico, where some local SWA officials have limited English ability and, without translations, are unable to refer workers to available positions elsewhere in the United States.

General ETA-790/790A Recommendation 1: We recommend that the Department create a Spanish version of the ETA-790/790A and post translated versions of all clearance orders on the Seasonal Jobs website. This would align with the practices of certain SWAs that already translate or require submission of translated clearance orders and help to fulfill the Department's language access obligations under E.O. 13166. It would also bolster compliance with the existing regulatory requirement that all H-2A workers and workers in corresponding employment receive a copy of the work contract "in a language understood by the worker."[23]

General ETA-790/790A Recommendation 2: In addition to language access issues, we have also found that the presentation of the forms on the Seasonal Jobs website can create an obstacle to identifying the employer seeking certification for any particular job offer. This is because the Seasonal Jobs website separates the two forms that make up . It only displays the ETA-790A, which does not include employer information, as opposed to the ETA-790, which does. To remedy this, we recommend that the Department take one of two approaches. The Department could either add the ETA-790 to the job postings on the Seasonal Jobs site, or the Department could add new boxes to the first page of the ETA-790A which require the employer seeking certification to provide their name and contact information once more.

General ETA-790/790A Recommendation 3: Finally, we request that the Department take measures to address the font size and length of employer responses permitted in response to questions on the ETA-790/790A. We frequently encounter clearance orders that have lengthy copy-pasted lists of terms, many of which are often irrelevant to the particular position, that are presented on the form in a font size so small that it is functionally illegible. An example from a recent order is provided below:[24]

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[20] E.O. 13166 (Aug. 11, 2000).
[21] Department of State, *FY2020 NIV Detail Table* (2021), https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY20NIVDetailTable.pdf
[22] NAWS Report, pg. 13
[23] 20 C.F.R. § 655.122(q).
[24] Stemilt ETA-790A, H-2A Case Number: H-300-21345-759174, Certification Determination Date: 01/05/2022.

I. Job Offer Information 12

1. Section/Item Number *	A.11	2. Name of Section or Category of Material Term or Condition *	Pay Deductions - 8e. Additional Crop

3. Details of Material Term or Condition (*up to 3,500 characters*) *

3 PIECE RATE BONUS PAY: If a worker's Piece Rate amounts for any work week total more than what the worker would have earned on an hourly basis for the time spent in Piece Rate Activities, the worker will be paid that higher amount as "Piece Rate Bonus" pay, making the worker's total pay for that time the higher of hourly or Piece Rate. As a result, workers will always be paid at least his or her hourly rate for all time. Workers will be paid additional pay for rest breaks as required by law.
4 BASE HOURLY RATES: Subject to earning Piece Rate Bonus pay (as described above), a worker's hourly base pay compensates workers in full for all of their work time. Workers are hourly employees, with opportunities to earn Piece Rate Bonus pay." Language included within each piece rate listing, under the " Additional Crop or Agricultural Activities and Wage Offer Information." field:
"Piece Rate Units: Bin 47x47x24.5

Special Pay Information: Workers are paid hourly . This piece rate is an additional productivity bonus available to workers for the activity specified herein to the extent the bonus amount exceeds a worker's hourly pay. The rate provided represents the prevailing wage rate for Washington published by the US Dept. of Labor at the time this ETA 790 was drafted."

Minimum piece rates are as follow:
Apple Harvest:
Golden Apple Harvest- Harvesting All $24.50 per bin(47x47 inchx24.5 inch)
Braeburn Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)

Fuji Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
Gala Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
Granny Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
Honey Crisp Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
Red Delicious Apple Harvest- Harvesting Medium $20.00 per bin (47x47 inchx24.5 inch)
Pink Lady Apple Harvest- Harvesting All $24.50 per bin (47x47 inch x24.5 inch)
MN1914/Honeiska Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
Pinova/Roho Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
Aurora Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch)
MN55 Rave Apple Harvest- Harvesting All $24.50 per bin (47x47 inchx24.5 inch

*See 8e. Additional Crop or Agricultural Activities and Wage Offer Information. 1.3

We understand that the small font size may be a back-end technical interaction with the DOL's Foreign Labor Application Gateway (FLAG) system used by employers when applying for certification. We encourage the Department to place reasonable word limits on responses or take similar measures to ensure legibility of the terms and conditions on clearance orders.

2) Section A - Job Offer Information (Wages)

Section A requests information from employers on the applicable wage rate for the job offer. Under existing regulations, employers must pay all H-2A workers and U.S. workers in corresponding employment at least the highest of the following applicable wage rates in effect at the time work is performed: the adverse effect wage rate (AEWR), the applicable prevailing wage, the agreed-upon collective bargaining rate, or the Federal or State statutory minimum wage.

