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November 5, 2018

William W. Thompson II
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: H–2B Temporary Non-Agricultural Labor Certification Program Forms; OMB Control Number: 1205-0509

Dear Administrator Thompson:

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, landscape, nurseries, agriculture, 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 and H-2A programs.

These programs are extremely important to both our employer and worker members. For employers, these programs provide 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 them to provide for their families and still maintain their homes in their native countries. It is also important to recognize that the H-2A and H-2B programs are vital for American workers whose year-round positions rely upon the help of seasonal laborers during peak seasons.

First, we would like to thank the Department of Labor (DOL) for its effort in streamlining and improving the H-2B forms. We also applaud all efforts in promoting greater efficiency and minimizing delays associated with the issuance of paper-based labor certification decisions. As such, we fully support the attempt to create a one-page Form ETA-9142B, Labor Certification Determination, to be issued electronically to employers. We do have some very serious concerns with certain aspects of the changes to the H-2B forms that could actually work against the efforts to streamline and improve the forms. We strongly urge DOL to not implement specific changes, including the addition of Appendix A and the substantive changes to the attestations on Appendix B. We also have some suggestions and recommendations concerning form and instruction verbiage to improve clarity and understanding to the larger H-2 community as a whole. These recommendations will be addressed in turn.

Form ETA-9142B Concerns

The first form to be addressed is the Form ETA-9142B. On the proposed form the first question, A.1, asks the following: "Is the employer seeking to employ H-2B workers under this application who will be exempt from the statutory numerical limit, or 'cap,' on the total number of foreign nationals who may be issued an H-2B visa or otherwise granted H-2B status?" This question will be very difficult for employers to answer at the early stage of filing a temporary labor certification application (90 days before start date). In most cases it depends on whether or not there will be cap relief by the time the employer gets certified and files at the U.S. Citizenship and Immigration Services (USCIS). The legislative state of affairs pertaining to the H-2B program is very fluid and changes many times throughout the year depending on congressional priorities. It will be very difficult for an employer to know with certainty whether Congress will act in the future to provide additional cap exempt status for certain workers or employers or to create another condition for their application to be exempt from the cap. There will be certain industries (fish roe processors) that will be able to indicate this exemption with certainty, but it will be limited until Congress provides more permanent exemptions to the cap that employers are able to rely on with certainty.

In addition, it is unclear from the Form ETA-9142B General Instructions whether this question applies only when all H-2B workers sought with the application are exempt or if any of the workers associated with the application are exempt. For instance, a worker that is extending their stay from one approved petition to another petition is exempt from the cap.[1] If the employer is requesting certification for 10 H-2B workers it is unclear if they would select this option if only 1 of the workers would be exempt (i.e. where one worker is already in the country on a currently approved petition and seeks to extend their stay) or if all 10 workers would need to be exempt in order to select this box. If the DOL is attempting to get an accurate count on a specific number of workers that will be exempt, perhaps an option for an employer to indicate how many workers will be exempt from the labor certification would be beneficial. However, this information may have limited utility as an employer will often not know each individual worker's situation with absolute certainty this early in the application process. Often, employers are planning on filing unnamed workers at this stage. Only when they file at the USCIS or get approved by USCIS do they begin gathering a list of names to ultimately submit to the U.S. Department of State (DOS) through the consulates in the workers' home countries. The employer could provide expected or anticipated numbers, but the employer should not be limited by these projected numbers or any expressed intent to bring exempt workers as it is likely to change before the employer is certified and files at USCIS.

Next on the Form ETA-9142B is the question B.8. The question concerning the statement of temporary need contains the following instruction: "Must be disclosed on this form. Separate attachments will not be accepted." The Form ETA-9142B General Instructions state the following: "The brief statement of temporary need must be provided in the allotted space on the form. Separate attachments will not be accepted. Other documentation or evidence demonstrating temporary need is not required to be filed with the H-2B application." This new requirement could

[1] "Generally, workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap." https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants (Last accessed October 30, 2018)

limit an employer attempting to fully explain not only their temporary need but also any changes that have been made in the application from the previous filing. If the employer experiences any changes in their need relating to the number of workers they are requesting, or to their dates of need, they may be unable to fully explain. Where an employer has experienced a change related to business necessity, the statement of need will often need to be accompanied by an additional page or letter to fully detail the changed circumstances. It is critical for an employer to be able to fully explain these changes up front to the DOL or else risk a Notice of Deficiency (NOD). Receiving a NOD creates a significant delay for an employer and by the time the employer gets to USCIS the cap will most likely be met. While we appreciate the DOL's need for succinct explanations and for brevity because of the sheer volume of applications to review, there should be an ability for an employer to continue attaching an additional letter of explanation and additional evidence where there are changes to the employer's normal statement of need.

