December 24, 2018

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

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: Proposed Forms ETA-9142A; ETA-9142A, Appendix A; and ETA-790/790A and Addenda--Document Number: 2018-23276

Dear Mr. Thompson:

Farmworker Justice and the undersigned groups submit these comments regarding the Department of Labor's revision of Form ETA-9142A; Form ETA-9142A, Appendix A and proposal to implement a revised agricultural clearance order, Form ETA-790/790A, and addenda, that will be integrated with the Form ETA-9142A, as proposed in the October 25, 2018 Federal Register notice at 83 FR 53911. In general, regarding the revision of the forms, we note that with the consolidation of some of the information, it is important to ensure that both the Form ETA-790/790A and the Form ETA-9142A, along with Appendix A and any addenda, be made available via the Public Job Registry to ensure that all of the job and employer information in both forms is accessible to potential workers, including farmworkers and their advocates. Further, we write specifically to express our opposition to some of the proposed changes in Form ETA-9142A and Form ETA-790A and also to note our support for some of the proposed changes in the proposed forms. Please see the discussion below for more detail. Failure to adequately address the concerns we raise will undermine the statutory mandate of protecting the jobs, wages, and working conditions of U.S. workers prior to certifying an employer for H-2A workers. Moreover, failure to follow our recommendations below, including restoring the noted language in the current forms would be arbitrary and capricious. Finally, we recommend including some additional provisions and questions to strengthen the DOL's ability to meet its obligations under the INA statute regarding its duties to protect the jobs, wages, and working conditions of U.S. workers prior to certifying employers, as well as to help prevent the exploitation of H-2A workers.

Farmworker Justice is a national advocacy organization that seeks to improve the wages, working, and living conditions of all farmworkers. Specifically, with respect to the operation of the H-2A temporary foreign agricultural worker program, we strive to ensure implementation of the statutory purpose of ensuring that U.S. workers are not displaced and do not suffer adverse effects in their wages or working conditions related to the hiring of H-2A temporary foreign workers. We also seek to ensure that the H-2A program provides basic labor protections for both foreign H-2A workers and U.S. workers, and that those labor protections are enforced for both U.S. and foreign workers.

The other signatories to these comments are organizations that provide legal and other services to migrant farmworkers and that have an interest in, and represent or serve clients who have an interest in ensuring that growers and the federal and state governments comply with their legal obligations with respect to the H-2A program.

Revisions of proposed Forms ETA-9142A; ETA-9142A, Appendix A; and ETA-790/790A and Addenda that we oppose and recommendations for improvements

The proposed Forms ETA-790/790A and ETA-9142A have omitted and changed several questions and sections of information that are included on the current forms. The omissions and changes to these questions and sections will harm U.S. workers and H-2A workers by failing to adequately inform them of applicable wages and working conditions, thereby making it less likely they would seek these available positions and, in certain situations, impacting their ability to seek relief when there are violations of the H-2A program protections. Moreover, the omissions and changes to these questions and sections will make it more difficult for the DOL and SWAs to protect the jobs, wages, and working conditions of U.S. workers

Removal of question regarding overtime pay from the current Form ETA-9142A in Section G, Item 1a

One question that appears to have been deleted from the proposed ETA Forms 9142A and 790A is a question regarding the rate of overtime pay, which is currently included on Form ETA-9142A. While many agricultural jobs are not eligible for overtime pay, other H-2A jobs would be required to provide overtime, and it is important for the job order to provide that information to potentially interested U.S. workers as that may impact their interest in the position—that is, jobs that pay overtime will be more attractive to U.S. workers than jobs that do not. Moreover, some state laws do require overtime pay for farmworkers, including in California, where a recently passed law will be phasing in overtime pay for farmworkers beginning in 2019.

Omission of disclosures of the three-quarters guarantee and home-bound transportation from proposed Form ETA-790A

Important protections for U.S. and H-2A workers are, except as limited by subsequent H-2A employment or contract impossibility, the three-quarters guarantee and the right of a worker who has completed the contract or been terminated without cause to have transportation and daily subsistence costs from the place of employment to the place from which the worker came to work for the employer. *See* 29 C.F.R. § 655.122(h)(2), (i), (n), and (o). These contractual provisions would be attractive to U.S. workers and are important protections for H-2A workers to be aware of. Accordingly, the Form ETA-790A should somewhere briefly state these rights, perhaps as part of the introductory statements in Section A Item 10, Section F Item 2, and/or Section H Item 1.

