



March 29, 2012

William L. Carlson, Ph.D., Administrator
Office of Foreign Labor Certification
U.S. Department of Labor, Room C-4312
200 Constitution Ave. NW.
Washington, DC 20210
VIA EMAIL: ETA.OFLC.Forms@dol.gov

Re: Comments re: Revised ETA Form 9127
OMB Control Number 1205-0457

Dear Mr. Carlson:

Farmworker Justice submits these comments in support of the Department of Labor's Extension of Information Collection with Revisions to ETA Form 9127, Foreign Labor Certification Quarterly Activity Report, Office of Management and Budget ("OMB") Control Number 1205-0457. 77 Fed. Reg. 18,267-68 (March 27, 2012). The proposed information collection action for which the Department of Labor ("DOL") seeks comment relates to DOL's administration of the H-2A temporary agricultural guestworker program and the H-2B non-agricultural temporary guestworker program. While it appears that the revisions to the Form 9127 will also be useful to DOL's proper administration of the H-2B program, our comments focus on the proposed action in connection with the H-2A program. Farmworker Justice offers these comments as a national advocacy organization representing migrant and seasonal farmworkers who perform work in the United States. We seek to ensure that operation of the H-2A program serves the statutory purposes of providing basic labor protections for both foreign H-2A workers and United States ("US") workers in corresponding employment, and ensuring that US workers do not suffer adverse effects in wages or working conditions from the employment of H-2A workers.

We strongly support DOL's proposed extension of its collection of information regarding the H-2A program activities performed by State Workforce Agencies ("SWAs"), and the corresponding revisions to ETA Form 9127. The proposal includes changes that would significantly improve the collection of information available to assist DOL in overseeing the SWAs' administration of the H-2A agricultural guestworker program. As SWAs receive federal grants for their duties, it is important that DOL monitor and evaluate their activities for both compliance and budgeting purposes. SWAs already maintain the underlying data to be reported on this form, so the extension of this reporting activity will not impose significant additional burdens on them.

Division of the Data Collection into Regular and Special Procedures

The Revised Form 9127 breaks down data collection related to H-2A items 1-15 into “regular” H-2A job orders and job orders submitted pursuant to “H-2A Special Procedures.” While the great majority of H-2A applications do not involve special procedures, the OFLC Administrator is authorized to establish special procedures for processing H-2A temporary labor certification applications as determined to be necessary in certain industries or occupations, such as sheepherding, beekeeping, and custom combine operations. *See* 20 C.F.R. 655.102 (2012). These procedures may deviate from established H-2A application requirements. By breaking out data for special procedures job orders, DOL will be able to track the processing of these orders separately and identify any significant trends that may develop with respect to the submission and processing of such job orders.

Data Collection Related to Processing Job Orders

The new data collection items related to the processing of job orders will give DOL more detailed information about the number of active job orders with each SWA. Under the H-2A regulations, SWAs play a central role in processing job orders that communicate employment opportunities to prospective US workers through the interstate and intrastate network of state employment service centers. These functions are essential to ensuring compliance with the H-2A program’s statutory mandate that the Secretary of Labor test the labor market and certify that there are insufficient US workers available for the positions and that the employment of guestworkers will not “adversely affect the wages and working conditions of US workers similarly employed.”

The requests for information not only on how many job orders were filed, but also how many were processed, how many active orders were still pending from a previous report and how many active orders remain at the end of the reporting period will allow DOL to improve its monitoring and understanding of the SWAs’ processing of job orders.

Data Collection on Staff Assisted Referrals and Interstate Job Orders

We support the addition of items 4 through 7, which address recruitment of US workers through interstate job orders received and transmitted and through SWA staff assisted interstate and intrastate referrals.

Employers may only bring in H-2A workers if they are unable to find adequate numbers of qualified US workers. The SWAs play a critical role in helping to recruit US workers for the available positions. The SWA role includes placing the job order in both the intrastate and interstate job clearance system and assisting in referrals to employers. The new items on Form 9127 will gather additional information about the number of job orders being placed in the interstate system and being received from other SWAs via the interstate system. Also critically important is the addition of two questions that require the SWAs to list how many SWA staff

assisted intrastate and interstate referrals have been made. Improved data collection regarding referrals is very helpful in better understanding the numbers of US workers who are referred to employers for potential H-2A positions and what happens as a result of those referrals.