The "Wage Offer" field in Section A is a source of confusion for certain workers who may be subject to required wage rates for different activities. For example, a worker who is paid at a higher piece rate for picking certain crops might receive the AEWR for other crop activities. Yet employers often fail to indicate this in the fields in Section A. The instructions attempt to account for the limitations of the term "Wage Offer" by instructing employers that offer a range of pay rates to "enter the minimum wage offer in Item A.8b (Wage Offer)" and provide the "upper range of any wage offers" in the "Piece Rate Units/Special Pay Information" fields in Item A.8e. The language of the form itself, however, does not contain any indication to employers or workers that "Wage Offer" in Item A.8b actually represents the minimum wage they could earn and that Item A.8e. is intended to include the "upper range" of the possible earnings. In the case of piece rate pay, it is unclear how the "upper range" of possible earnings would even be defined, given that many jobs have multiple piece rates for different crops, often measured in different units.

These ambiguities often create the erroneous impression that workers will only earn the AEWR or fail to inform workers of the most competitive piece rates offered by the employer. The following three examples from recent job orders illustrate this issue. Despite the fact that the Addendum A for each job order includes piece rate offers higher than the AEWR, the "Piece Rate Offer" section does not convey that key information to the worker.

- AEWR listed in both "Wage Offer" and "Piece Rate Offer"[25]

8b. Wage Offer *	8c. Per *	8d. Piece Rate Offer §	8e. Piece Rate Units/Special Pay Information §
$ 17 . 41	☑ HOUR ☐ MONTH	$ 17 . 41	See Addendum C.

- AEWR listed in "Wage Offer" and "0.00" listed in "Piece Rate Offer"[26]

8b. Wage Offer *	8c. Per *	8d. Piece Rate Offer §	8e. Piece Rate Units/Special Pay Information §
$ 17 . 41	☑ HOUR ☐ MONTH	$ 00 . 00	* See 8e. Additional Crop or Agricultural Activities and Wage Offer Information.

- AEWR listed in "Wage Offer" and one of the lowest, non-harvest piece rates from the Addendum is listed in "Piece Rate Offer"[27]

8b. Wage Offer *	8c. Per *	8d. Piece Rate Offer §	8e. Piece Rate Units/Special Pay Information §
$ 17 . 41	☑ HOUR ☐ MONTH	$ 02 . 00	Apples: Hoop Trellis Erection, per hoop

ETA- 790A Section A Recommendation: The Department should change Section A of the ETA-790A to clarify for workers when both an hourly wage and piece rate wage are offered. The inclusion of regulatory language specifying that the employer is required to pay the piece rate if it is highest would help ensure that local workers do not assume that the wage listed under Item A.8b (usually the AEWR) will be the only and/or the highest wage offered for all activities. Combining Items A.8b and A.8c creates a simpler, more readable appearance so that the information is more accessible to workers. The added piece-rate fields more clearly identify to workers when piece rates are being offered, which activities will be paid at the piece rate, and where in the form more information about piece rates can be found.

In light of the above-identified problems with Items A.8(b)-(e) and A.9, we recommend that Item A.8 be changed to appear as follows and that Item 9 be removed from the form:

[25] Alamo Orchards ETA-790A, H-2A Case Number: H-300-22031-866366, Certification Determination Date: 03/03/2022
[26] El Rosario ETA-790A, H-2A Case Number: H-300-22041-892975, Certification Determination Date 03/01/2022
[27] Wyckoff Farms ETA-790A, H-2A Case Number H-300-22040-888447, Certification Determination Date: 03/13/2022

The employer must pay all covered workers at least the highest of the following applicable wage rates in effect at the time work is performed: the adverse effect wage rate (AEWR), the applicable prevailing wage, the agreed-upon collective bargaining rate, or the Federal or State statutory minimum wage. *Workers may receive piece rates or special pay for certain activities, but they must always receive at least the minimum offered hourly or monthly wage for any given pay period.*

8b. Minimum Offered Wage	**8c. Are Piece Rates or Other Special Pay Offered?** (Details must be provided in **Addendum A**)
per ☐Hour ☐Month	☐ Yes ☐No
8d. Activities for which Piece Rate or Special Pay will be Offered (e.g., Cherry Harvest, Apple Harvest, Apple Thinning)	

3) *Addendum A - Additional Crop or Agricultural Activities and Wage Offer Information*

Addendum A suffers from a similar lack of clarity regarding which wage rate should be listed in the column titled "Wage Offer." As they are currently written, the ambiguously worded "Wage Offer" and "Piece Rate Units/Special Pay Information" columns allow employers to present wage information in a way that obscures the fact that they will offer (and are legally required to offer) piece rates for certain harvest activities. Even when the piece rate is written in the "Piece Rate Units/Special Pay Information" column, it is often provided in confusing terms and is insufficient to negate the impression that the AEWR is the offered rate, as seen in the following example:

