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December 20, 2018

William W. Thompson II, Administrator  
Office of Foreign Labor Certification  
Box PPII 12-200, Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**RE:** Comments on proposed revisions to Form ETA-9142A and appendix, Form ETA-790/790A and addenda

These comments are submitted to the above-referenced docket in response to the .....

Michigan Farm Bureau (MFB) is the state's largest general farm organization representing nearly 42,000 Michigan farm families. Our organization's policies have been grassroots, developed, debated and adopted by our members since our founding in 1919. We are pleased to present these grower's perspectives on the modernization of the H-2A visa program. Our members have increasingly utilized the H-2A program in response to the shortage of available workers in the agricultural sector; they will be directly affected by how the Department determines their recruitment obligations in the H-2A program.

***Revising Form ETA-9142A, H-2A Application for Temporary Employment Certification, and the Appendix A, Attorney/Agent/Employer Declarations..., and "replace the existing Form ETA-790 with a new Form ETA-790/790A, H-2A Agricultural Clearance Order..."<sup>1</sup>***

We support the streamlining of application procedures, a reduction in duplicative "application" data points and a return to statutory/regulatory required information<sup>2</sup> following plain language guidelines<sup>3</sup>.

- Requiring duplicative information on separate forms has created/generated an increase in the issuance of Notice of Deficiencies (NODs) leading to significant costs incurred by government agencies, attorneys/agents, agricultural employers and current/prospective agricultural workers.
- The Form ETA-790 should follow the requirements of [§653.501\(c\)\(1\)\(iv\)](#) as the INA at 8 U.S.C. 1188(b)(4) requires and should not establish expanded requirements through "form revisions."
- These documents include covered guidance that "explains to the public how to comply with a requirement the Federal Government administers or enforces.." and are related to "a regulation" that is not covered by the law<sup>4</sup>. As such the Form or guidance should not materially change the statutory or regulatory content.

<sup>1</sup> Supporting Statement, OMB Control No. 1205-0466, July 2018 pg. 1

<sup>2</sup> Agricultural Recruitment System statutory authorization

<sup>3</sup> [Plain Writing Act of 2010](#)

<sup>4</sup> 5 USC 301 § 3(2)

- The draft 790/790-A, H-2A Agricultural Clearance Order, appears to require<sup>5</sup> all employers using the Agricultural Recruitment System (ARS) to follow the requirements of the H-2A foreign labor program. The proposed Instructions do not provide a distinction between ARS related Clearance Orders<sup>6</sup> and H-2A related Clearance Orders thus applying requirements to ARS system users not authorized under the Wagner Peyser Act and associated regulations. A combined Form should make clear the distinction between these requirements. The authorization for Forms 790 and 795 is granted under 20 CFR 653.500.<sup>7</sup>

***“Employers already submit information related to the different crops or agricultural activities that workers are expected to perform, including appropriate wage offer(s),...”<sup>8</sup>***

- To meet the basic premise of the of the Paperwork Reduction Act (PRA) minimize the paperwork burden for individuals, small businesses... State, local and tribal governments, and other persons...”<sup>9</sup> the agency should assure only required information is mandated on the Forms. To expand a statutory or regulatory requirement through an Information Collection Request (ICR) in contrary to the express requirement of the PRA. For example, ARS requirement of “the crop” and “the nature of the work”<sup>10</sup> has been to include “Description of the job duties or services to be performed.” This expansion beyond statutory/regulatory requirement(s) through the ICR process should be eliminated and additional “information requirements” should be added through the regulatory process<sup>11</sup> or through statutory change.

***“OFLC issues either a Notice of Deficiency (NOD) or Notice of Acceptance (NOA). Where deficiencies in the application are discovered, the NOD provides the employer with an opportunity to correct the deficiencies or file an appeal with the Department’s Administrative Law Judge.”<sup>12</sup>***

- We concur with the department’s assessment indicating a reduction in redundant data “facilitates a more efficient and consistent review of the employer’s application and reduces the incidence of OFLC issuing a NOD to request missing documentation or corrections of errors or inaccuracies.”
- We recommend a review of statutory/regulatory data authorization for each data point during this process.
- Electronic filing, NOD and NOA communications could significantly reduce program costs to state/federal agencies, attorneys/agents and agricultural employers.