On the Form ETA-9142B, the questions concerning the job order (F.a.1-3) appear to be redundant as a copy of the job order is required to be submitted with the application pursuant to 20 CFR §655.15(a). The job order must be submitted to the SWA serving the area of intended employment and will indicate on its face the state name and date of submission. It would also be helpful for each state workforce agency (SWA) to utilize the same job order form. There is great disparity between the forms and systems making it increasingly difficult for an employer to navigate. There is often undue complexity added to the systems and the information required to submit a job order is not always compatible with the DOL requirements. Specifically, the fields needed for DOL required information are often lacking and the information has to be added in another free-form text field, or there are superfluous fields. All information needed by DOL should be on one standard job order page used at every SWA. This form should be able to be submitted early to the SWA online and the SWA should hold the job order open until receiving notification from the DOL of the Notice of Acceptance. Once the SWA receives the Notice of Acceptance, the SWA should then activate the online job order to begin the recruitment process.

On the Form ETA-9142B General Instructions, it would be helpful to employers to indicate that the hourly work schedule indicated in F.a.6 of the Form ETA-9142B is inclusive of break and lunch periods. There are only two fields available, one for start time ("A.M") and one for end time ("P.M."). The field limitation necessarily limits the explanation from employers relating to their work schedules as it pertains to break and lunch periods. In addition, it would be helpful to provide instructions that if there are multiple shifts occurring within the stated hourly work schedule, those details will need to be provided in the special requirements field F.a.10. It would also be helpful to allow the employer to indicate whether the beginning of the shift is "AM" or "PM" instead of having that text pre-filled. The employer could be requesting workers for afternoon shifts beginning at 2:00PM and ending at 10:00PM each day, but with the current form it would appear that the worker begins at 2:00AM and works until 10:00PM, which would incorrectly represent the intended job details.

It may be confusing for some employers that the field on the Form ETA-9142B F.b.1 has the name "Worksite Address 1" and field F.b.2 has the name "Worksite Address 2." Although F.b.2 has the additional explanatory text provided (apartment/suite/floor and number) and the instructions make it clear this is for additional street address information, it may be helpful to remove the "1" and

"2" and leave both fields with the "Worksite Address" field name. The explanatory text of F.b.2 provides the clarity of what information should be included in that field.

Form ETA-9142B - Appendix A Concerns

There are some critical issues with the proposed Form ETA-9142B - Appendix A. Section F.b. of the ETA-9142B General Instructions states that "[i]t is important for the employer to define the area of intended employment with as much geographic specificity as possible." There are many industries that participate in the H-2B program, including the largest industry, landscaping, that do not have access to specific daily jobsite addresses at the time of filing.

Landscaping companies may have hundreds of potential jobsites that workers may visit in hundreds of different cities, and they are continually adding additional clients and jobsites throughout the filing period. These conditions create a situation where attempting to indicate every potential jobsite at the time of filing would be wholly impractical. Each specific jobsite depends on seasonal conditions and specific plant and growth conditions on the ground at those locations and decisions concerning site visits are made on a daily basis. The employer does not know months ahead of time the number of workers that will perform at certain addresses nor the beginning and ending date at that specific location because the conditions on the ground cannot be evaluated until closer to the date of performance. Crew size and the tasks performed on a particular jobsite, and the timing of those tasks, are largely determined by seasonal conditions and plant and growth conditions that cannot be predicted with certainty.