Omission of workweek and pay period designations from proposed Form ETA-790A, Item 9

One of the most frequent complaints the signatories to this letter receive from workers is that they are not being paid timely and don't know when they are supposed to be paid. This is important information for the worker to know whether he is being paid the FLSA minimum

wage or another applicable H-2A wage rate. It is also necessary for the worker to ascertain whether he is earning at least these wage rates when being paid on a piece rate.

Making these determinations is extraordinarily difficult when the worker does not know what the workweek is or when he is supposed to be paid. This situation is exacerbated by the common phenomenon of employers not paying their H-2A workers on regular pay dates for regular pay periods—for example, when one check is for three days' work, and another check, not paid for a a month, is for eight days' work.

The FLSA requires that a FLSA-covered employer designate a seven-day period as the workweek for FLSA compliance purposes. See 29 C.F.R. § 778.105. The H-2A regulations assume the existence of a normal workweek, see 20 C.F.R. § 655.122(i)(1)(iii). They also require the employer to keep records relating to its pay period, see 20 C.F.R. § 655.122(j)(1), and to furnish the worker with hours and earnings records showing beginning and ending dates of the pay period, 20 C.F.R. § 655.122(k)(7). There is no good reason not to furnish this information on the clearance order that is used to recruit, and that sets forth the terms of the contract for workers.

Removal of specific wage deductions from current Form ETA-790A, Item 17
The proposed Form ETA-790A no longer includes a specific breakdown of wage deductions. While the proposed ETA-790A does include Item A.11 asking for "all deductions from pay and, if known, the amount(s)," the format on the current form makes it more likely employers/agents will provide consistent and specific information on all of the listed items. One needed improvement to the check-box format of the current Form 790 are modifications to distinguish between deductions from the pay of H-2A workers versus deductions from the pay of U.S. workers. The former, so long as they furnish a taxpayer identification number to the grower, are exempt from withholding for federal income tax and the employee's share of federal payroll taxes, whereas the wages of the latter are subject to such withholding.

Removal of Items 20-25 from the current Form ETA-790A
Specifically, the questions that have been omitted include the following: anticipated range of hours for different seasonal activities; whether collect calls are accepted; whether it is the prevailing practice to use farm labor contractors to recruit, supervise, transport, house and/or pay workers for these crop activities and if so, what is the farm labor contractor wage for each activity; whether workers are covered by unemployment insurance and workers' compensation; whether tools, supplies, and equipment are provided at no charge to the workers; any arrangements made with establishment owners or agents for payment of a commission or other benefits for sales made to workers; whether there is any strike, work stoppage, slowdown, or interruption of operation by employees at place where workers will be employed. Some of these issues are covered in the assurances and declarations on the proposed Forms ETA-9142A, Appendix A and 790A and the inclusion therein is integral to ensuring employer compliance with these key terms and benefits. However, the inclusion of these questions in the current ETA-790 job order itself, along with other specific information about wages and working conditions, makes clear to workers whether these benefits are being provided. For example, U.S. workers who are in states where workers' compensation is not provided to agricultural workers may not otherwise realize that they will be eligible for workers' compensation at jobs with H-2A employers. Moreover, some of these points, such as whether there are any arrangements made

with establishment owners or agents for payment of a commission or other benefits for sales made to workers, are not included in the assurances and can be critically important for workers to understand what potential charges they may face in the employment. Our experience is that such "arrangements" are not consistently disclosed to workers. While the proposed Form 790A does include section "H. Other Material Terms and Conditions of the Job Offer," the breadth and vagueness of the question makes it unlikely that all of these specific questions and benefits will be uniformly addressed by employers for potential applicants.

Regarding the removal of Question 20 from the Form ETA-790A—whether it is prevailing practice to use farm labor contractors to recruit, supervise, transport, house and/or pay workers for these crop activities and if so, what is the farm labor contractor wage for each activity—we adopt the comments submitted from Florida Rural Legal Services (FRLS) and incorporate portions of the comments here as well, adding to it the experiences in other states.

Farm labor contractors (FLCs) have long played a central role in the farm labor market in Florida, Texas, and other states. 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.[1]

We strongly oppose removal of Item 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 in other states, including much of Georgia, South Carolina, North Carolina, Virginia and Maryland, and South Texas). This notice to employers is essential given that the Department the current regulations do not include 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, as can be readily confirmed if the Department consults with local job

[1] 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 Fed. Reg. 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..."

services personnel in sending areas, 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 states such as Florida and in Texas (even in areas, such as South Texas, with no dearth of U.S. workers seeking agricultural jobs), many local farmworkers have witnessed job opportunities in their field dwindle as more and more employers participate in the H-2A program.

