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November 6, 2018

VIA E-Mail (*ETA.OFLC.Forms@dol.gov*)

Mr. William W. Thompson II
Administrator
Office of Foreign Labor Certification
Box PPII 12–200
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Comments on Proposed Forms For H-2B Certification Process

Dear Mr. Thompson:

On September 7, 2018, the Department of Labor published Agency Information Collection Activities; Proposed Revision of a Currently Approved Collection; Request for Comments; H–2B Temporary Non-Agricultural Labor Certification Program Forms (OMB Control Number 1205–0509) ("Request") in the Federal Register. The Request solicited comments on several proposed forms related to the labor certification process for the H-2B Program.

This law firm represents a large number of participants in the H-2B program from agents to individual employers and others whose interests are affected by the H-2B program. This representation ranges from assistance with the certification process to administrative appeals of notices of deficiency to Wage and Hour Division audits and investigations, debarment representation, and administrative and civil litigation in federal district courts related to the H-2B Program. It has a unique perspective and expertise for discussing the practical and legal implications of the proposed forms. We appreciate the opportunity to comment.

Overview

The purpose of the H-2B certification process is "to secure information sufficient to make factual determinations" about the existence of qualified U.S. workers and potential adverse effect. 20 C.F.R. § 655.0. It follows that the purpose of the forms in question is to secure this information.

If there are demands for information or other items that do not directly advance this purpose, those demands by definition create an unnecessary burden.

The fundamental theme of these comments is that the forms are too complicated because they try to do too many things and it would be advantageous to all people affected by the forms, whether governmental or private sector, to have simpler, more direct forms that collect the right information. For example, while the forms for the most part focus on relevant information, they are also made to serve an enforcement purpose, which has nothing to do with the certification process described in § 655.0. This leads to multiple levels of confusion: employers and their legal counsel have to review regulations, "attestations," policy guidance, other interpretive material, and judicial decisions just to divine what the law is. What is worse each enforcement agency – OFLC's paper auditors, OFLC's certification personnel, the Wage and Hour Division, and the courts – each has to repeat the process and often answer the material questions quite differently. The basic thrust of these comments is that ***the forms should (1) only collect information and (2) collect the absolute minimum information needed*** to make the factual determinations related to certification. Taking approach would reduce the burden associated with the certification process, enhance compliance with the regulations overall because the law would be clear to agents, employers, and enforcers alike, and assist OFLC in meeting its mission.

Organization Of These Comments

These comments focus on ETA Form-9142B; ETA Form-9142B, Appendix A; and ETA Form-9142B, Appendix B; and the applicable instructions.

Each form or appendix has a specific section. In each section, a part of the form is identified followed by a comment. Most comments are relatively short and specific. Some comments are more extensive because they relate to more general concerns. This should make it possible for you to focus on the issues raised by particular elements of the forms and conforms to the instructions provided in the Federal Register Notice.

Proposed ETA Form 9142B and Instructions

The elimination of several unnecessary items from the current ETA Form 9142B is noted and appreciated. Most of this information appears to have been related solely to the U.S.C.I.S. review of a potential Form I-129 Petition for Nonimmigrant worker and had little to do with the labor certification process.

There are several changes to the form on which we would like to comment. The first is Box A.1 "Nature of H-2B Application." It asks the employer to categorize the filing as "cap exempt" or not cap exempt. The proposed instruction provides very general direction about this question:

> Enter "Yes" or "No" as to whether the employer seeks 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. For further details on H-2B cap exemptions, please visit the Department of Homeland Security's U.S. Citizenship and Immigration Services' (USCIS) web site at www.uscis.gov.

The supporting statement does not explain what DOL is trying to achieve with this box or how this information is related to the ultimate question of labor certification posed in § 655.0.

There are several aspects about this box that OFLC should consider. First, it should ask itself whether this information is needed for certification purposes. The connection is not obvious. Second, the terminology is imprecise. The concept of "cap exempt" refers primarily to the "Returning Worker Exemption" of many years past. There are no exemptions today. There are instances in which issued visas are not counted (as when U.S.C.I.S. grants a transfer petition) twice against the cap. It is unclear whether an employer is to answer the question "yes" or "no" in the case of a transfer petition when it is seeking certification. Third, it is important to remember that a large number of certification applications are received from employers without counsel or sophisticated agents. Their categorization may or may not be correct, no matter how much effort they put into trying to figure it out.