A.9. Additional Crop or Agricultural Activities and Wage Offer Information

Crop ID	Crop or Agricultural Activity	Wage Offer	Per	Piece Rate Units/Special Pay Information
	Ambrosia Harvest	$ 17 . 41	Hour	Ambrosia Harvest may be either paid hourly or by piece rate. If paid hourly the rate will be $17.41 an hour. If paid by piece rate the rate will be $28.26 (47" X 47"X 24.5") bin. *See Additional Crop or Agricultural Activities and Wage Offer Information.
	Cripps Pink Harvest	$ 17 . 41	Hour	Cripps Pink Harvest may be either paid hourly or by piece rate. If paid hourly the rate will be $17.41 an hour. If paid by piece rate the rate will be $30.00 (47" X 47"X 24.5") bin. *See Additional Crop or Agricultural Activities and Wage Offer Information.
	Fuji Harvest	$ 17 . 41	Hour	Fuji Harvest may be either paid hourly or by piece rate. If paid hourly the rate will be $17.41 an hour. If paid by piece rate the rate will be $28.26 (47" X 47"X 24.5") bin. *See Additional Crop or Agricultural Activities and Wage Offer Information.
	Gala Harvest	$ 17 . 41	Hour	Gala Harvest high density may be either paid hourly or by piece rate. If paid hourly the rate will be $17.41 an hour. If paid by piece rate the rate will be $28.26 (47" X 47"X 24.5") bin. *See Additional Crop or Agricultural Activities and Wage Offer Information.

ETA 790A Addendum A Recommendation: The Department should update the fields on the Addendum A to differentiate between wage rates provided on the clearance order and to limit

variability in the ways that employers describe their wage offers. This update will also provide clarity to employees who are working in positions compensated on a piece rate to ensure that their wages do not fall below the hourly minimums required by the H-2A program.

Crop or Agricultural Activity	**Piece Rate or Special Pay Offer**	**Unit of Pay**	**Additional Information About Piece Rate Units or Special Pay Offer**	**If piece rate pay is being offered, what is the estimated hourly equivalent rate?**	**Minimum Offered Wage**
Honeycrisp Apple, Harvest	31.76	bin		$31.76 (based on an average harvest rate of 1 bin per hour)	$17.41

4) *Section B - Job Qualifications/Requirements*

As explained above in Part III of this comment, the rise of unnecessary and unsupported job qualifications and requirements has become a serious impediment to U.S. farmworkers seeking employment. Under the Department's own regulations, employers seeking certification for H-2A positions must only include job requirements that are "normal and accepted." Similarly, the Department's Wagner-Peyser regulations require that any job clearance order must have working conditions that are not inferior to prevailing working conditions for similarly situated farmworkers. The existing ETA-790A Section B fails to communicate these standards, creating the impression that an employer can put any requirement they would like, even if it ends up excluding willing and able U.S. farmworkers.

Another issue that we have seen is that employers often insert overreaching requirements elsewhere in the form, such as Part D (Housing) and Addendum B, and then unfairly use those extraneous requirements to justify termination of the worker down the line. Employers may attempt to include these restrictions even if they are not prevailing practices. For example, the use of "drunkenly" or "after hours" or other ill-defined housing provisions are used by employers to create nebulous catch-all terms to police individual worker behavior nowhere near the job site. These provisions have consequences. Once these ambiguous terms are entered into the job order and approved, employers can use individual at-home behavior to attempt to fire and evict H-2A workers mid-contract. Workers need and deserve clarity about what will be expected of them and what requirements are material to their employment.

ETA-790A Section B Recommendation: We recommend that the Department add a field in Section B for employers to provide evidence and justification for each job qualification or

requirement listed for the position. The Department should also add a note reminding employers that Section B is the only section of the form where they can list requirements that the worker will be subject to, and that H-2A workers cannot be terminated without cause.[28] The note could also specify that job requirements listed by the employer in response to other sections of the form will not be applicable to the worker.

5) Section C: Employment Information

The employment information sections of the ETA-790A should include additional information to improve their practical utility for farmworkers and advocates working on their behalf. Many agricultural worksites are in rural areas with unreliable or difficult-to-find addresses. With mobile technology, it should not be a challenge for employers to provide GPS coordinates for both work sites and worker accommodations.

ETA-790A Section C Recommendation 1: To better describe the physical location of the worksites, the ETA-790A should ask employers to provide the GPS coordinates of worksites in Section C and Addendum B.[29] This would provide more exact and standardized information than the address normally provided by employers.

ETA-790A Section C Recommendation 2: Additionally, Section C should ask employers to provide the dates that workers will be at the worksite. This information is already requested in the corresponding section of Addendum B, and adding this field to Section C in the main form would standardize the function of the forms.

6) Section D: Housing Information

ETA-790A Section D Recommendation 1: Similarly to worksite information, the housing information of the ETA-790A could be made more practical to farmworkers and their advocates. Again, many housing facilities for agricultural workers are in areas with unreliable or difficult-to-find addresses. It would be easier for government officials and advocates to access and connect with farmworkers if the ETA-790A Section D included a section for employers to provide GPS coordinates of these housing facilities.