Removal of Item 20 from the Form ETA 790A will also make it difficult, if not impossible, for any 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 Item 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, Texas, and other traditional sending states.

Changes to current ETA Form 790, Item 16, regarding job experience, training and working conditions

Another section changed in the proposed Form ETA-790A is section B, which includes the questions regarding job experience, training, and working conditions found in question 16 on the current Form ETA-790. These questions are critically important to the recruitment of U.S. workers as they set forth requirements for the job and share important details about the working conditions. Without accurate information, U.S. workers might not understand their qualifications for the job or may mistakenly believe themselves unable to perform the work, hindering their desire and understanding of their eligibility to apply for these jobs. Thus, failure to include these job requirements and conditions impedes the DOL's ability to properly certify the employer as able to hire H-2A workers, as required under the INA, because U.S. workers might be available given proper information. Furthermore, in Item 1, DOL should remove the options for associate's, bachelor's, master's or higher, and other specialized (e.g., J.D., M.D.) degrees as supposed educational minimums. If an H-2A position requires a law degree or a doctorate, it shouldn't be a job for which an H-2A visa is available.

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

The proposed Form ETA-790A also fails to include the job condition that "OT/holiday is not mandatory," which is included under Item 16.2 on the current form ETA-790A. Again, for domestic applicants, full information about the job requirements and conditions is integral to an ability to assess whether the job is suitable. Failure to provide this information to potential applicants makes it impossible for the DOL to accurately certify whether there is in fact a

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

One additional change to the questions regarding work education, training, and experience on the proposed Form ETA-790A is the framing of the questions regarding experience and training. On the current ETA-9142A, the questions regarding minimum education, training and whether employment experience is required do not presume that experience, education, and training are required. The framing of the initial question asks whether such experience, training, or education is required, followed by a question asking for more detail if the answer is in the affirmative. In contrast, the proposed form ETA-790A creates a presumption that these jobs do require training and work experience by eliminating the initial question asking if such training or experience are required, and instead asking the "number of months required."

In addition to the points above regarding the importance of accurate information to the ability of U.S. workers to assess their interest and eligibility for a job, the framing of these questions is also important to prevent the displacement of U.S. workers. Despite H-2A program requirements aimed at protecting U.S. workers, displacement of U.S. farmworkers remains a problem in the program.[2] Over the past several years, legal services organizations have seen an increase in clients, administrative agency proceedings (including with DOJ's Immigrant and Employee Rights Section), and lawsuits involving U.S. workers whom growers discouraged from taking jobs later filled by H-2A workers. Once employers invest in the H-2A program, they prefer the control they have over H-2A workers to U.S. farmworkers. One way that employers avoid hiring U.S. workers is through the use of particular job terms and requirements to deter U.S. workers from applying for H-2A jobs or disqualify them from obtaining the job. Such job terms and requirements include experience requirements, "verifiable references," and criminal background checks—"requirements" that, in the experience of Farmworker Justice and the other signatories to these comments, are almost never imposed on H-2A workers. Under H-2A regulations, to be allowed in the job order, job qualifications must be "bona fide" and "normal and accepted" qualifications required by employers that do not use H-2A workers in the same or similar occupations or crops in the area of intended employment. Thus, the framing of questions regarding working conditions and job qualifications is key to protecting U.S. workers' access to employment opportunities, particularly in light of this Administration's commitment to providing maximum job opportunities to U.S. workers and to reducing employer fraud in nonimmigrant worker visa programs. See also the discussion in the comments to the H-2B forms, 83 Fed. Reg. 45,469 (September 7, 2018), submitted by Justice at Work, along with

[2] *See* the article, "All you Americans are Fired," Buzzfeed, Jessica Garrison, Ken Bensinger, Jeremy Singer-Vine, December 1, 2015 available at https://www.buzzfeednews.com/article/jessicagarrison/all-you-americans-are-fired#.qq6KPEOgv.

Farmworker Justice and the Low Wage Worker Network, which we incorporate by reference as if fully set forth herein.

Finally, Form ETA-790A, particularly Sections B and I, should require employers to assure and certify that any wages, piece rates, productivity standards, and other job requirements comply with applicable DOL guidance and standards. Too many clearance orders include spurious job requirements the purpose of which is to deter U.S. workers and to make it easy to terminate U.S. and H-2A workers for pretextual reasons. As the Department is aware, and as is demonstrated by publicly-available information on the Department's website, there have been very few surveys of prevailing hourly wage or piece rates or of job requirements over the past decade, along with limited oversight of these requirements. Any prevailing piece-rate survey for a particular crop activity in a particular state, for example, is the exception to the rule.