Assuming that DOL's purpose in gathering this information is statistical, we would suggest that DOL revise the form by adding specific boxes for the information it wants to collect. If that leads to an unwieldly form, DOL should eliminate it.

Items B.7 and B.8 relate to the Statement of Temporary Need. The first asks an employer to choose its temporary need and the second provides a small space for explaining the temporary need. The instructions require an employer to state the temporary need entirely within B.9 and prohibit it from attaching additional papers. We would urge the Department to rethink this. Everyone's goal is the rapid processing of H-2B applications and the accurate identification of those applications that cannot be certified. We are concerned that the space limitation and prohibition of attachments works against this goal. While it is true that some statements of temporary need are simple, some have to be more detailed. Experienced filing agents and attorneys are able to distinguish between the two and generally know what information the Chicago National Processing Center ("CNPC") will require. The new Form 9142B needs to provide enough space or allow continuation pages to deal with these more complicated cases. It also should allow submission of substantive attachments. While it must create a handling issue, there is no reason to require an analyst to look at an application only to request that information that experience shows it is CNPC's policy to demand. That disadvantages those employers for no apparent reason. The Department should revise the form to provide more space, allow continuation fields, and allow submission of supporting information proactively.

The Department should consider eliminating Item E.21. Whether and when a filing agent has to obtain a certificate of registration is often a difficult question. Most will just register as a protective matter, even if they do not believe that the law actually requires them to do so. The application should provide them an opportunity to indicate that this is a protective filing only.

Item F.a.4. is the section for job duties. This box has the same restriction as Item B.8 – employers have to fit all duties in the box. Providing a complete job description is becoming

increasingly important as Wage and Hour Division considers any work not in the job description – no matter how minor – to violate the H-2B regulations. This creates an incentive for employers to list everything. However, Item F.a.4. limits that ability greatly. The supporting statement does not explain why employers cannot use a continuation page for this purpose.

Item F.a.5 asks for the expected work schedule, including overtime hours. The form or, at the very least, the instructions should make it very clear that these are estimates so that the information in these boxes does not become a straight-jacket. Also, in many instances, the job opportunity may be overtime exempt so the concept of overtime is not really applicable and could lead to costly confusion for employers and workers.

Item F.a.10 asks the employer to list "special requirements" for the job. We appreciate that this box does not prohibit the use of continuation pages. However, there is a more serious problem that occurs in the instructions. The proposed instructions read:

> Enter the job-related skills, minimum qualifications, field(s) of training, and other special requirements of the job opportunity. Examples include but are not limited to: licenses, including a valid driver's license; certifications; specific foreign language fluency; proficiency with specific tools, equipment, software, or machinery; proficiency in specific methods (e.g., Churrasco chef skills); travel or relocation requirements; shorthand and typing speeds; ability to pass drug and/or background checks. If a job opportunity requires training as described in Section F.a.8, you must enter in this field the specific field(s) and/or name(s) of the training required. You may list more than one field of training and/or more than one name. If the job opportunity does not require any special requirements, enter "N/A."
>
> **Note:** All requirements must be bona fide, and consistent with the normal and accepted qualifications/requirements imposed by non-H-2B employers in the same occupation and area of intended employment. ***The entry in this field must be the same as the special requirements issued by the Department for the employer's job opportunity on the PWD Form ETA- 9141.*** (Emphasis added).

The first paragraph encourages the employer to list all such qualifications. However, the emphasized language could be read to prohibit any skills and/or requirements except for the generic "special requirements issued by the Department for the employer's job opportunity." Alternatively, the emphasized language could mean that the requirements that the employer listed in its PWR and present in the PWD must be carried over. It is also unclear whether the Department intends to begin rewriting job descriptions at the prevailing wage stage. The Preamble to the regulations suggests a different process – consultation at the application phase. The Department should be wary of anything that slows the prevailing wage process. It is also concerning that it will be difficult for an employer to challenge an erroneous decision that whether a qualification is "normal and accepted" given the limitations on review. If the Department wishes to change this process, it should do so through rule making.

