FRIENDS OF FARMWORKERS, INC.
Legal Services for Farmworkers

699 Ranstead St Ste. 4
Philadelphia, PA 19106-2334
E-mail: ***aread@friendsfw.org***

Telephone: (215) 733-0878
(800) 729-1607
Fax: (215) 733-0876
Direct: Arthur N. Read (215) 690-5687

September 14, 2015

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

Via email: ETA.OFLC.Forms@dol.gov

Re: Comments Request for Information Collections in the H-2B Temporary Non-agricultural Employment-Based Visa Program on Form ETA–9165, Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey (OMB Control Number 1205–0516), which expires on October 31, 2015.

Dear Mr. Pasternak:

We submit these comments on behalf of the H-2B working group of the Low Wage Workers Legal Network ("LWWLN") in response to the Employment and Training Administration's ("ETA") request for comments concerning the information collection in the H-2B temporary non-agricultural employment-based visa program on Form ETA–9165, Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey (OMB Control Number 1205–0516), 80 Fed. Reg. 42,124 (July 16, 2015).

The LWWLN is an affiliation of more than 350 legal advocates for low wage workers in over 130 organizations and 28 private law firms located in thirty-four states, the District of Columbia and Mexico. The H-2B working group has been collaborating to make the H-2B program less abusive to U.S. and foreign workers since 2007. The LWWLN appreciates the opportunity to comment on Form ETA–9165 and its instructions.

These comments are also submitted on behalf of the plaintiff organizations in CATA v. Perez and related litigation. Those organizations are: Comité de Apoyo a los Trabajadores Agrícolas (CATA), Pineros y Campesinos Unidos del Noroeste (PCUN), and Northwest Forest Worker Center. In addition, these comments are submitted on behalf of the following organizations who have been involved in representation of workers in *CATA v. Perez* and related litigation:

- Northwest Workers' Justice Project (Oregon)
- Friends of Farmworkers, Inc. (Pennsylvania)
- Southern Poverty Law Center
- Centro de los Derechos del Migrante, Inc.
- Florida Legal Services, Inc.
- North Carolina Justice Center

Regulatory Requirements

The proposed forms are intended to implement requirements of the Final Wage Rule, "Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program," 80 Fed. Reg. 24,146 (Apr. 29, 2015) ("2015 Wage Rule"). DOL is, of course, aware that the commenters have challenged under the Administrative Procedure Act ("APA") that rule's authorization to employers to utilize employer provided wage surveys (public or private), except under the limited circumstance that no OES, DBA or SCA wage rate is available for the occupation in the area of employment. *See CATA v. Perez,* United States District Court for the District of New Jersey, Case 1:15-cv-04014-RBK-JS. Prior comments had been submitted on employer provided wage surveys in Regulations.gov document: ETA-2013-0003-0187 on June 10, 2013. *See* http://www.regulations.gov/#!documentDetail;D=ETA-2013-0003-0187.

Form ETA-9165 is intended to implement the requirement of 20 C.F.R. § 655.10 (f) Employer-provided survey which provides:

20 C.F.R. § 655.10 (f) *Employer-provided survey.*

(1) If the *job opportunity* is not covered by a CBA, or by a professional sports league's rules or regulations, the NPWC will consider a survey provided by the employer in making a Prevailing Wage Determination only if the employer submission demonstrates that the survey falls into one of the following categories:

(i) The survey was independently conducted and issued by a state, including any state agency, state college, or state university;

(ii) The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers employed in the SOC;

(iii) (A) The *job opportunity* is not included within an occupational classification of the SOC system; or

(B) The *job opportunity* is within an occupational classification of the SOC system designated as an "all other" classification.

(2) The survey must provide the arithmetic mean of the wages of all **workers similarly employed in the area of intended employment**, except that if the survey provides a median but does not provide an arithmetic mean, the prevailing wage

applicable to the employer's *job opportunity* shall be the median of the wages of workers similarly employed in the area of intended employment.