To make effective these rights of H-2A workers and workers in corresponding employment, the ETA-790A should require the employer to certify that any job requirement or qualification, such as an educational minimum or passing a drug test, is "normal and accepted" within the meaning of 20 C.F.R. § 655.122(b) and is "not less than the prevailing wages and working conditions among similarly employed farmworkers in the area of intended employment" within the meaning of 20 C.F.R. § 653.501(c)(2)(i). In addition, the employer should be required to certify that any offered piece rate is the "prevailing" piece rate as defined by 20 C.F.R. § 655.122(l)(2)(ii) using the wage-finding methodology required by ETA Handbook 385. The cursory reference to the "prevailing piece rate" in Item 11 of Section I of Form ETA-790A is insufficient to convey the gravity of an employer's duty to comply with these obligations.

Incomplete specification of hours and work schedule, proposed Form ETA-790A, Section A, Items 5 and 6 and Addendum A

Many, if not most, H-2A employers employ workers in multiple crop or agricultural activities, such as tobacco cultivation being combined with sod harvesting. Other crops or agricultural activities, such as tobacco in Kentucky and Tennessee, employ workers in several phases of a crop's cultivation. These crop activities and phases often have radically different labor needs. For example, in tobacco in the Southeast, our experience is that, when planting and topping tobacco in the spring and early summer, workers typically work only five to six days per week, for six to eight hours per day. Later in the cultivation cycle, however, such as in the hanging and stripping phases, workers typically work much longer hours—late into the night, up to 12 to 14 hours per day, up to seven days per week.

In other words, the estimates of days and hours of work per week (Form ETA-790A, Item 5) and expected hourly work schedule (Item 6) vary widely for some crop activities and for different phases of the growing/harvesting season of a particular crop. Items 5 and 6 do not contemplate this variation and fail to adequately inform workers of possible schedule variations. Typically, this results in significant understating of the number of hours of expected work under the three-quarters guarantee. It also inhibits U.S. workers from making decisions about employment based on full and transparent information about the material terms of the job. DOL itself can verify that this is taking place by comparing the hours and days worked on payroll information furnished to it by H-2A employers in audits with the hours and days stated on the corresponding clearance order.

This shortcoming can be remedied by having the ETA-790A state, either in Items 5 or 6, and in Addendum A for additional crop or agricultural activities, the anticipated days and hours of work and hourly work schedule for each crop, agricultural activity, or phase of crop production, where different production phases have different labor needs that are encompassed in one clearance order. SWAs and USDA's Agricultural Extension Service should be in a position to furnish DOL with the information necessary to make these determinations.

Incomplete statement of other material terms and conditions of the job offer, proposed Form ETA-790A, Section H, Item 1

The item proposed that the employer "[s]pecify any other material terms, conditions, and benefits (monetary and non-monetary) that will be provided by the employer under this job opportunity." An H-2A employer is forbidden from imposing job terms or conditions that are inconsistent with the H-2A statutes and regulations. Accordingly, we believe that it will be more clear and accurate for U.S. workers if this item concludes with "that are not inconsistent with H-2A program regulations" or words to that effect.

Need for more comprehensive information on business entities acting as employers, proposed Forms ETA-790, Section II, Items 1 and 2, and ETA-9142A, Section B, Items 1 and 2

These items require the employer to identify its legal business name and its trade name. Experience shows that this information is insufficient to protect workers' rights. Too many employers operate under dissolved, inactive, or defunct corporations, limited liability corporations, and limited liability partnerships; the practice is rampant. Unfortunately, the OFLC and the SWAs, rarely, if ever, seek to verify that such business entities are in good standing under state corporation laws.

This is deleterious to workers, and it is unacceptable. When an employer chooses to recruit and employ H-2A workers through a business entity that is dissolved or not in good standing, it often means that the entity lacks income and assets sufficient to pay wages owed to workers, back wages or civil monetary penalties assessed by the Department, or judgments obtained by the workers in civil litigation. Furthermore, an employer who lacks the diligence to maintain his business entity in good standing with the state should not be permitted to undertake the serious obligations associated with recruiting and employing H-2A workers.

Accordingly, checkboxes should be added to these items requiring the employer to state the form of corporate business organization, if applicable (e.g., corporation, LLC, LLP) and to declare that the business organization is active and in good standing with the state.