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<sup>5</sup> Supporting Statement, OMB Control No. 1205-0466, July 2018 pg. 1 - Proposing to replace the existing Form ETA-790 with a new Form ETA-790/790A, H-2A Agricultural Clearance Order...

<sup>6</sup> 20 CFR 655.103(b) defines “Job Order” as: The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter and intra-state job clearance systems based on the employer’s Agricultural and Food Processing Clearance Order (Form ETA-790), as submitted to the SWA.

<sup>7</sup> OMB Control No. 1205-0134; Supporting Statement, pg. 1

<sup>8</sup> Supporting Statement, OMB Control No. 1205-0466, July 2018, pg. 7

<sup>9</sup> 44 U.S. Code § 3501(1)

<sup>10</sup> §653.501(c)(1)(iv)

<sup>11</sup> Administrative Procedure Act

<sup>12</sup> Supporting Statement, OMB Control No. 1205-0466, July 2018 pg. 8

***Form 790-A “required information” as indicated by the use of an “\*” on the proposed Form 790-A and proposed instructions.***

**Section A**

- Sec. A.1. - 20 CFR 653.501 contains requirements and does not require "job title" but does require “nature of the work.” Entering the ONET/OES title should meet the both Sec. A.1. and A.7a./7b.
- Sec. A.2. – Neither 20 CFR 653 or 20 CFR 655 require the total number of workers needed. This information should be limited to the number of workers sought through the ARS system.
- Sec. A.3. and A.4. – 20 CFR 653 provides an exception from the period of employment; “the exclusive manner in which the guarantee may be abated due to weather conditions or other acts of God beyond the employer's control.” 20 CFR 655.122(o) speaks only to “contract impossibility.” The Form should allow/include the allowance for abatement under 20 CFR 653.
- Sec. A.5. – 20 CFR 653 requires “the anticipated number of days and hours per week for which work will be available.” 20 CFR 655.122(i) does not require individual daily hours but requires that “the work hours must be offered during the work period specified in the work contract”. The Form requirement should be limited to “the anticipated number of days and hours per week.”
- Sec. A.6. – There is no requirement for this data point. It is also misleading as starting time, in particular, may be depended upon many factors including day light,<sup>13</sup> dew point, rain, heat or cold. This data point can increase worker safety risks by “requiring” work during inclement weather periods. While the Instructions indicate “normally be offered” the department guidance has been work outside of the listed time(s) would not be required and work refusal could not be subject to disciplinary action.
- Sec. A.7a. and 7b. – This information is duplicative as it is captured under the ONET/OES description listed in Sec. A.1. Listing of “all job duties” is not a requirement of 20 CFR 653 or 20 CFR 655. An acknowledgement of the definition of “agricultural labor”<sup>14</sup> should be sufficient. As the ONET/OES codes are inclusive the applicant might be given an opportunity to exclude “duties or services” rather than including “all job duties.”
- Sec. A.7c. through 7f. – This group appears to limit or eliminate the use of “base rates and bonuses” and bonuses that are expressly allowed under 20 CFR 653.501(c)(2)(i). 20 CFR 655.122(l) allows this pay structure provided the employer guarantees the AEW or applicable rate.
- Sec. A.11. – Requiring “all deduction(s) from the worker’s paycheck the employer is required to make by law” is redundant and may not be determinable at the time of application. In addition, the deductions “required by law” within income tax alone vary between U.S workers,<sup>15</sup> non-

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<sup>13</sup> Sunrise varies in Grand Rapids Michigan from approximately 6:00 a.m. to 8:15 a.m.

<https://www.timeanddate.com/sun/usa/grand-rapids?month=5&year=2018>

<sup>14</sup> 20 CFR 655.103(c)

<sup>15</sup> IRS Form 1040 <https://www.irs.gov/pub/irs-pdf/i1040gi.pdf>

resident aliens,<sup>16</sup> and H-2A Visa workers.<sup>17</sup> This requirement should be assumed to be the responsibility of the employee.

## Section B

- Minimum Job Qualifications/Requirements are specified in 20 CFR 653 and the 20 CFR 655.122 provision applies only when the qualification is not "bona fide and "consistent".
- Sec. B.1. – This information is not required and if added should include the “§.”
- Sec. B.2. and B.3. – These are not required by 20 CFR 653. 20 CFR 655.122 (b) may require, but only for those areas that are not "bona fide and "consistent". O\*NET 45-2092.02 indicates<sup>18</sup>: “Some of these occupations may require a high school diploma or GED certificate.” The “number of months required” is not required. Essentially allowing for only affirmative answers is an invalid description of the qualifications.

