FARMWORKER JUSTICE

September 3, 2013

Department of Homeland Security
USCIS
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue NW
Washington, DC 20529-2140

Submitted via email: USCISFRComment@uscis.dhs.gov

Re: Comments re: Revision of USCIS Petition for a Nonimmigrant Worker, Form I-129;
OMB Control Number 1615-0009; Docket ID USCIS-2005-0030

Dear Acting Chief Deshommes:

Farmworker Justice, a national advocacy organization representing migrant and seasonal farmworkers submits these comments in support of the Department of Homeland Security, U.S. Citizenship and Immigration Service's (USCIS) revisions to the H Classification Supplement to the Petition for a Nonimmigrant Worker, I-129 in response to the July 5, 2013 Federal Register notice at 78 Fed. Reg. 40,490 (July 5, 2013). Farmworker Justice seeks to ensure that the operation of the H-2A temporary agricultural guestworker program serves the statutory purposes of providing basic labor protections for both foreign H-2A workers and United States workers in corresponding employment, and ensuring that that U.S. workers are not displaced and do not suffer adverse effects in wages or working conditions because of the employment of H-2A workers. We also seek to improve the wages, working and living conditions of all farmworkers, including H-2A and H-2B agricultural guestworkers and U.S. farmworkers.

Farmworker Justice writes to comment specifically on the questions in the H Classification Supplement to I-129 Petition ("H Supplement") that relate to whether the applicant or his or her agent has charged or plans to charge recruitment fees to H-2A and H-2B temporary guestworkers. The current H Supplement to the I-129 Petition already includes some questions regarding recruitment fees. The revised form contains clarifying changes as well as a new question, all of which should improve USCIS's data collection and information regarding recruitment fees and other forms of compensation charged during international labor recruitment. These revised questions also serve to put employers on notice of the prohibition against fees and

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their responsibility to investigate whether their employees are being charged recruitment fees by the individuals or agencies they hire. The modest changes to the questions on USCIS's I-129 petition addressing recruitment fees are a step in the right direction towards preventing and remedying abuse in the international recruitment of H-2A and H-2B guestworkers, which can in its worst form amount to human trafficking.

Background on Abuses in the International Labor Recruitment of H-2A Guestworkers

American employers that hire guestworkers typically rely on labor recruiters to find and recruit workers in their home countries. These labor recruiters usually charge guestworkers high fees – forcing workers to arrive to the United States deeply in debt. Upon arrival in the U.S., these indebted workers are desperate to work and too fearful of losing their jobs and being deported to challenge unfair or illegal conduct. Debt to foreign labor recruiters makes guestworkers vulnerable to exploitation – frequently rising to the level of human trafficking. These recruitment abuses harm not only guestworkers, but U.S. workers and law-abiding employees as well. In these circumstances, U.S. workers are often viewed as insufficiently compliant and as a result suffer discrimination from employers who prefer the more desperate to please foreign workforce. Failure to prevent and punish recruitment abuses will not only harm workers, but will also disadvantage recruiters and employers that pay the cost of treating workers with respect and face unfair competition. Further, such abuse embarrasses the United States government in the eyes of our international allies whose citizens are invited to work in this country.

The following are three examples of H-2A workers who were subject to abuse that began with their initial recruitment to their jobs in the U.S.[1]

Chinnawat, a citizen of Thailand, was recruited to the H-2A program with the promise of a job in the U.S. at $8 an hour for 40 hours a week; free housing and food; and a year-long contract that would be extended for two years. To pay the recruitment fee of about $11,250, Chinnawat took out loans with his house as collateral. On arrival to the U.S. in August 2005, the workers were housed in a crowded motel room and then a barn infested with insects and mice. The workers slept on a dirty vinyl floor and washed their hands and clothes at an outdoor faucet. They were served only rice and vegetables and scrounged for extra food in the fields. Within weeks, only a few workers were allowed in the fields each day and the rest received no pay. The workers panicked because they had no money to pay interest on their debt. They were threatened and told not to leave the farm; they feared that the police might arrest them if they disobeyed. After Hurricane Katrina, the contractor took Chinnawat to New Orleans to do clean-up work, which lasted only a few days. Without money for food, Chinnawat was so hungry he caught and cooked a pigeon. After returning to North Carolina, he met a legal aid attorney who helped him organize an escape from the farm. Chinnawat obtained a visa reserved for victims of trafficking.