Omission from Proposed Form ETA-9142A of Question C, Items 14-16, on current ETA-9142A

The current Form 9142A includes questions addressing the number of non-family full-time equivalent employees, annual gross revenue, and year established that have been removed from the proposed Form ETA-9142A and are also not included on the proposed Form ETA-790A. Having answers to these questions would be material for DOL Wage and Hour enforcement, including jurisdiction under the FLSA. The year the business was established is disclosed by

DOL on iCERT and helps to verify if the employer is an established business. These items must be included on the Proposed Form ETA-9142A.

Revisions Needed to Current Form 9142A-Appendix A and Proposed ETA-790A language regarding housing for workers

The language in the current and proposed Appendix A of Form ETA-1942/Form ETA-1942A states that the employer must "provide for or secure housing for workers who are not reasonably able to return to their residence at the end of the work day," and the proposed ETA-790A states that the employer must "agree to provide for or secure housing for workers (H-2A workers and those workers in corresponding employment) who are not reasonably able to return to their residence at the end of the work day." We support the inclusion of the employer's housing obligations under the H-2A program in the assurances/declaration sections of the ETA Forms 790A and 9142A; however, the language included in both forms does not clearly reflect the employer's obligation to provide housing to all H-2A workers as required under the H-2A regulations. We believe this language should be clarified so that it is not misinterpreted by H-2A workers or employers.

Under the H-2A regulations, "[t]he employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day." 29 C.F.R. § 655.122(d). The phrase "who are not reasonably able to return to their residence within the same day" applies only to "those workers in corresponding employment." *All* H-2A workers are eligible for housing, regardless of whether they are "reasonably able to return to their residence within the same day." Failing to properly place the modifier of "who are not reasonably able to return to their residence within the same day" may improperly lead H-2A workers and employers to believe that not all H-2A workers are eligible for housing, as required by statute and the H-2A regulations. Specifically, based on the language in the assurances, H-2A workers and employers may not understand that even those H-2A workers who are able to return to their residence within the same day are entitled to housing.

Even for H-2A workers who live near the Mexican border, there are many barriers that may cause them to prefer to live in employer-provided housing, including the time and money they would have to spend crossing the border each day. The border crossing points are highly inefficient and burdensome to farmworkers. Workers would have to get up long before dawn to make their way to a border crossing check point where they might have to wait for hours to cross. Once across the border they might have to pay "raiteros" to transport them to the job site, which might be hours away.

Moreover, some workers working near the border may be pressured into forgoing housing even when they do not actually live near the border or have housing. Without housing, many workers could end up in substandard housing or homeless, sleeping on the streets or in fields. An article about homeless migrant workers in El Paso highlights sanitation problems resulting from workers not having homes or access to toilets.[3] We already have an unsanctioned version of this. For more than two decades, U.S. farmworkers have slept on the streets of El Paso and traveled

[3] *Feces and Urine Problem in Downtown El Paso,* KTSM.com, May 25, 2011, http://www.ktsm.com/news/feces-urine-problem-in-downtown-el-paso. The experience of legal services advocates in El Paso is that this problem remains pervasive in 2018.

several hours on buses to the chili pepper fields of Las Cruces, New Mexico, where there is no housing. A government-sponsored visa program should not allow such misery. Moreover, U.S. workers should not have to compete against foreign workers who are so desperate that they will accept almost any conditions and then be too afraid of retaliation in the form of denial of a guestworker visa to demand improvements. The ETA Form 9142A Appendix A and 790A declarations/assurances should clearly and accurately state employers' housing obligations.

Requiring that attorneys declare that they are MSPA-certified FLCs, Form ETA-9142A, Section D, Item 21

Item 21 of Section D of new Form ETA-9142A requires an H-2A agent to attach his FLC certificate of registration under the MSPA identifying the farm labor contracting activities he is authorized to perform. As the Department knows from its disclosure data, many agents of H-2A employers are in fact attorneys. Many, if not all, of those attorneys engage in farm labor contracting activities as defined by the MSPA. Indeed, it is hard to imagine how a diligent agent for an employer seeking H-2A workers could not engage in the farm labor contracting activity of recruiting without violating the recruitment requirements of the H-2A program. Attorneys, therefore, should also be required to attach a copy of their FLC certificate of registration to Form ETA-9142A.