ETA-790A Section C Recommendation 2: Additionally, Section D should ask employers to provide the dates that workers will be at the worksite. This information is already requested in the worksite section of Addendum B, and adding this field to the housing section of both the main form and Addendum B would inform workers and the government of the housing locations at different points in the season.

[28] See 20 CFR § 655.122(n).
[29] Form ETA-790, Place of Employment Information, page 4.

ETA-790A Section D Recommendation 3: Another issue that arises with the housing information provided by employers in the ETA-790A is related to hotels and motels. Sometimes, employers will list a motel or hotel that they claim has the kitchen facilities required by Department regulations, but the facilities are actually only available in the rooms of one or a few workers, and other workers are dependent on the occupants of those rooms making their kitchen facilities available. The general address of a hotel or motel is often insufficient. Employers will sometimes name a large hotel in the clearance order, but when outreach workers arrive to speak with H-2A workers, they are unable to find any workers onsite. We recommend that the Department provide a field in Section D and Addendum B for employers to specify room numbers, floor numbers, or other more detailed information to adequately inform government officials and workers themselves about the workers' housing and whether it meets the required standards.

7) Section F - Transportation and Daily Subsistence

The ETA-790 could simplify the travel reimbursement process by describing the timeline and manner for inbound and outbound travel reimbursement. H-2A workers often make significant up-front expenditures to travel from their home countries to the employers' work sites in the United States as well as during their travel home. Covered travel and subsistence expenditures include tickets for air travel, bus travel, hotels, meals, and other costs that occur during travel.

In the ETA-790A, the payment or reimbursement for this travel is described in Section F and Addendum C. These sections only ask for the employer to provide a brief, general description of the "terms and arrangements" for travel along with the daily minimum and maximum amounts for subsistence.[30] The instructions do state that employers must at least describe whether the transportation will be provided or reimbursed, but employers are not currently provided a guided opportunity to describe reimbursements in greater detail.[31]

Travel reimbursement can theoretically be a simple transaction–a check upon arrival and a check before departure–but it often does not work this way in practice. Oftentimes, workers are left without clarity on how they can expect to receive reimbursement payment for their inbound and outbound travel expenses. For example, will the worker be paid all at once or in installments? What receipts, if any, must the worker provide to ensure full reimbursement? By what date after the "50 percent of the work contract period" can the worker expect reimbursement?[32] How will the employer estimate "the most economical and reasonable common carrier transportation charges for the distances involved" to the job site?[33]

[30] Form ETA-790, Section F, page 3.
[31] Form ETA-790, General Instructions, page 8.
[32] Form ETA-790, Conditions, page 5.
[33] 20 CFR § 655.122(h)(1).

These and other questions raise common material terms that are often not described in the ETA-790 forms provided to H-2A workers. Often an employer will simply state the earliest timeline for reimbursement for inbound expenses along with the rates for subsistence. No deadlines for reimbursement or other details are necessarily provided. These kinds of cryptic descriptions can create situations where the reimbursement amount is unclear or situations where workers are not fully reimbursed under the law.

These concerns become especially challenging for outbound travel reimbursement. Does the employer plan to provide reimbursement while the worker is still on site? If not, then how will the employer send reimbursement payment to the worker? By what date must the employer send the payment? How will the employer communicate to the worker when the reimbursement payment was sent? Does the employer have access to a reasonable means to communicate to the worker and send payment internationally? If so, can the employer describe these methods so that the worker can prepare to receive the communications and payment? As stated above, just because the Regulations do not describe the timeline and manner of the reimbursement arrangement does not mean that the forms must lack helpful guidance. An example of helpful guidance not found in the Regulations can already be found in Section F, itself. The subsistence costs subsection provides a model that could be applied to other reimbursement terms.[34] This format is not found in the regulations but, rather, elucidates the intent of the regulations and creates a simpler process for completing and understanding the ETA-790.

Section F and Addendum C mirror the language within 20 CFR § 655.122(h)(1)-(2), but these form sections could provide more practical guidance to the employers and workers who use the ETA-790A, and allow employers to provide specific details of the reimbursement arrangement without conflicting with the Regulations. If the ETA-790A included specific sections that required employers to describe reimbursement in more detail, then the ETA-790A could reduce real-life risks for confusion and conflict between employers and workers during the reimbursement process.

ETA 790A Section F Recommendation: Section F should include a subfield for an employer to specifically describe the time and manner for inbound travel reimbursement by including the first and final dates that a worker can expect reimbursement and whether this payment will be provided directly through payroll or other means. Section F should also ask the employer to describe the time and manner of payment for outbound travel reimbursement, such as whether the payment will be provided before departure or at a later date, and if provided at a later date– how this payment will be sent and communicated to the worker. We therefore recommend that the Department amend Section F to include specific sections for an employer to describe both (1) the timeline for inbound and outbound travel reimbursement and (2) the manner of reimbursement for both inbound and outbound travel.