The employer often has various crews depart from a central worksite and visit multiple jobsites within the designated area of intended employment and return to the central worksite at the end of the day. The individual cities where workers will be performing throughout the day are all within the same area of intended employment within the counties represented on the PWD. There would be no benefit added to the DOL in evaluating these locations because they will not affect the wage as they are within the counties already included on the PWD. There are potentially hundreds of towns within an individual MSA, and the city is rendered irrelevant because "any place within the MSA is deemed to be within normal commuting distance of the place of intended employment."[2]

Having to list each city in every county where employers work within the same MSA will expand exponentially the number of pages that the DOL has to review greatly overburdening staff and slowing down application review. It would be extremely cumbersome for the DOL to review tens of thousands, if not hundreds of thousands of additional new pages of application forms. Multiple pages of this appendix will add a significant number of pages to individual applications and will become outdated within days or weeks of including as the employer continues to add additional clients.

If the DOL is attempting to add efficiencies to their processes by including Appendix A for certain itinerant industries (who move from one MSA to another at set times throughout the year), the DOL should make it clear that it is limited to those situations and excludes all others. For central worksite employers, "as much geographic specificity as possible," is limited to the county where the workers will be performing. If the DOL desires the employers to utilize the Appendix A to

[2] 20 CFR §655.5

merely list the counties, then the following fields should be optional and indicated by the § symbol: "City," "Total Workers," "Begin Date," and "End Date." As it relates to individual job sites, those fields are largely irrelevant at the time of filing for an employer that is sending crews out on a daily basis from a central worksite location. Since the conditions on the ground are not known months in advance an employer is unable to predict how many workers will be needed to perform a service at a specific location, and how long it will take (i.e. how many leaves the trees will drop from the ground, on what date, and how many workers to rake).

Having an employer fill out the MSA and wage rate information is redundant as this information is already present on the PWD that the employer is incorporating by reference under F.b.10-11 of the ETA Form-9142B. The PWD lists the counties where work will be performed, the MSA related to those counties, and the associated wages. In addition, it is redundant to require wage rates listed by MSA because under §655.10(d), "[i]f the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites." Listing the wage information associated to each worksite is irrelevant for normal H-2B applications as the required wage is the highest of the wages.

The new Appendix A will not work in the present form for the largest users of the H-2B program and should immediately be abandoned if it is unable to be altered to accommodate employers sending crews to jobsites from a central location on a daily basis. If the DOL feels they must utilize the Appendix A, it should be limited to County and MSA information as that information will at least coincide with the information on the PWD. The least burdensome alternative for employers and the DOL would be to return to the previous way of listing additional worksite locations on the ETA Form 9142B. This is currently an open field allowing an employer to list the information in the manner most relevant to their operation. Some employers have multiple "central worksite locations" from which workers depart each day in their area of intended employment. Often, these are different branch locations or workshop locations. This open field allows the employer to input these specific address details of these additional central worksite locations. At the same time, it also allows the employer to enter all the counties where the workers will be working. Although the workers will be working in a multitude of different cities, the counties where they will be performing are fairly limited due to the area within a given county. As such, the counties where they will be performing, unlike cities, can be fairly predictable because there are fewer counties where work will be performed. In addition, the NPWC utilizes work counties to assist in determining the correct prevailing wage issued on the PWD. The county information traditionally provided on the ETA Form 9142B coincides with the county information used by the NPWC to determine the correct prevailing wage rate issued on the PWD. This way of listing work counties allows the employer to indicate the area of intended employment with as much geographic specificity as possible.

Form ETA-9142B – Appendix B Concerns

As it pertains to the Form ETA-9142B - Appendix B, we support the initial fields for the individual attestations and hope that this will aid in employer compliance and knowledge concerning program requirements. However, there are some very concerning alterations to the individual attestations that must be addressed.

The fifth attestation contains a phrase "for the time period the work is performed." For peakload employers the work to be performed will extend beyond the validity of the certification, and so this attestation wording, as it is currently stated, reaches beyond the period of the certification. It should be narrowly written to link the requirement to pay the highest wage to the actual period of the certification. An alternative proposal would be "for the time period certified." Another alternative would be "during the period of employment that is the subject of this application," which is the language already used in the seventh attestation. Under 20 §CFR 655.20(a) the language used is the following: "[t]he employer must pay at least the offered wage, free and clear *during the entire period of the Application for Temporary Employment Certification* granted by OFLC" (emphasis added).