Additional Employer Declaration regarding employer financial obligations for proposed Form ETA-9142A and Appendix A

Older versions of the Form ETA-9142 included an assurance that the employer has enough funds available to pay the wage or salary offered to the alien. The current and proposed Form 9142A-Appendix A both include a similar assurance for H-2ALCs, namely that the H-2ALC "is able to provide proof of its ability to discharge financial obligations under the H-2A program." We urge the DOL to include a similar assurance for other employers utilizing the H-2A program. Likewise, the assurance that the employer has paid all wages due to H-2A workers and U.S. workers similarly employed in past years should be included in the employer declarations. DOL has to prioritize its enforcement resources and should be able to rely upon such returning employer assurances. A false certification about such payments would appropriately be a basis for DOL to obtain unpaid wages due for past years if subsequently discovered by DOL. In addition, due to the documented prevalence of human trafficking and forced labor in the H-2A program, which is consistent with our experience of H-2A lawsuits involving forced labor allegations, employers should be required to assure that "In compliance with the William Wilberforce Trafficking Victims Protection Reauthorization Act, the employer will not hold or confiscate workers' passports, visas, or other immigration documents. 20 CFR 655.135(e)." Identical wording should be added to the employer declarations.

Addition of a question on Form ETA-9142A providing greater transparency on international recruiters

We recommend that DOL include on the new Form ETA-9142A a question requiring the employer, or its attorney or agent, as applicable, to provide the identity and address of any recruiter or agent that they have hired, who has received compensation, and/or who is reasonably known by the employer, or its attorney, agent, or recruiter to be helping in efforts to identify, recruit or hire prospective foreign workers for the H-2A job opportunities. This disclosure should also include the identity and location of all persons and entities hired by, working for, or

reasonably known by the agent or recruiter to be helping the recruiter or agent, and any of the agents or employees of those persons and entities, to identify, recruit or hire prospective foreign workers for the H-2A job opportunities. The addition of this question is necessary to protect H-2A workers from unlawful fees and also to provide information that will help ensure that DOL is fulfilling its statutory responsibilities in the H-2A certification process, specifically, that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."[4]

By including a question that will improve transparency in the recruitment process, the DOL will be taking a step towards improving oversight and enforcement of its prohibition against recruitment fees for the benefit of both U.S. and H-2A workers. Our experience continues to be that the imposition of illegal fees is a common problem in the H-2A program, the regulatory prohibitions notwithstanding. The ability to enforce the prohibition of recruitment fees is critically important to ensuring that the wages and working conditions of U.S. workers are not adversely impacted. When workers suffer abuses such as recruitment fees during the recruitment process, they arrive in the United States indebted and desperate to work. This desperation, coupled with their dependence on the employer who brought them here, makes workers vulnerable to abuse, particularly to forced labor schemes in violation of the TVPRA. To keep their employment and return in the following season, H-2A workers must hope that their employer requests a new visa for them. Consequently, H-2A workers rarely complain about their treatment and are known for their high productivity. This in turn impacts U.S. workers, who often are unwelcome at H-2A employers because they have the freedom to switch jobs and are more likely to challenge unfair or illegal conduct.

Increased enforcement of the ban on recruitment fees is greatly needed. Including the proposed question requesting information about the recruitment process provides a step towards increased transparency and a clear message to employers that they must have knowledge of the process leading to the recruitment of their workers and must take responsibility to ensure their H-2A workforce is not being charged prohibited fees.

Furthermore, attorneys and agents should affirmatively be required to assure that they, or any persons used by them to recruit H-2A workers, have complied with the no-fees requirements of 29 C.F.R. § 655.135(j) and (k). Again, it is our experience, based on litigation against H-2A employers for violations of the H-2A program rules, that employers and attorneys/agents typically proclaim their ignorance of illegal fees charged during recruitment and point their fingers at each other as to who is responsible. Agents/attorneys also routinely distance themselves from and disclaim knowledge of the practices of recruitment and consular processing providers abroad who charge such fees. Adding this assurance to the ETA-790A will highlight the importance to attorneys/agents of compliance with their own responsibilities under the H-2A program. In addition, the language referencing agents and indirect employment should be added to the declaration in Appendix A, ETA- 9142A ("…(or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly…"

[4] 8 USC §1188(a)(1)(B).