[34] Form ETA-790, Section F, Question 3, page 3.

V. Recommendations for Form ETA-9142A and Accompanying Forms

While the clearance orders (Forms ETA-790/790A) contain many of the relevant terms of employment, additional important data are found only in the ETA-9142A *Application for Temporary Employment Certification*. This includes an extensive list of employer assurances (in ETA-9142A Appendix A), the employer's identity assurances, and important employer-specific data not found on the current iteration of the clearance order, such as the identity of the employer and the name of the employer's agent, if any. The information in the ETA-9142A has enormous practical utility in helping the Department to determine whether an employer has complied with the H-2A program requirements.

1) Public Access to Approved ETA-9142 Applications

Presently, employers' H-2A applications on Form ETA-9142A are not publicly available and may only be accessed in response to Freedom of Information Act requests. Prior to 2019, the Department routinely posted certified ETA-9142A forms on its I-Cert portal. This was done in part to provide prompt notice to employers as to the approval of their H-2A applications. The Department ceased posting certified ETA-9142As when it began notifying employers of H-2A application approvals through the FLAG system.

General ETA-9142A Recommendation 1: Public posting of the certified ETA-9142A forms will help effectuate the provisions of the H-2A regulations. Under current regulations, workers must be provided with a copy of the "work contract," either when they apply for their visa, in the case of H-2A workers, or when work commences, for U.S. workers in corresponding employment.[35] Where the employer does not provide a separate written contract (the vast majority of situations), "the required terms of the job order and the certified will be the work contract."[36]

Unfortunately, many H-2A employers only furnish their H-2A and U.S. workers with the clearance order, leaving the workers without the important additional data contained in the ETA-9142A. By posting the certified ETA-9142A forms on the Seasonal Jobs portal, this information will be more readily available to both the workers and those assisting them.

General ETA-9142A Recommendation 2: As we have recommended for the ETA-790/790A, when posted online, the ETA-9142A forms should be in both English and Spanish. This will

[35] 20 C.F.R. § 655.122(q).
[36] *Id. See also Palma Ulloa v. Fancy Farms, Inc.*, 762 Fed. Appx. 859, 863 (11th Cir. 2019) ("Along with the labor certification application, these clearance orders served as the employment contracts between the foreign workers and [the employer].")

facilitate compliance with the existing rule requiring that the "work contract" be in "a language understood by the worker."[37] The employer, and not the Department or the State Workforce Agency, should be responsible for providing this translation.[38]

2) *ETA-9142A Need for Recruitment Section*

The Form ETA-9142A currently lacks any section that provides clear information about the recruitment process for workers. Transparency in employers' recruitment practices is key to ensuring that U.S. workers do not experience adverse effects as a result of the H-2A program, as well as to ensure that H-2A workers are not subject to the kinds of unlawful fees or pressure that can lead to forced labor and trafficking.

ETA-9142A Recruitment Recommendations: The Department should require employers to provide the names of any recruiters that they used to fill their H-2A positions. Even if the 9142A's are not ultimately made public, the lists of recruiters collected in this section should be made public. This public list would make clearer to prospective workers which job opportunities and recruiters are legitimate. The Department should also require that employers state the amount they are paying to foreign recruiters and confirm that the employer has invested similar resources in the recruitment of U.S. workers. This would aid the Department in complying with the regulatory requirement that "the effort . . . required of the potential H-2A employer must be no less . . . the kind and degree of recruitment efforts which the potential H-2A employer made to obtain foreign workers."[39]

3) *Form ETA-9142A Section E - Job Opportunity and Supporting Documentation (Additional information from H-2A Labor Contractors)*

In some areas, we have seen a marked increase in H-2A applications from H-2A Labor Contractors seeking workers to, *inter alia*, transport materials or commodities in heavy trucks. These applications usually require the worker to possess or obtain in short order a commercial driver's license (CDL) necessary for operation of these vehicles.

In many instances, have misclassified these truck driving activities as agricultural, and therefore eligible for H-2A visas. As explained below, most are not performing "agricultural labor or services" within the meaning of 20 C.F.R. § 655.103(c). Form ETA-9142A should be revised to obtain the information necessary for the Department to determine whether these truck drivers employed by H-2ALCs are indeed eligible for H-2A classification, or should instead only be eligible for admission under the H-2B program.

[37] 20 C.F.R. § 655.122(q).
[38] *Villalobos v. North Carolina Growers Association, Inc*., 42 F.Supp.2d 131, 136-37 (D.P.R. 1999).
[39] 20 CFR § 655.154(b).