[1] See Farmworker Justice report, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, available at http://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf.

Pedro,[*] a citizen of Peru, had been a teacher but when he was told he could make $1,300 a month as a sheepherder in the U.S. he jumped at the chance to better provide for his wife and child. He paid more than $5,000 in recruiting fees, and $1,000 for visa fees, arriving in Colorado on an H-2A visa in spring 2009. But he then learned that he would be working 11-14 hour days, seven days a week, for only $750 a month. His employer took his passport, social security card, and other documents. On the ranch, he was housed in a small sheep wagon with holes and a door that did not shut properly. There was no bathroom or refrigerator to store food. Though his employer was supposed to provide him with food every weekend, he would often not show up. When he protested, the ranch owner threatened to send him back to Peru. Soon, Diego was sent to herd sheep in the mountains. He lived in a tent and became ill. Though $27 per month was deducted from his pay for health insurance, the rancher refused to take him to the doctor. And he could not use ranch vehicles to go to town and buy food. In August, he left, and the local police led him to a legal services attorney, who was able to help him reclaim his documents and some of his stolen wages.

In 2012, Victor and several other Mexican citizens were recruited to harvest melons, onions and peppers in Georgia on an H-2A visa. He received a document showing his piece-rate wage and was promised reimbursement for travel and visa costs. Upon arriving in Nuevo Laredo, Mexico as instructed, he was required to pay a second recruiter $100 dollars and to pay the H-2A visa fees. To cover the expenses totaling about $788, Victor had taken out a loan of 11,000 pesos. Before departing Mexico, Victor spoke by telephone with the employer, who instructed him to travel there. Upon arrival, the employer informed the workers that there was no work, that she had helped them obtain the visas, and that they could work wherever they pleased. Victor did not want to violate the terms of his visa. He worked approximately 2 weeks, just to make enough money to get home and then returned to Mexico. He has been unable to pay back his loan.

As these examples demonstrate recruitment fees are common in the H-2A guestworker program and impact every aspect of the workers' experience.[2] Increased enforcement of the ban on recruitment fees is greatly needed. USCIS's revised questions on recruitment fees and other forms of compensation represent a step towards increased transparency and a clear message to employers that such fees are prohibited and that employers have a responsibility to ensure their H-2 workforce is not being charged prohibited fees.

Changes to the H Classification Supplement to the I-129 Form

Farmworker Justice supports the following changes to the H Supplement to I-129:

Question 8.a.: The new proposed Question 8.a., which addresses whether any H-2A/H-2B workers have paid the applicant or their agent a job placement fee or other form of compensation, clarifies what is meant by "fees or other compensation" to make the question

[*] Not his real name

[2] For further explanation and examples of recruitment abuses, see also International Labor Recruitment Working Group Report, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse*, available at http://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf.

more accurate and to comport with existing law. The law is clear that employers may not pass on the cost of recruitment or job placement fees to H-2A and H-2B workers. *See* 20 CFR 655.135 (2013); 20 C.F.R. § 655.22(j) (2013). Also, under the Fair Labor Standards Act and Department of Labor ("DOL") guidance, the employer is responsible for the costs of H-2A and H-2B workers' transportation and visa costs if those costs would effectively bring workers' wages below the minimum wage in their first week of employment. *See* DOL, Wage & Hour Division, Field Assistance Bulletin No. 2009-2 (Aug 21, 2009); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002). The current I-129 form, however, instructs employers to identify whether workers have paid compensation for employment but not to "include reasonable travel expenses, government visas fees, or other reasonable fees for which the worker is responsible," which could create confusion regarding transportation costs or other fees which might be prohibited under the circumstances. The new question 8.a. of the H Supplement remedies this problem by more accurately describing which fees are prohibited from being charged.