(3) Notwithstanding paragraph (f)(2) of this section, the geographic area surveyed may be expanded beyond the area of intended employment, but only as necessary to meet the requirements of paragraph (f)(4)(ii) of this section. Any geographic expansion beyond the area of intended employment must include only those geographic areas that are contiguous to the area of intended employment.

(4) In each case where the employer submits a survey under paragraph (f)(1) of this section, the employer must submit, concurrently with the ETA Form 9141, a completed Form ETA– 9165 containing specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey *job descriptions*, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey. In addition, the information provided by the employer must include the attestation that:

(i) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the **occupation** and geographic area surveyed or conducted a randomized sampling of such employers;

(ii) The survey includes wage data from at least 30 workers and three employers;

(iii) If the survey is submitted under paragraph (f)(1)(ii) or (iii) of this section, the collection was administered by a bona fide third party. The following are not bona fide third parties under this rule: Any H–2B employer or any H–2B employer's agent, representative, or attorney;

(iv) The survey was conducted across industries that employ workers in the **occupation**; and

(v) The wage reported in the survey includes all types of pay, consistent with Form ETA–9165.

(5) The survey must be based upon recently collected data: The survey must be the most current edition of the survey and must be based on wages paid not more than 24 months before the date the survey is submitted for consideration.

Shortcoming of ETA-9165 and its Instructions

Distinction between Occupations and Job Opportunities

The most fundamental flaw in the Form ETA-9165 is the failure to recognize and clearly define the distinction between an "**occupation**" and an individual employer's "*job opportunity*" or "*job description*." This is a particular concern in §D of the form which asks for the "Title of job(s) included in the survey" and for §E of the form which repeatedly refers to the "occupation" without defining that term or clarifying that it is broader than the employer's job

description. DOL **must make clear** that the "jobs included in the survey" and "duties of the job" in §§D 1 and 2 relate to the jobs and duties of the "occupation" being surveyed, **not the narrow job title and job duties specified in the employer's ETA-9142B §F.a.1 & 5.** The job title and duties in the ETA-9142B may, and likely are, only one of many jobs that would be included in the "occupation" that is being surveyed. The way the ETA-9165 is currently worded, an employer would likely think that §§D 1 and 2 are asking for the same information as §F a.1 & 5 of the ETA-9142B, and that that job was the same as the "occupation" inquired about in §E of the ETA-9165.

DOL has long recognized that a critical requirement for all prevailing wage determinations is that there is no adverse impact on "**similarly employed**" workers in the area of employment. The 2008 DOL H-2B rules contained an explicit definition of "similarly employed" at 20 C.F.R. § 655.10 (c) (2008) which provided:[1]

> (c) Similarly employed. For purposes of this section, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:
>
> > (1) Having jobs requiring a substantially similar level of comparable skills within the area of intended employment; or
> >
> > (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

20 C.F.R. § 655.10 (c) (2008). *See also* 20 C.F.R. § 656.40(b) (PERM Regulations) referenced at 80 Fed. Reg. at 24,158.

In order to implement the requirement of 20 C.F.R. § 655.10 (f)(2) that the "…survey must provide the arithmetic mean of the wages of all workers similarly employed in the area of intended employment," the ETA-9165 must require the third party (state related or private) to define not just the "job description" of the individual employer's "job opportunity," but also the "**occupation**" into which the "job opportunity" falls (which must be "across industries") and for which the prevailing wage survey is conducted. This requirement is fundamental to reining in the adverse impact on "**similarly employed**" workers in the area of employment. In the absence of such direction – i.e. the form as it presently exists – employers will likely assume that "occupation" in places like §E 5 and 6 means the same thing as the "job title" in §D1 with the

[1] Neither the April 29, 2015 H-2B Wage Rule nor the April 29, 2015 Interim H-2B General Rule - 80 Fed. Reg. 24,042 (Apr. 29, 2015) ("2015 H-2B IFR") - offer any explanation for the removal of a definition of "**similarly employed**" for purposes of prevailing wage determinations as set forth in the 2008 rule and there is no indication that DOL intended to make substantive changes in that definition. If DOL intended to do so, nothing in the Notice of Proposed Rulemakings since October 2010 have indicated an attempt to make substantive changes in that definition.

result that the survey will only survey individuals with that job title, not similarly employed individuals working in that "occupation." And, as a result, the survey will not protect the wages of "similarly employed" workers.