In many situations, H-2ALC employees engaged as truck drivers are not engaged in "agriculture" within the meaning of the Fair Labor Standards Act (FLSA). If occurring away from the farm, these transportation jobs are only able to qualify as agriculture under FLSA if performed by the direct employees of the farm's owner.[40] Similarly, in these instances, the H-2ALC employees are not involved in agriculture under the Internal Revenue Code definition when they are operating off farm property. As a federal judge recently wrote in a case brought by H-2ALCs, "[t]o the extent the DOL argues that any activity incident to harvesting performed by ALC employees (i.e., non-farm employees) is no longer agricultural labor once those ALC employees leave the farm site, I agree. *See* 26 C.F.R. § 31.3121(g)-1(b)(1) (limiting agricultural labor to "[s]ervices performed *on a farm*" (emphasis added))."[41]

ETA-9142A Section E Recommendation In order to determine whether workers requested by H-2ALCs to transport materials or commodities are performing "agricultural labor or services" and are thereby eligible for H-2A visas, the following questions should be added to the "For H-2A Labor Contractors ONLY" of Section E of the ETA-9142A:

- Does the job require the worker to possess or obtain a commercial driver's license (CDL)?
- What materials or commodities are to be transported or hauled by the worker?
- What percentage, if any, of the materials or commodities being transported or hauled were produced by the H-2ALC?
- Will the transportation occur on public roads, off of farm property?

4) Form ETA-9142A, Appendix A, Section B: Employer Declaration

Appendix A of Form ETA-9142A lists a series of declarations that an employer must attest to for any position for which it is seeking H-2A certification. These declarations are drawn from the H-2A regulations and serve the important purpose of ensuring that employers are aware of their responsibilities to both H-2A workers and workers in corresponding employment. We have identified several areas of frequent non-compliance with the existing H-2A regulations that may be addressed by enhancing the clarity of the Appendix A employer declarations.

[40] *See, e.g.*, 29 C.F.R. § 780.154 (stating that when the delivery to market of agricultural commodities "involves travel off the farm. . . the delivery must be performed by the employees employed by the farmer in order to constitute an agricultural practice"); Wage and Hour Division ("WHD") Opinion Letter, FLSA2019-5, 2019 WL 1516460, at *3 (Apr. 2, 2019) (explaining that "any delivery involving travel off of the farm generally must be performed by the farmer's employees").

[41] *Everglades Harvesting & Hauling, Inc. v. Scalia*, 427 F.Supp.3d 101, 113 (D.D.C. 2019).

a) *Item 3: Discrimination in the selection of H-2A workers by employers and their agents.*

In Item 3 of the employer declarations, employers promise that the job is open to any domestic worker, regardless of race, color, national origin, age, sex, religion, handicap or citizenship. However the application contains no such limitation in the hiring of foreign workers.

In reality, there is rampant discrimination in the recruitment and hiring of H-2A workers by employers and their agents. Some of this discrimination has been based on race. In Mississippi, for example, there has been a widespread displacement of longtime Black farmworkers in the Delta region by South African H-2A workers.[42] Almost all of the South African H-2A workers are white, despite the fact that whites make up less than 10 percent of that nation's population. The selection of this all-white workforce is plainly a deliberate choice by the employers and/or their H-2A agents.

Frequent age and gender discrimination in the H-2A program also hastens the displacement of U.S. workers.[43] Facing no accountability for discrimination in the selection of foreign workers, H-2A employers have almost universally selected a workforce that is comprised of males in their 20's and 30's. No longer employing a workforce that represents a rough bell curve, including older as well as younger workers, the average production level of many work crews dominated by H-2A workers has risen sharply. This practice indirectly displaces many domestic workers, because a number of H-2A job orders require as a condition of employment that workers meet a nebulous production standard keyed to the production of their co-workers. It is not uncommon for an older, experienced U.S. worker to fall short of performing at the same level of production as a crew of H-2A workers in their 20's, leaving the U.S. worker subject to dismissal. As described in Part III of this comment, these production standards are among the unjustified clearance order terms routinely approved by the Department.

ETA-9142A Appendix A, Section B, Item 3 Recommendation: Item 3 of the Employer Declaration in the ETA-9142 Appendix A sets forth the non-discrimination standards for U.S. workers in positions certified for H-2A employment. Item 3 should be revised (or a subsequent item added) so that its protections are extended to foreign prospective H-2A workers as well as U.S. workers.

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[42] *See* Jordan, *supra* note 7.

[43] To justify their violation of a host of federal and state anti-discrimination laws in hiring their H-2A workers, employers often point to the Fourth Circuit's decision in *Reyes Gaona v. North Carolina Growers Ass'n, Inc.,* 250 F.3d 861 (4th Cir. 2001). At most, *Reyes Gaona* applies only within the Fourth Circuit. Furthermore, there are serious doubts whether this 2-1 decision is well-reasoned or applicable today.

b) Item 8(i): Compliance with state and local laws.

In Paragraph 8(i) of the employer declarations, H-2A employers promise to comply "with applicable Federal, State, and local employment-related laws and regulations, including employment-related health and safety laws." This is similar to, though not exactly aligned with, the H-2A regulations at 20 C.F.R. § 655.135(e). The Appendix A language inserts the terms "employment-related," which do not appear in the regulations.