Reports from farmworker advocates on the ground indicate that US workers who seek H-2A employment are often turned away in the application process or terminated or forced to quit shortly after hiring after being subjected to unfair and possibly discriminatory treatment in the workplace. Recent examples include allegations at a hydroponic tomato facility in Michigan, which laid-off or fired workers who had complained about issues related to safety and bathroom breaks, and the findings of an EEOC investigation that a grower in Georgia, Hamilton Growers/Southern Valley Fruit and Vegetable Inc., engaged in a pattern or practice of firing virtually all of its US workers while retaining H-2A guestworkers. Historically, whether due to a perceived employer preference for H-2A workers or some other reason, some SWAs have failed to refer available US workers to H-2A and other agricultural employers. To help monitor and evaluate the prevalence of these abuses, we recommend that DOL require SWAs' to maintain and report the number of US workers actually hired by employers as a result of referrals, as well as the number of US workers terminated before the end of the H-2A contract period.

The collection of the additional data regarding recruitment will be useful to track and monitor the SWAs' referrals of workers to potential H-2A employers, as well as the number of job orders that SWAs are placing into intrastate and interstate clearance.

Data Collection on Number of Prevailing Wage and Employment Practice Surveys Completed

We support the continuation of data collection on prevailing wage surveys and the proposal that appears to expand what had previously covered "prevailing practice surveys" to include all "employment practice surveys." This change would require SWAs to report surveys conducted not only with respect to certain job terms (family housing, inbound transportation advances, and frequency of pay) that the H-2A regulations require to be consistent with "prevailing practices," but also terms that must be consistent with "normal and accepted" practices of similarly situated non-H-2A employers. 20 C.F.R. 655.122. Terms subject to the "normal and accepted" standard include job qualifications, experience requirements, and other terms and conditions of employment sought to be imposed by an employer. DOL has often asked SWAs to conduct normal and accepted practice surveys on an "ad hoc" basis when an employer appears to be imposing an abnormal job terms that may tend to discourage applications by US workers.

The role of the SWA in conducting prevailing practice and ad hoc surveys is critically important to the fundamental role of the labor certification process - ensuring that there are no available US workers interested in the jobs and that there are no adverse effects on the wages and working conditions of US workers. One way in which SWAs play a role in protecting US workers is by ensuring that the H-2A job orders do not include job terms or requirements that would dissuade potential US workers from applying by including requirements that many interested workers may not be able to meet and that are not normal and accepted job criteria for the job at issue, such as verifiable experience requirements. Similarly, SWAs protect the ability of US workers to access H-2A jobs by ensuring that job orders do not include onerous requirements that are not normal

and accepted requirements for non-H-2A employers in the area, such as a higher than usual production standard that would discourage traditional farmworkers from applying or that would make it difficult for some US workers to satisfy. Because of their familiarity with local crops and working conditions, SWAs are in a unique position to review H-2A job orders and should recognize when such work requirements or terms might be unusual or questionable for their area. In such instances, the SWA should reject such requirements, ask the employer for justification of the requirement or engage in a survey to determine that the job requirement is consistent with the normal and accepted standard.

Farmworker advocates are concerned that with the expansion of the H-2A program, the failure of SWAs to conduct sufficient employment practice surveys has resulted in the approval by DOL of job terms that deter US workers from applying or that result in their being fired or forced to quit. The data collected on employment practice surveys should reveal the extent to which prevailing practice surveys have been performed in geographic areas where there are H-2A applications filed, and the degree to which surveys have not been performed. This data would help identify resource needs and the locations that need to be targeted. Given the expanded use of the H-2A program, DOL should seek the resources to ensure that SWAs are able to conduct needed employment practice surveys.

While we support the proposed collection of information as to employment practice surveys, it would be helpful to separately obtain the data for prevailing practice surveys and those for all other employment practice surveys. This would allow DOL and farmworker advocates to get a better sense of the performance and responsiveness of SWAs in conducting both types of surveys.