Items F.b.8 and F.b.8(a) are important, but risk substantial confusion. First, it is unclear why Item F.b.8 is "Basic Wage Rate Paid To Nonimmigrant Workers" rather than all workers.

Second, as to overtime premiums, it is impossible to calculate the applicable overtime premium without knowing the regular rate. What appears to be intended is to require disclosure of the employer's premium rate, if applicable, for hours worked about forty in a single workweek. It would be helpful if the Department clarified this in the instructions. Finally, as for exempt/non-exempt status, please clarify that such details can be provided in Item F.b.9(a).

Items F.b.10, F.b.10(a), and F.b.10(c) are unclear. Neither the supporting statement nor the instructions provide information about what the Department is trying to accomplish. DOL has no mechanism for issuing a PWD except at the instance of an employer. *In the Matter of Island Holdings*, No. 2013-PWD-00002 (Dec. 3, 2013) (*en banc*), pp. 12-14. Presumably, if an employer asks for and receives two PWDs, the latter would control. Another point of confusion may arise here. Sometimes employers pare down or otherwise change a job opportunity and ask for a PWD. Employers need direction about when they have to disclose the information demanded here if the Department retains it.

Appendix A

Appendix A poses an impossible burden for the landscaping industry. Per OFLC's website, the requirement for physical location refers literally to every single worksite where an H-2B worker performs any service. As explained in FAQ – Round 17:

> For purposes of the H-2B program, a "worksite" is any location where the worker performs one or more duties of the job opportunity. For example, a landscaping crew may meet each morning at the employer's place of business to gather and prepare equipment, load trucks, and then travel to various other locations to provide landscaping services. The employer's place of business where the crew gathers and prepares the employer's equipment or other tools is a worksite, as is each other location where the crew provides landscaping services. This is because the workers engage in one or more job duties at each of these locations.

There are multiple problems with Appendix A, especially when combined with this non-regulatory statement. First, it is impossible to anticipate months ahead of time every single place where services might be performed. Second, even if the form were read to impose a duty of amendment, the burden would be overwhelming. Let's take a small landscaper with five crews working in a single area in intended employment. Each crew works at 10 locations a day and works 6 days a week. That means the employer would have to report 300 locations per week and repeat the same information over and over again. That is wholly unreasonable. It is important to understand that location and customer are not necessarily synonymous. A single developer or homeowner's association might have hundreds of locations and it is locations that the form demands. Forestry employers working in remote locations have an even harder problem – how to identify the worksite and when to report.

Moreover, it is difficult to identify the Department's legitimate regulatory interest in obtaining information at this level of detail at the certification stage. The terms and conditions of

employment are set at the level of the area of intended employment or more broadly at the metropolitan statistical area level.

Finally, Appendix A involves rule making. It takes a definition of "worksite" that is not regulatory and then mandates that employers complete Appendix A using it. That is a binding norm involving serious social costs that can only be adopted through notice and comment rulemaking.

Appendix B

Before assessing individual attestations, several preliminary comments are in order. The purpose of the certification process and the forms used in it is "to secure information sufficient to make factual determinations" about the existence of qualified U.S. workers and potential adverse effect. 20 C.F.R. § 655.0. Appendix B does not gather information because it has a different purpose. The purpose, per the Supporting Statement, is:

> The revisions to this collection of information clarify employer assurances and obligations, including clarifying that an employer is obligated to pay a new prevailing wage if the Department issues an official correction to that employer, unless the Department notifies the employer otherwise. Additionally, the collection of this information will be used in post-adjudication audit examinations and/or program integrity proceedings (e.g., revocation or debarment actions) and requested by WHD during an investigation or enforcement proceeding. *See* 20 CFR 655.56; 29 CFR 503.17. The Department's estimated burden for the current Form ETA-9142B includes the completion of *Appendix B*.

The twin purposes are to "clarify employer assurances and obligations" and (2) be used in enforcement proceedings. Neither of these is appropriate. The best way to "clarify" obligations is through notice and comment rulemaking or through the public FAQ process. As will be discussed below, the illustrative clarification relates to a pending rulemaking proceeding, is not the law, and confuses program practice significantly. As for post-adjudication proceedings, the sole purpose of the forms is to collect "information" for adjudication. The relevant enforcement document is the Petition for Nonimmigrant Worker, not the certification.