Section D 1 of the ETA-9165 should require the third party surveyor to identify a recognized "occupational" "title" (not a job title which confuses a job with an occupation) and §2 should list the "duties" of the occupation since it is the occupation and individuals performing the occupational duties that are to be surveyed (or randomly sample). Section D of the form should also require the employer to identify the industries employing individuals in the "occupation" so that DOL can be assured that the survey does indeed survey across industries as required by the regulations. Finally, while employers could, if they chose, use OES ONET SOC code definitions to identify the "occupation" being surveyed in §D.1, if some other recognized occupational classification is used instead, the third party surveyor should identify the source of or basis for the occupational definition used to survey "substantially comparable jobs" across industries. If, for example the survey uses the Dictionary of Occupational Titles (DOT) to identify the occupation, the DOT code should be include in §D1. If some other state or academic source for the occupational title is used, that source should be clearly identified.

For example, "North Carolina Sea Grant" has in the past performed wage surveys for North Carolina seafood processors who were otherwise grouped in SOC Code 51-3022 "Meat, Poultry, and Fish Cutters and Trimmers."[2] The DOL ONET OnLine provides a detailed analysis of the tasks performed under this occupational code. *See* http://www.onetonline.org/link/summary/51-3022.00. Similarly, the Louisiana Department of Agriculture & Forestry in the past performed wage surveys for Louisiana seafood processors who were otherwise grouped in SOC Code 53-7064 "Packers and Packagers, Hand."[3] The DOL ONET OnLine provides a detailed analysis of the tasks performed under this occupational code. *See* http://www.onetonline.org/link/summary/53-7064.00.

In each case, if the third party surveyor does not use the SOC Code "occupation," the ETA-9165 should, in §§ D.1 and 2, require the related third party surveyor to identify the "occupation" being surveyed either with reference to a published list of occupational definitions specifying the tasks and skills related to the occupational classification (e.g. a reference to the specific Dictionary of Occupational Titles code used if that is the source of the occupational classification), or in the absence of a published occupational definition, the third party surveyor should be required to explain the definition and the tasks and skills related to the occupational classification that the state related surveyor is proposing constitutes a separate occupation and how it differs in terms of "substantially similar level of comparable skills" from the broader SOC

---

[2] *See e.g.* PWD Tracking Case Numbers: P-400-15118-753838; P-400-15118-329281; P-400-15055-463655; P-400-15054-503875; P-400-14324-607247; P-400-14301-693104; P-400-14286-153349; P-400-14295-240233; P-400-14286-284530; and P-400-14281-769797

[3] *See e.g.* PWD Tracking Case Numbers: P-400-14279-857845; P-400-14226-460032; P-400-14265-552588; P-400-14224-396262; P-400-14301-449412; P-400-14301-673392; P-400-14297-102993; P-400-14227-249323; P-400-14275-267544; P-400-14289-121532; P-400-14226-501950; P-400-14274-334977; P-400-14280-202288; and P-400-14227-178556.

Code classification which otherwise would be appropriate. Such third party surveyors should further be required to identify each of the industries utilizing persons in that occupation and why it is appropriate to exclude similarly employed individuals working in industries which they have excluded from their occupational definition.

These changes are critical because DOL must have information regarding the "occupation" that is being surveyed and its defined tasks and skills to ensure that it is, indeed, an "occupation" that is being surveyed, not just a particular job within an occupation. A survey of a job within an occupation cannot, by definition, protect "similarly employed" workers as DOL has historically defined that term. Moreover, the ETA-9165 must provide DOL with sufficient information to judge if the surveyors are including within their occupational definition all of the "**similarly employed**" workers in the area of employment.