We also support the continuation of the question regarding number of prevailing wage surveys completed. In some instances, the prevailing wage survey may be higher than the state's AEWR and these surveys are critically important in ensuring that US workers' wages are not adversely impacted by allowing employers to bring in foreign workers at a lower wage.

Data Collection Related to Housing Inspections

We support the expansion of data collection related to the housing of farmworkers. The only item related to housing inspections listed on the old Form 9127 states, "housing inspections visits made." The revised form calls for more detailed information as to the total number of housing inspections completed, number of inspections completed by alternative method, number of sleeping units inspected, capacity of sleeping units inspected, and number of housing self-certifications.

The inspection of housing by SWAs is very important to H-2A farmworkers, who typically have no choice but to live in employer-provided housing. It is similarly important to US workers in corresponding employment that are eligible for employer-provided housing. The additional collection of information on the number of sleeping units and capacity of sleeping units inspected will provide DOL with a more accurate count of the number of inspections and the type of housing being inspected, and whether SWAs may need more funding to conduct the required housing inspections. The total capacity of sleeping units inspected should reflect the

total number of positions being requested by an employer. The questions regarding the number of housing self-certifications and inspections by alternative method will give DOL a more accurate count of the type of housing being inspected and how much of the H-2A housing is not being inspected by the SWAs.

Data Collection of Common Deficiencies in Job Orders and Other Issues

Item 16 in the H-2A section of the Revised Form 9127 adds a space for SWAs to list the most common deficiencies noted on the job orders. Item 17 adds an extra space for “comments or other issues noted during the quarter.” As described above, SWAs review job orders for compliance with DOL regulations. By requiring SWAs to identify common deficiencies, DOL will be able to get an understanding of deficiencies common in each state, but will also be able to assess whether there are common violations across different states on job orders being submitted by particular labor contractors, employer associations or agents. Such common violations may indicate a fundamental misunderstanding of the H-2A program requirements or an effort to exclude US workers by relying on terms that have been successful in deterring US workers; and could indicate a broader campaign is needed to challenge a particular requirement. For example, Farmworker Justice has recently observed many instances in which employers have included in H-2A job terms unlawfully short deadlines for workers to notify employers of on-the-job injuries and/or file workers’ compensation claims. We have urged DOL to take steps to stop SWAs from accepting job orders with such terms. Workers already face numerous obstacles accessing health care treatment and workers’ compensation coverage, and employer’s efforts to further limit their access to workers’ compensation is extremely troubling and illegal. DOL’s improved Form 9127 would help identify such trends and remedy illegal terms.

Item 17 provides SWAs with an opportunity to provide DOL with any other issues that arose during the quarter. This information will provide DOL with timely information on issues, so that it can issue guidance for SWAs and employers, which will help employers to avoid a common problem in the future, saving time for both employers and SWAs.

Public Access to Information Collected on Form 9127

In addition to supporting the proposed revisions, we also ask that DOL publish the information collected on the revised Form 9127 and make it available on the internet. Currently, in order to access this data on a timely basis, advocates must request the information under the Freedom of Information Act. By making the information publically available and easily accessible, DOL would increase the H-2A program’s transparency, thereby enabling the public, including farmworker advocates, to monitor important concerns such as common deficiencies and job availability.

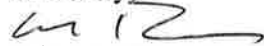
Conclusion

Farmworker Justice strongly supports this extension and expansion of ETA Form 9127, with the above suggestion of dividing the “employment practice survey” item into the separate items: one addressing surveys on prevailing practices and one addressing surveys on “normal and accepted” qualifications. We further request that DOL publish the information collected from the SWAs

on ETA 9127 on its website to improve transparency and oversight of SWAs and the H-2A program. The revisions to the form will generally improve the clarity and utility of the information to be collected from the SWAs and will enable greater review, understanding and corrective action, where needed, of key H-2A protections and provisions. Because SWAs already maintain much of this data, the requirement to report on this form on a quarterly basis will not impose a significant increase in burden on them.

Thank you for your consideration of these comments.

Sincerely,



Adrienne DerVartanian

Director of Immigration and Labor Rights