The most problematic portion of the attestations is also found in the fifth attestation. The following text is not supported by the regulations governing the program:

> If, after the issuance of a prevailing wage determination, the Department issues a new or revised prevailing wage determination that is assigned to the employer's application or certified period of employment, the employer must offer a wage that equals or exceeds the highest of the new prevailing wage or the applicable Federal, State, or local minimum wage, unless notified otherwise by the Department.

This language imposes a requirement that is not supported or provided for in the regulations. In fact, this language contradicts the regulations in a variety of places. The only method to allow for such an alteration in wages would be through 20 CFR §655.32 which contains a limitation to modifications that occur before the final determination:

> The *CO may require modifications to the job order at any time <u>before</u> the final determination to grant or deny the Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in §655.18" (emphasis added).

Further, 20 CFR §655.35(d) also contains language that "[a]mendments after certification are not permitted." Thus, the language in the fifth attestation should be limited, at most, to revisions that occur prior to the final determination. However, under 20 CFR §655.15(a) the employer must file a valid PWD along with the ETA Form 9142B no more than 90 calendar days and no less than 75 calendar days before the employer's date of need. The wage is incorporated into the SWA job order[3] and the newspaper advertisement,[4] and this wage is then used to recruit domestic U.S. workers to fully apprise them of the conditions of the job and the benefits offered by the position.[5] This ensures that there are no qualified U.S. workers who will be available for the position,[6] and allows the DOL to make such an attestation through the granting of the certification.[7] Requiring

[3] 20 CFR §655.18(b)(5)
[4] 20 CFR §655.41(b)(7)
[5] 20 CFR §655.18(b)(10), §655.18(b)(3), see also §655.47 ("SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment . . .")
[6] 20 CFR §655.40(a)
[7] 20 CFR §655.50(b), §655.51

the employer to advertise and create a job order that contains a wage that could later be negated by the DOL's implementation of a higher wage (which would not have been advertised or offered to U.S. workers) would necessarily cause the employer to be in violation of §655.18(a)(1) and §655.20(q). In this situation, the employer's job order would then offer U.S. workers less than the wage offered to the H-2B workers if the DOL requires the employer to increase the wage after the job order was placed and the advertisements had run. The regulatory language indicates that the offer to U.S. workers be no less than the same wages that the employer is offering, intends to offer, or *will provide* to H2B workers.

The DOL's ability to issue a PWD is indicated under 20 CFR §655.10 and clearly indicates that the employer must "advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest." A subsequent PWD issued after certification would create a situation where the employer would not be in compliance as this wage was not offered and an adequate labor market test would not have been conducted. Under §655.10(c)(1), the employer must also request and receive the PWD from the NPWC before filing the job order with the SWA." Under §655.10(c)(2), the PWD must be valid on the date the job order is posted. Neither of these conditions would be met under a subsequent PWD issued after certification. In summary, the DOL does not have the regulatory authority under the current framework to issue a supplemental PWD to an employer and therefore the fifth attestation's language related to the authority of the agency and the obligation of the employer in this regard should be removed.

In addition to the regulatory prohibitions on subsequent PWD's, an employer would also experience dire consequences were the DOL to attempt such an action. Most employers engage in contracts with their customers providing fixed prices for goods or services based on fixed (or at least projected) costs of inputs (materials, labor, etc.). Labor is often the largest cost that businesses have and so an unexpected increase in wages during the middle of the contract would have disastrous effects on an employer. The employer is often operating at low profit margins and unable to absorb additional costs without passing those costs along to the customer. In a scenario where a contract established the fixed price of the goods/services the employer is unable to pass along the cost to the customer. If the employer is unable to deliver the services at the negotiated prices the employer will be in breech. This would likely result in litigation and the employer would face litigation fees and claims for damages. If the employer attempts to absorb the cost of labor without passing the cost along to the customer, the employer may be driven out of business by becoming unprofitable and eventually not being able to pay its creditors.

We thank you for the opportunity to comment on the proposed amendments and additions to the H-2B forms, and we sincerely appreciate the DOL's efforts at streamlining and improving the forms. It is vitally important to the users of the H-2B program that the program remains viable, and that the forms required for submission continue to allow users to participate in the program to the fullest capacity.

Thank you for your consideration of these comments.

Respectfully submitted,

Scott Evans, President