To summarize, the ETA-9165 and its instructions should be amended to clarify that:

1. §D 1. Should identify the source, title, and code of the **"occupation"** being surveyed and the instructions should make clear that, while the employer's job described in ETA-9142B §F.a.1 &5 must be included in the "occupation," the "occupation" is different from and broader than the employer's job because it includes other jobs using the same or similar skills.

2. §D 2. should identify the duties and or skills of the "**occupation"** and again the instructions should make clear that this is not the same as the employer's particular job opening.

3. §D should be amended to add a §D 3 which would require identification of the industries employing workers in the occupation.

4. §E. The Form and instructions to §E should make clear that the references to "occupation" in §E 1, 2, 3, 5, 6, 9, and 11 are references to the "occupation" described in §D.

Other Technical Issues with the ETA-9165:

1. Disclosure of Relationship to Employers

The instructions to the ETA-9165 at Part C.1 state

> Section C. Employer-Provided Survey Information. #1. Enter the complete name or title of survey. If the survey was commissioned by the employer and does not have a name, enter 'Employer Commissioned'.

The form should explicitly ask for all surveys, whether named or not, whether the survey was employer commissioned, and whether it was in whole, or in part, employer financed (either directly or indirectly through a trade group or other association of which the employer is a member). This should be true for state related surveys as well.

DOL's preamble to the 2015 H-2B wage rule notes:

> Even H–2B employers, representatives, agents, and attorneys who are not directly involved in the application for which the survey is submitted are barred from conducting a wage survey under this final rule because we conclude that H–2B employers and the entities that represent them are likely to share common

> interests and biases that may affect the reliability of such surveys. *See* 20 CFR 655.10(f)(4)(iii) of this final rule.

See 80 Fed. Reg. at 24,174. The additional questions listed above are necessary in order to ensure compliance with this statement. It cannot be assumed that all state related institutions are fully insulated from these bias issues where industry connected groups are involved in either the funding of the state related entity or are allowed to participate in the planning or conduct of the survey by such a state related agency. Full disclosure of all possible conflicts by third party state related surveyors is critical to the transparency of the process.

2. **Identification of State Official Approving Survey**

The instructions to the ETA-9165 at Part C.5 state:

> 5. If the survey was conducted by a state, including any state agency, state college or state university under question 4a, provide responses to questions 5a – 5b.
>
> 5a. Enter the name of the state agency, state college or state university. Please do not enter acronyms as these vary by state. Standard abbreviations, such as "Dept.," are acceptable.
>
> 5b. Enter the last (family) name then first (given) name of the state official approving the survey.

Part C.5.b. should require the official title / position of the state official approving the survey and contact information including phone number for that individual.

3. Disclosure of Whether data for survey was collected by any H-2B employer or any H-2B employer's agent

The instructions to the ETA-9165 at Part C.6 state:

> 6. If the survey is eligible under question 4b or 4c, provide responses to questions 6a-6b.
>
> 6a. Mark "Yes" or "No" as to whether the collection of data was collected by a third party permitted by ETA regulations at 20 CFR § 655.10(f) and no data for the survey was collected by any H-2B employer or any H-2B employer's agent, representative, or attorney.

This disclosure inquiry should be asked even if the survey is conducted under the auspices of a state related entity. Part C.6a should simply ask whether "…data for the survey was collected by any H-2B employer or any H-2B employer's agent, representative, or attorney."

4. Identification of Third Party Surveyor

The instructions to the ETA-9165 at Part C.6 state:

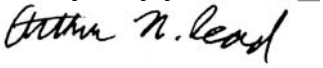
> 6c. Enter the last (family) name then first (given) name of the official representative of the third party surveyor who approved the survey.

Part 6.c. should include contact information including phone number for that individual.

CONCLUSION

DOL should restructure Parts D and E significantly in light of the comments on the need to identify a cross industry occupation rather than a job. The current Form ETA-9165 and its instructions are wholly inadequate to make a determination that there is no adverse impact on "**similarly employed**" workers in the area of employment

Very truly yours,



Arthur N. Read
General Counsel
Friends of Farmworkers, Inc.