To begin with, we are concerned the Department has generally chosen not to enforce this guarantee. For example, the anti-discrimination provisions in Paragraph 3 are limited. Among other things, they do not prohibit discrimination on the basis of sexual orientation or familial status. However, a number of states have enacted more extensive human rights legislation protecting against some of these additional forms of discrimination, and the Department has repeatedly declined to require H-2A employers to comply with them. Although the H-2A program is federally administered, workers are not forfeiting rights and protections afforded them by state or local law when they accept an H-2A job. The Department should fully enforce 20 C.F.R. § 135(e) and make compliance with state and local laws, including those barring various forms of discrimination, an obligation of every H-2A employer.

ETA-9142 Appendix A, Section B, Item 8(i) Recommendation: The Department should remove the terms "employment-related" from the declaration to better align with the regulatory text. State laws that may not traditionally be understood as "employment-related" may have significant impacts on H-2A workers lives and be under the employer's control. The Department has thus far declined to require H-2A employers to comply with state fair housing laws, even though at least one DOL administrative law judge has ruled that the Department could and should deny H-2A certification to an employer who refused to offer housing to family members as required by Oregon's fair housing law.[44] We are disappointed that the Department has actively refused to enforce these and other state laws in the H-2A program, and the form declarations should not create further opportunities for noncompliance.

c) Items 8(ii) and 8(iii): Providing housing in compliance with federal standards and guidelines.

Item 8(ii) requires the employer to declare that it will provide housing to eligible workers "that complies with applicable local, State, or Federal standards and guidelines for housing." Item 8(iii) mandates that the employer request a preoccupancy inspection and receive certification "where required."

As noted previously, H-2A employers are increasingly relying on non-traditional housing to accommodate their workers. Oftentimes this takes the form of accommodations in motels or

[44] *In re Cal Farms, Inc.*, OALJ Case No. 2014-TLC-00085 (order of April 28, 2014).

hotels. Most motels and hotels are not designed for long-term occupancy and lack, among other things, the cooking, refrigeration, food storage and laundry facilities required by long-term residents.

Under the H-2A regulations, the Department has been issuing H-2A certifications to employers proposing to house their workers in rental and public accommodations. The Department has not required that these units comply with OSHA temporary camp standards so long as the facilities meet local standards applicable to the housing.[45] These standards frequently are minimal in nature because they are aimed at units which will be occupied for very brief periods. Notably, regulations governing motels and hotels rarely limit the occupancy of a room or impose minimum square footage requirements.

In fact, the Wagner-Peyser Act regulations require that such housing meet the OSHA standards. In order to have a clearance order accepted by the state workforce agency, an employer must provide an assurance that it will provide no-cost housing that meets Federal standards.[46] Once this assurance is provided, the SWA "must determine, through a preoccupancy inspection performed by ES staff or an appropriate public agency, that the housing assured by the employer is either available and meets the applicable housing standards or has been approved for conditional access to the clearance system..."[47]

The Wagner-Peyser Act regulations further provide that "[i]t is the policy of the Federal-State ES system to deny its intrastate and interstate recruitment services to employers until the State ES agency has ascertained that the employer's housing meets certain standards." 20 C.F.R. § 654.400(b) goes on to explain that "[t]o implement this policy. § 653.501 of this chapter [the clearance order processing regulations] provides that recruitment services must be denied unless the employer has signed an assurance that if the workers are to be housed, a preoccupancy inspection has been conducted, and the ES staff has ascertained that, with respect to intrastate or interstate clearance orders, the employer's housing meets the full set of standards set forth at 29 C.F.R. 1910.142 of this subpart [the OSHA labor camp standards] ..."

ETA-9142 Appendix A, Section B, Items 8(ii) and 8(iii) Recommendation: Under the existing regulations, the prospective H-2A employer must have housing that complies with the OSHA labor camp regulations to have its order accepted into interstate clearance. The H-2A Forms should require that employers provide an assurance to this effect as part of the declarations under Item 8, whether by amending existing Items 8(ii) and 8(iii) or by adding an additional sub-item. Such a declaration would be consistent with the H-2A regulatory requirement that the

[45] 20 C.F.R. § 655.122(d)(ii).
[46] 20 C.F.R. § 653.501(c)(3)(vi).
[47] 20 C.F.R. § 653.501(b)(3).

employer's job order "satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F [which includes 20 C.F.R. § 653.501]."[48]

d) Item 8(v): Providing safe and properly-insured transportation.

In Paragraph 8(v) of the employer declarations, H-2A employers promise to provide transportation between the housing accommodations and the worksite in compliance with Federal, State and local laws and regulations. This incorporates an important provision of the H-2A regulations.[49] Unfortunately, a substantial amount of the transportation furnished by H-2A employers, and especially H-2A labor contractors, is inadequately insured. And none of the H-2A Forms obtain sufficient information from H-2A employers, especially H-2A labor contractors, to assess the adequacy of the vehicle insurance provided.

