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Submitted via email: ETA.OFLC.Forms@dol.gov.

William W. Thompson II, Administrator
Office of Foreign Labor Certification
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Employment and Training Administration
U.S. Department of Labor
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RE: Department of Labor proposed revision to remove Question 20 from the Form ETA 790A.

Florida Rural Legal Services, Inc. submits these comments to express our strong opposition to the Department of Labor's ("DOL") Notice of Proposed Rulemaking (NPRM or proposed rule) on removing Question 20 from **the ETA 790A Form.**

Farm labor contractors (FLCs) have long played a central role in the farm labor market in Florida and other eastern states. As Congress noted in enacting the first federal legislation designed to protect migrant farmworkers, "[f]arm labor contractors are the middlemen in making work arrangements between farmworkers and growers and in this capacity often recruit, transport, supervise, handle pay arrangements, and otherwise act as an intermediary between the migrant worker and the farmer…Because of the circumstances of migratory farmworkers' employment, farm labor contractors, or "crew leaders" as they are often called, play a unique and important role in the farm labor market…He usually provides the means of transportation for members of his crew…"Senate Report No. 202, Farm Labor Contractor Registration Act of 1963, at 1-2, reprinted in 1963 U.S. Code Cong. & Adm. News 3690-91.

Given the central importance of FLCs in locating domestic workers and transporting and furnishing them to agricultural employers, the Department has consistently insisted that applicants for H-2A workers utilize FLCs wherever their use is a prevailing practice, and that the FLCs be offered at least the prevailing override in the area for their services. The initial regulations issued to implement the current H-2A program expressly required that "[w]hen it is the prevailing practice in the area of intended employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H-2A agricultural employers and shall provide an override no less than that being provided by non-H-2A agricultural employers." 20 C.F.R. §655.103(f) (2007), 52 Federal Register 20516 (June 1, 1987). Although not specifically mentioned in the current regulations, this requirement is subsumed in the current 20 C.F.R. §655.154(b), requiring H-2A employers to

engage in positive recruitment efforts "no less than the normal recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of intended employment."

The continued vitality of the requirement to offer prevailing FLC overrides is reflected in the ETA Handbook 398, the H-2A Program Handbook. At Page II-12, the Handbook underscores that in areas in which the use of FLCs is the prevailing practice, H-2A employers are obligated to offer a competitive override: "Another factor which has to be considered in determining positive recruitments is the extent to which non-H-2A employers utilize farm labor contractors (crewleader) to secure U.S. workers. If a majority of non-H-2A employers in an area (who employ a majority of the U.S. workers in the area) use crewleaders, and provide an override (payment usually based on a per worker or per unit of production basis for the crewleader's services, H-2A employers must be willing to do the same and must provide an override which is no less than provided by other employers..."

This well-established Department policy is reflected in Question 20 on the current ETA 790, which inquires of the applicant, "Is it the prevailing practice to use Farm Labor Contractors (FLC) to recruit, supervise, transport, house, and/or pay workers for this (these) crop activity (ies)?" If the applicant answers in the affirmative, he is asked to state FLC wage (or override) for each activity. This information allows both the SWA and the Office of Foreign Labor Certification to implement the requirements of ETA Handbook 398.

Farm labor contractors remain the principal means by which the majority of non-H-2A fruit and vegetable producers in Florida secure migrant and seasonal farmworkers for their operations.[1] As was the case when Congress examined the use of farm labor contractors in 1963, the average FLC in Florida still ordinarily "provides the means of transportation for members of his crew." Because most Florida farmworkers do not own their own vehicles and rely on FLCs for daily transportation to and from the jobsite. Without transportation from a farm labor contractor, many farmworkers are unable to accept jobs on nearby farms or groves.

This is not a merely hypothetical situation. In recent years, a number of Florida agricultural employers have chosen to enter the H-2A program. As part of this changeover from U.S. workers to an H-2A workforce, these employers have furloughed their longtime FLCs, who had for many years provided daily transportation to and from the jobsite to local U.S. workers. The nascent H-2A employers continue to offer jobs to interested domestic workers (including their long-time U.S. worker employees), knowing full well that absent provision of transportation through a farm labor contractor, the worker will in most instances be unable to travel to the jobsite. As a result of these practices, literally hundreds of U.S. workers have been forced to

[1] Unfortunately, the precise percentage of FLC users cannot be stated because the Florida SWA has failed to conduct prevailing practice surveys relating to the use of farm labor contractors.

abandon their longtime jobs, as a direct result of the employer's refusal to continue offering a competitive override to their FLCs.[2]

We strongly oppose removal of Question 20 from the ETA Form 790 because it will remove the most prominent notification to potential H-2A employers of their obligation to offer FLCs a competitive override in those instances in which the use of FLCs is the prevailing practice (as is the case throughout Florida and much of Georgia, South Carolina, North Carolina, Virginia and Maryland). This notice to employers is essential now that the Department has removed from the current regulations the express reference to FLC overrides that appeared in the regulations prior to 2008.

If this question is removed, then it would further hinder local farmworkers from being able to accept H-2A jobs since traditionally local farmworkers depend on farm labor contractors to transport them to and from the employers work sites.

As the H-2A program has grown substantially in Florida, many of our clients who are local farmworkers have witnessed many job opportunities in their field dwindle as more and more Florida employers participate in the H-2A program. As local workers, our clients should enjoy a hiring preference for jobs for which H-2A workers are requested. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

Removal of Question 20 from the ETA 790A Form will also make it difficult, if not impossible, for the Florida SWA or the OFLC to determine what, if any, override is being offered by the potential H-2A employer. It is difficult to imagine how either agency will be able to implement the provisions of ETA Handbook 398, Page II-12, without these data being included as part of the employer's application.

For these reasons, we strongly oppose the removal of Question 20, or its equivalent, from ETA Form 790A. To do so will only exacerbate and accelerate the displacement of U.S. workers from farm labor jobs in Florida.

We appreciate your attention to our concerns.

Sincerely,

Tia Huntley

Tia Huntley, Migrant Unit Staff Attorney
Florida Rural Legal Services, Inc.

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[2]The employers have managed to avoid offering FLC overrides by falsely denying, in response to ETA 790 Question 20, that FLCs are the prevailing practice in their respective geographic areas and crops. In the absence of prevailing practice surveys by the Florida SWA regarding use of FLCs, the OFLC has repeatedly certified H-2A applications from these employers, the majority of which are FLCs themselves. Our firm is planning litigation over this situation.