Addition of Employer Declaration to Proposed Form ETA-9142A, Appendix A, to address discrimination during recruitment of H-2A Workers

Workers' experiences during recruitment abroad have a substantial impact on their earnings and conditions in the U.S., as well as on the U.S. workers in the labor market where the foreign workers are employed. As demonstrated by available statistics, discrimination on the basis of protected characteristics such as gender and age routinely occur in the H-2A program. Since the Civil Rights Act of 1964 and the Age Discrimination Employment Act of 1967, employers in the U.S. have been forbidden to use race, color, religion, sex, national origin, and age as factors in hiring practices. Yet the DOL refuses to investigate and curb such abuses that occur during recruitment abroad. Consequently, H-2A employers' recruiters often search out a very specific demographic, thought to be perfect for farm work: young single men without family in the United States. Workers who don't fit into this category, both abroad and in the U.S., are impacted by this discrimination. For example, U.S. workers who are women, who are older than the average H-2A worker, or who otherwise don't fit into the "ideal" demographic may face discrimination by these H-2A employers. Moreover, although women constitute more than 20% of farmworkers, there are very few women in the H-2A program. The EEOC has taken steps to assert the applicability of Title VII and other EEO laws to recruitment abroad, and DOL must do the same. DOL can remind employers of their obligations under EEO laws by including language in the proposed Form ETA-9142A-Appendix A to that effect. We recommend adding language such as "and employment-related EEO law" to the declaration in Section B, item (9)(i).

Clarification of Proposed Form ETA-9142A, Appendix A, Item 15's statement of worker's obligation to return to his country of origin

We are concerned that Item 15 of the employer declaration in Proposed Appendix A to Form ETA-9142A oversimplifies a worker's duty to return to his country of origin when his employment ends and, thus, of the employer's duty to so inform the worker. The item does not sufficiently account for grace periods that workers may have to depart the country. We are increasingly finding that growers are terminating H-2A workers and then immediately calling ICE to have the workers detained and deported. DOL should consult with the Department of Homeland Security to craft simple but accurate language.

Questions and provisions of proposed Forms ETA-9142A; ETA-9142A, Appendix A; and ETA-790/790A and Addenda that we support, with recommendations for strengthening some of these provisions

The proposed Forms ETA-790A includes more specific and detailed conditions of employment and assurances for the H-2A agricultural clearance order. Many of the employer's obligations under the H-2A program with regard to the workers' wages and working conditions are now included under this section. Moreover, the employer must now certify knowledge and compliance with the applicable laws and conditions of employment under penalty of perjury. This additional requirement to certify compliance with applicable laws and conditions of employment under penalty of perjury sends an important message to employers regarding their responsibilities and obligations under the law. Moreover, it provides workers an important detailed description of the terms and conditions of their employment— a document that they can turn to for enforcement if there are violations of those guarantees. Also welcome is

the new declaration on proposed Form ETA-9142A, Appendix A, number 6, that the employer "has read" and "understands" the conditions of employment and assurances on Forms ETA-790A and ETA-9142A. Our experience, based on many depositions of growers and farm labor contractors in lawsuits for misconduct in relation to the H-2A program, is that they all too often admit not having read their H-2A paperwork and point their fingers at their H-2A agents, whom they thought "would take care of all that."

Section A, Item 2 in Proposed Form ETA-790A
The proposed Form ETA-790A includes some additional new questions that provide important information about the job opportunity and conditions, as well as the employer workforce. For example, the form asks for both the total number of workers needed and the total number of H-2A as opposed to just the total number of workers requested. This additional detail gives a better understanding of whether the employer also employs domestic workers and how many, or whether the employer is largely dependent on H-2A workers.

Proposed Form ETA-790A, **Section D, Items 7-9 and Addendum B**
In addition, the new form includes helpful additional questions regarding housing, including asking which housing standards are applicable and whether the housing complies with those standards, as well as the total units and occupants of the housing. This provision could be further strengthened by requiring that, for housing to which federal standards apply, the employer state whether the OSHA or the ETA standards apply. The proposed form also includes a new addendum, ETA-790A, Addendum B, that includes a specific section in which employers must provide the location and descriptions for all other housing that will be provided to workers. It is critically important for DOL to ensure that adequate housing is available for all H-2A workers and for eligible U.S. workers. As DOL knows, H-2A workers are sometimes housed in unacceptable and dangerous conditions, such as converted buses or former jails, or motels that lack capacity for the number of workers being housed. Asking employers to provide specific information for each housing unit provides greater clarity about the capacity of the housing and whether it meets applicable housing standards.