Under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA), agricultural employers and farm labor contractors are required to purchase a liability bond or maintain insurance against injuries to the passengers of any vehicle they use to transport farmworkers.[50] Currently, insurance requirements are $100,000 per seat, with a cap of $5 million.[51]

MSPA provides a waiver of this requirement if the employer provides workers' compensation insurance that covers all "circumstances" under which the workers are transported, with the employer being required to provide liability insurance for any circumstances not covered under the state's worker's compensation law.[52] The employer is required to maintain liability insurance or a liability for any transportation that is not covered under the state's workers' compensation law.[53] Most employers availing themselves of the workers' compensation insurance waiver do not provide additional liability insurance for bodily injuries, expecting (or hoping) that the workers' compensation insurance will be in effect for any and all transportation provided to the workers.

In issuing H-2A certifications, the Department ordinarily only requires that the applicant submit a workers' compensation policy that extends through the period of proffered employment and does not cover initial travel to the worksite or return transportation after the contract is complete.[54] Neither Form ETA 790/790A nor Form ETA-9142A obtain sufficient information to

[48] 20 C.F.R. § 655.121(a)(3).
[49] 20 C.F.R. § 655.122(h)(4).
[50] 29 U.S.C. § 1841(b)(1)(C).
[51] 29 C.F.R. § 500.121(b).
[52] 29 C.F.R. §§ 500.122(a)(1) and (b).
[53] 29 C.F.R. §500.122(b).
[54] Many farm labor contractors and agricultural employers obtain workers' compensation coverage through professional employer organizations (PEOs) or other employee-leasing companies. Typically, the PEO is the insured entity for workers' compensation purposes, rather than the farm labor contractor or agricultural employer. The insurance provided through the PEOs often strictly limits workers' compensation coverage to the period the worker

determine if the proffered workers' compensation policy encompasses all transportation the employer will be providing to its workers. Nothing is done to determine the scope of the coverage provided. Because of these lax policies, each year hundreds of H-2A applications are approved in which there are gaps in insurance coverage, with the employer relying exclusively on workers' compensation to insure against bodily injuries with policies that at best provide only partial coverage.

In recent years, several fatal accidents have occurred with farm labor buses in which the PEO insurance did not cover the deaths and injuries to the passengers because of these insurance gaps. For example, on November 6, 2015, six H-2A workers were killed while being transported back to Mexico in their H-2A employer's bus after completing employment contracts in Florida and Michigan.[55] The H-2A labor contractor had procured workers' compensation insurance through a PEO. Because the employment ended prior to the workers embarking on the trip back to Mexico, the insurance was not in force, because the H-2A workers were no longer "employed" by the PEO.[56]

ETA-9142A Appendix A, Section B, Item 8(v): The Department should revise Form ETA-9142A to include questions that will enable DOL to determine if the employer's workers' compensation policy names a PEO or staffing service as the insured party and, if so, insist that the employer demonstrate that the proffered workers' compensation insurance policy does not contain coverage gaps. If such gaps are uncovered, the MSPA requires that the Department insist that the employer purchase liability insurance or provide a liability bond in the amount specified by the MSPA regulations.

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appears on the PEO's payroll. Therefore, no workers' compensation coverage is in force when a crew of workers is traveling to a new job in a new state after completing a previous assignment. When the worker completes the job assignment, the workers' compensation coverage ceases, including during any return transportation at the end of the contract provided by the employer. Also, the typical workers' compensation policy provided through a PEO does not cover idle periods, when the worker is not working or receiving a payroll check but is still transported (to the grocery store, to the laundry, etc.) by the employer.

[55] *Six Migrant Farmworkers Killed In Arkansas Bus Crash,* KUAR (Nov. 6, 2015), https://www.ualrpublicradio.org/local-regional-news/2015-11-06/update-six-migrant-farmworkers-killed-in-arkansas-bus-crash

[56] These insurance gap issues were raised with the former Wage and Hour Division Administrator through a nine-page letter from Southern Migrant Legal Services on October 30, 2019. No response to the letter was ever received.

We appreciate the opportunity to provide comments on the H-2A Forms. We hope that the Department will choose to make these much-needed modifications to the forms rather than renewing them in their current state.

Sincerely,

Farmworker Justice
Farmworker Legal Services
Texas RioGrande Legal Aid
Columbia Legal Services, Washington State

Advocates for Basic Legal Equality, Inc.
Equal Justice Center
Indiana Legal Services, Inc.
Justice at Work (Friends of Farmworkers, Inc.)
Justice in Motion
Legal Aid Services of Oregon - Farmworker Program
Legal Aid Society of Metropolitan Family Services
Michigan Immigrant Rights Center
National Employment Law Project
NC Justice Center

For further information, please contact Andrew Walchuk, Senior Policy Counsel & Director of Government Relations, Farmworker Justice at awalchuk@farmworkerjustice.org.