For applicants who indicate that workers have paid or have agreed to pay job placement fees or other compensation, a new section has been added to question 8.a. that requires applicants to "list the types and amounts of fees that the worker(s) paid or will pay." It instructs applicants to exclude "reasonable travel expenses and certain government-mandated fees (such as passport fees) that are not prohibited from being passed to the H-2A or H-2B worker by statute, regulations, or any laws." We support the requirement that any recruitment or related fees that workers have paid be listed in the petition. This information will serve to increase transparency and to better demonstrate what fees are being charged during international recruitment.

Question 8.b. The current question 8.b. of the H Supplement asks, "If the workers paid a fee, have they been reimbursed for such fees or compensation, or if the workers had an agreement to pay a fee that has not been paid, has that agreement been terminated before being paid by the workers?" The new I -129 form splits question 8b into 2 sections, with 8.b. asking whether the workers were reimbursed for fees and new question 8.c. asking about the termination of agreements to pay a fee. This clerical change will allow the agency to collect better data on the collection of fees in the recruitment process, which is helpful for transparency in the system and the prevention of abuses in the international labor recruitment process.

New question 9. Farmworker Justice supports the addition of the new question 9, which states:

> Have you made reasonable inquiries to determine that to the best of your knowledge the recruiter, facilitator, or similar employment service that you used has not collected, and will not collect, directly or indirectly, any fees or other compensation from H-2 workers of this petition as a condition of the H-2 workers' employment? Yes/No
>
> Note: If USCIS determines that you knew, or should have known, that the workers requested in connection with this petition paid any fees or other compensation at any time as a condition of new employment, your petition may be denied or revoked.

Question 9 reminds employers that they have a responsibility for the conditions under which their workers are recruited and must make reasonable inquiries as to whether recruitment fees have been charged by recruiters, facilitators or other employment services that the employer retains. In order to curb abuse in temporary visa programs, the ultimate employer must be held responsible for the actions of the individuals or agencies that recruit their workers. Employers benefit from the guestworker programs and must be responsible for their workers by exercising control and oversight of the recruitment process. Moreover, the employers have attested to the federal government during the DOL certification process that the guestworkers that they hire will not be charged fees for employment and they must take steps to verify that this is true and that their workforce is not being charged fees. International labor recruiters, on the other hand are often difficult to hold accountable. They can be hard to locate or insolvent. Moreover, because these companies operate abroad, they are frequently beyond the reach of American courts.

While question 9 is a step forward in reminding employers of their responsibility for ensuring that the law is not violated in the recruitment of their workers, it could be phrased more affirmatively as to the employer's responsibilities. For example, by requiring employers to affirmatively attest that they have made reasonable inquiries into recruitment fees, USCIS would be sending a clearer signal that employers must undertake reasonable inquiries. As currently written, there is no clear repercussion for an employer who checks "no." While there is a note indicating that if "USICS determines that you knew, or should have known, that the workers requested in connection with this petition paid any fees or other compensation at any time as a condition of employment, your petition may be denied or revoked," there is no indication of what factors may lead to denial or revocation of the petition.

Finally, while Farmworker Justice believes that the denial or revocation of a petition prior to the payment of recruitment fees by a worker is an appropriate penalty for an employer found to have charged recruitment fees, we are concerned about the impact of this penalty on workers where they have already paid recruitment fees. Once internationally recruited workers have paid recruitment fees, denial or revocation of visa petitions means that the workers will lose the chance of working to recover fees that they paid or to repay related debts they incurred. Workers have little incentive to come forward to report violations under these circumstances. Thus, in addition to petition denial or revocation, DHS should require employers to repay any recruitment fees or other forms of compensation and interest accrued and/or paid by the recruited workers. Employers should also be required to pay a penalty to deter future violations of the programs' requirements.

In conclusion, Farmworker Justice supports the above revisions to the H Classification Supplement to the I-129 Petition, relating to recruitment fees. These changes are a step towards increased transparency and enforcement of the H-2A and H-2B program's prohibition on recruitment fees. However, more efforts are needed to prevent trafficking, fraud and other abuses in the international recruitment of temporary workers. Congress and the agencies involved in overseeing the H-2A and H-2B program must make more serious efforts to protect internationally recruited workers who contribute to our economy and our country.

Thank you for your consideration of these comments.

Sincerely,

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