The proposed form does, however, exclude a question on the current Form 790 regarding directions to the housing, which we believe should be added back in: the specific request to provide directions to the housing to ensure that the SWA and outreach workers are able to locate the housing. This is important because of the problems of employers submitting phantom "addresses" of housing, such as in the middle of fields, and to moving workers to unapproved, uninspected housing. It is not clear why such phantom housing is not being ferreted out by the SWAs, but we propose requiring employers to list the GPS coordinates of all housing units, which will enable OFLC and the SWAs to engage in spot desk-checks of housing using online GPS mapping services such as Google Earth to ascertain when housing information is incorrect. The GPS coordinates of all work sites should also be required. Again, in our experience, workers are too frequently transported during the work day between fields that are far apart, sometimes requiring journeys of 45 minutes or more, without being compensated for this compensable travel time. Identifying the GPS coordinates of all work sites will make it easier to ascertain when this is taking place.

Proposed Form ETA-790A, Sections E and F

One last area of improvement on the proposed Form ETA-790A that we support is the new set of questions requesting specific information about the transportation and meals to be provided. While transportation is addressed on the current Form ETA-790, the question is a broad one asking for a description of transportation arrangements. The more specific questions on the proposed ETA-790A ensure employers are providing sufficient details regarding their specific transportation arrangements for both transportation from the housing to the workplace and to and from the place from which the workers come to the place of employment. Not only does this detail provide workers and the DOL greater transparency about the relevant working conditions and terms, but it also enables the DOL to ensure that adequate insurance and Farm Labor Contractor licenses are provided where needed. The proposed ETA-790A also includes detailed questions regarding meals for workers, both at the place of employment and during inbound and outbound travel. The inclusion of questions about meals is key for H-2A workers and qualifying U.S. workers to understand their rights and obligations under the H-2A program including what their own financial responsibilities with respect to meals will be. Question 2 in Section F should also add the clarifying phrase, "from the workers' permanent place of residence." See 29 CFR 655.122(h). This makes it clear that the transportation reimbursements or payments normally are from the worker's home town/permanent place of residence, and not from the consular city, such as Monterrey, where the worker obtained the H-2A visa.

Proposed Form ETA- 9142A, Section E, Item 4 and Section F

The proposed form ETA-9142 also includes questions making clear the individual responsibilities that each joint employer has. For example, in section E "Job Opportunity & Supporting Documentation," item 4 prompts the employer to affirm that where the application is an application by joint employers, that the form ETA-790A includes the name, address, total number of workers needed, and crops and agricultural work for each employer that will employ workers. Moreover, in section F, "Declaration of Employer and Attorney/Agent," the form includes a question asking whether in the case of a joint employer, each employer identified as a joint employer on the job order (the Form ETA-790/790A) has read and agreed to all of the applicable terms, assurances, and obligations contained in Appendix A and attached a separate signed and dated copy with the application. The ETA-790 and 790A should also expressly identify each joint employer as a joint employer. Workers employed by joint employers are often transferred among employers without the worker understanding the arrangement; explicitly identifying joint employers will give the workers knowledge they need to vindicate their rights under their contracts.

The issue of responsibility for each joint employer is important to the integrity of the H-2A program. Joint employer liability creates an incentive to ensure that a business wisely selects its labor contractors, as well as its directly-hired supervisors, and ensures compliance with employment laws. In addition to ensuring protections for workers, joint employer liability helps protect law-abiding businesses from unfair competition by unscrupulous employers that keep their labor costs low by using labor contractors that violate employment-related obligations. While we believe the joint employer liability under the H-2A program should be strengthened, it is nonetheless important that the forms highlight the responsibility of each employer as to the assurances provided and to make clear the work provided by each employer.

Proposed Form ETA-9142A, Section E, Items 5-9
The proposed Form ETA-9142A includes a section where H-2ALCs must verify that they have provided the additional information and documents required of H-2ALCs. This new proposed section is helpful to both H-2ALCs and DOL officials as it reminds them of the additional responsibilities of H-2ALCs. The enforcement of the H-2ALCs' additional responsibilities is important given the rise in the number of H-2ALCs using the H-2A program. Problems generally associated with labor contractors are also seen with H-2ALCs in their use of the H-2A program. For example, both H-2ALCs and farm labor contractors are often undercapitalized and lack the assets to pay out a judgment for unpaid wages.

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

Sincerely,

Farmworker Justice

Alianza Nacional de Campesinas

The Coalition to Abolish Slavery and Trafficking (CAST)

El Comite de Apoyo a los Trabajadores Agricolas /The Farmworker Support Committee (CATA)

Justice at Work (formerly Friends of Farmworkers)

Justice for Migrant Women

Justice in Motion

Legal Aid of North Carolina – Farmworker Unit

New Mexico Legal Aid, Centro Legal Campesino

Southern Poverty Law Center

Texas RioGrande Legal Aid, Inc. (TRLA)

UFW Foundation

United Farm Workers