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September 3, 2015

*Submitted Via Electronic Mail*

Mr. Brian Pasternak
National Director of Temporary Programs
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW., Room C-4312
Washington, DC 20210

**RE: Comment Request for Information Collections in the H-2B Temporary Non-Agricultural Employment-Based Visa Program (OMB Control Number 1205-0509), Extension, 80 Fed. Reg. 39801 (July 10, 2015)**

Dear Mr. Pasternak:

Thank you very much for the opportunity to submit these comments on behalf of the employer and worker members of the Federation of Employers and Workers of America (FEWA). FEWA is a non-profit association created to assist employers and workers in labor intensive service industries such as construction, restaurants, lodging, golf, marine salvage, landscape, nurseries, agriculture, amusement parks, shrimping, and others. FEWA is dedicated to improving business conditions, building awareness, and providing services in the areas of labor retention and management. FEWA provides several programs and services for our members including assistance with the H-2B program.

The H-2B program is extremely important to both our employer and worker members. For employers, the program provides access to critical seasonal labor when, despite intensive recruitment efforts, positions cannot be filled with American workers. For worker members, the program provides well-compensated seasonal jobs that allow H-2B workers to provide for their families and still maintain their homes in their native countries. It is also important to recognize that the H-2B program is vital for American workers whose year-round positions rely upon the help of seasonal laborers during peak seasons.

Our comment focuses on the quality, utility, and clarity of the information collection and the minimization of the burden of the information collection through the *H-2B Application for Temporary Employment Certification*, ETA Form 9142B - Appendix B. Specifically, the focus of this comment pertains to the set of employer declarations that is contained on this form apprising employers of the obligations associated with the use of the H-2B program. The presence of these declarations not only informs employers of the obligations of the program, but also aids the employer in making the decision to choose to participate by submitting the

information collected on the form to the Department of Labor. As such, the text contained within this form is of utmost importance and should be written in a way to provide maximum understanding and clarity of the actual regulatory obligations that exist as it pertains to the H-2B program. The importance of having this language reflect the regulatory obligations is apparent currently because in most instances the wording already reflects, nearly verbatim, the requirements set forth in 20 CFR §655.20 and corollary provisions. However, the fifth declaration that is contained on Appendix B exceeds the regulatory language and creates confusion for an employer about the actual obligations that are associated with the filing, therefore affecting the decision making process the employer must undergo to decide whether or not to send in the information collected in the application form.

The fifth declaration strays from the regulatory requirements by informing the employer that the offered wage the employer offers must exceed the highest of the "most recent" prevailing wage. However, there is no similar provision that contains the language "most recent" in the regulations, and this could misrepresent to the employer that the recency of the prevailing wage determination is more important than the specific applicability of the determination to the application for certification. For example, an employer with multiple prevailing wage determinations filing for multiple applications based on differences in job duties might understand this to mean that they should use the most recent prevailing wage determination for all applications regardless of the applicability or relevance of the specific determination to the job duties associated with the specific application for certification. This confusion can be alleviated by removing the text "most recent" from the fifth declaration present on the form.

In addition, the fifth declaration informs the employer that the employer's offered wage must equal or exceed a prevailing wage that "is or will be issued." The employer is unable to ascertain what a future wage would be that "will be issued" and so an employer is unable to definitely assert that the offered wage exceeds this unknown future wage. This creates uncertainty for an employer over what obligations the information collection seeks to impose and unnecessarily complicates the decision making process that an employer undergoes to determine whether or not they will submit the form. Moreover, this wording strays from the regulatory text and does not accurately portray the obligation present in the regulations. The regulatory text of 20 CFR §655.20(a)(1), which is substantively replicated in numerous other provisions (*see* §655.5, §655.10(a), 655.18(b)(5), 655.41(b)(7)) states that the "offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage." This text indicates that the employer must prepare to pay the prevailing wage obtained from the DOL, unless they are aware of a minimum wage change that would apply in their area increasing the local wage. This type of local increase will generally be known substantially in advance of implementation through notice by local authorities (or by federal or state authorities for changes to federal or state minimum wage rates). Even in a scenario with an unanticipated change concerning a federal, state, or local minimum wage rate the employer would already be bound to follow such law outside of the H-2B context. If the intent of the language is to give an employer notice of this possibility, it is duplicative in that the notice is already provided through the inclusion of the subsequent phrase "or the applicable Federal, State, or local minimum wage." The additional language relating to a wage that "will be issued" should be removed to alleviate confusion and provide clarity to an employer.

In conclusion, the fifth declaration present on the ETA 9142B – Appendix B should have "most recent" and "will be issued" removed from the first sentence in order to match the regulatory standard and inform employers in a way that allows the employer to make the decision to proceed based on an accurate representation of the H-2B requirements. The suggested changes will provide increased clarity for employers relating to the information collection thereby minimizing their burden in determining whether or not they will submit the information collection form.

Thank you for your consideration of these comments.

Respectfully submitted,

Scott Evans, President