Even with the Instructions descriptor of “experience required to perform the agricultural services or labor” maybe/is misleading to the job applicant. As, under the O\*NET for example, “farmworkers” may:

- Set up and operate irrigation equipment.
- Operate tractors, tractor-drawn machinery, and self-propelled machinery to plow, harrow and fertilize soil, or to plant, cultivate, spray and harvest crops.
- Repair and maintain farm vehicles, implements, and mechanical equipment.
- Harvest fruits and vegetables by hand.
- Apply pesticides, herbicides or fertilizers to crops.

Not all workers requested in an application will have the same responsibility, hence the same “qualifications.”

- Sec. B.4. and B.6. – Unless these sections could be included under the "unlawful discriminatory specification" or "prevailing working conditions" clauses, this section's information is not required. Requiring regurgitation of ONET/OES listed activities/qualifications should fall under the PRA’s desire to reduce/eliminate duplication. Flexibility is necessary regarding qualifications for particular activities that exceed or differ from ONET/OES. USDOL enforcement has made it clear “if it’s not listed, it can’t be done” leading to ever increasing application length and complexity. The proposed Instructions for item 4 provides: “...requirements that are normally required to perform the agricultural services or labor...” should be modified to encompass those activities beyond the ONET/OES and/or those activities/qualifications excluded from the list.

## Section C

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<sup>16</sup> IRS Publication 515 <https://www.irs.gov/pub/irs-pdf/p515.pdf>

<sup>17</sup> Foreign Agricultural Workers on H-2A Visas <https://www.irs.gov/individuals/international-taxpayers/foreign-agricultural-workers>

<sup>18</sup> <https://www.onetonline.org/link/summary/45-2092.02>

- 655.121(a) requires the "area of intended employment" not the specific locations. 20 CFR 655.103 defines the area as "within normal commuting distance" or within a "Metropolitan Statistical Area." The use of these terms should be sufficient for application purposes.

#### Section D – F

- As the federal register notice<sup>19 20</sup> suggests, a combined 790/790A, sections D-F are not required under 20 CFR 653 and should be identified as such for agricultural employers using the Agricultural Recruitment System.

#### *Cost Estimates*

***Based on recent program experience, the Department estimates it will receive, on average, approximately 8,783 Form ETA-9142A submissions and 8,783 Form ETA -790/790A submissions for the H-2A program.***

- Based on current year data<sup>21</sup> indicating 11,806 applications received by the Department, projecting 8,783 will lead to significant staffing/funding short falls within the foreign certification program and at SWAs. With unemployment rates at all-time lows<sup>22</sup> within the "normal" agricultural workforce, an aging<sup>23</sup> U.S. farmworker population, and robust immigration related enforcement strategies it is unlikely to see a reduction in the annual applications from 2018 levels and continued increases of 10%-20% per year should be projected. An average respondent level might be more reasonable at 12,986 for the H-2A program.
- A total respondent number of 12,986 multiplied by the Departments estimate Form development time of 5.96 hours<sup>24</sup> would indicate a respondent burden of \$6,576,427. This number does not appear to include NOD response time and may significantly underestimate the time in developing the application (such as determining address/coordinates of each work location).
- While relatively limited an estimate should be included for ARS Clearance Order applications in addition to "H-2A submissions."

We appreciate this opportunity to comment for the record and urge the Department to modify its proposal along the lines we recommend.

Sincerely,

Michigan Farm Bureau

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<sup>19</sup> Federal Register / Vol. 83, No. 207 page 53911

<sup>20</sup> Supporting Statement, OMB Control No. 1205-0466, July 2018 page 1

<sup>21</sup> H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2018, ETA

<sup>22</sup> BLS Series ID LNS14000009

<sup>23</sup> National Agricultural Worker Surveys years 1998 and 2014 indicated 33% of the workforce were 35 years of age or older increasing to 56% in 2014 and those 55 and older increased from 1% to 14% respectively.

<sup>24</sup> Extrapolated from Supporting Statement, OMB Control No. 1205-0466, July 2018 pg. 14