The second key principle is that the attestations may not add to, or in any way differ from, the regulations. As BALCA explained *In the Matter of Island Holdings*, No. 2013-PWD-00002 (Dec. 3, 2013) (*en banc*), pp. 12-13:

> Second, the Certifying Officer argues that Island agreed to pay a wage that equals or exceeds the prevailing wage that "is or will" be issued by the Department when it signed the *Application for Temporary Employment Certification*. In making this argument, the Certifying Officer relies on Paragraph 5 of Appendix B.1 to the *Application for Temporary Employment Certification*.
>
> . . .

The Certifying Officer's reliance on Paragraph 5 is misplaced. ***The Department may not require an employer to attest to a condition that is not required by the regulations.*** This is because the Department cannot impose additional legal obligations on a regulated party without following the procedures mandated by the APA. Among other things, the APA requires an agency to provide notice and comment for those rules intended to bind the public with the force of law. *See, e.g., Gen Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002). The Department implicitly acknowledged this fact in April 2012, when it sought emergency approval to change Appendix B.1. after a federal court enjoined it from implementing or enforcing the H-2B it promulgated in 2012. Specifically, the Department explained:

> DOL is asking for this emergency revision to use the former l 205-0466 instruments. The reason the forms must revert back to those in effect prior to the 2012 H-2B Final Rule is because the attestations that an employer using the H-2B program must make, which are listed in Appendix B.l, have changed substantially and ***the Department cannot require employers to make attestations that are not required by the current regulations, which will remain in effect if the rule is enjoined.***

See Island Exhibit 1, Supporting Statement For Request For OMB Approval Under The Paperwork Reduction Act of 1995, dated April 26, 2012 (emphasis added). In making this request, the Department apparently overlooked the fact that Appendix B.1. included an attestation that was not otherwise required by the regulations. (Emphasis added).

Unless the Department can now require employers to make attestations not required by law, the attestations serve no purpose not already served by the regulations. If the attestations differ, they are nullities and merely confuse employers and enforcers alike.

The Department should note, too, that even a set of attestations that exactly matches the regulations raises an issue. As the Department itself notes in its draft Appendix B, there are several federal crimes that address providing materially false information to federal officers. Because a violation would appear to support falsity of the attestation, the attestation process in effect attaches criminal penalties to civil administrative violations, something that the Department does not have the authority to do in general and which the Department's regulations do not authorize.

The Department should seriously consider whether attestations have any purpose. To the extent it needs a statement of intended compliance, "I certify that I intend to comply with the applicable regulations. I understand that by so certifying I am not subjecting myself to penalties for violations beyond those provided by the regulations" would be a good starting point.

With these principles in mind, it is time to turn to specifics.

Attorney Agent Declaration

Appendix B adds the following language to the Attorney/Agent Declaration: "**I HEREBY CERTIFY** that I have provided to the employer the Form ETA-9142B and all supporting documentation for review[.]" There does not appear to be any basis for this requirement in the regulations or the statute.

Attestation No. 5

The subject matter of Attestation No. 5 illustrates well the problems that arise from using Attestations as regulatory devices. The H-2B Program does not provide the Department with a regulatory mechanism to unilaterally issue an "Official Correction" to a prevailing wage determination post certification. *Island Holdings*, pp. 10-12. Indeed, after an employer advertises the prevailing wage, the prevailing wage rate is fixed by Petition and cannot be changed. *See Faith Forestry Servs. v. United States DOL*, 2018 U.S. Dist. LEXIS 128613 (N.D. Miss. Aug. 1, 2018). This was the Department's position. It is inappropriate, under the guise of changing a form that is supposed to merely repeat the regulations, to attempt to create a basis for issuing the sort-of official corrections that the Department has been repeatedly denied the authority to do from 2013 forward. If the Department wants to make a change of this significance, it should go through notice and comment rulemaking.

Attestation No. 17

The end of Attestation No. 17 includes the following statement:

> Provided that workers work until the end of the certified period of employment or are dismissed from employment for any reason before the end of that period, the employer will pay for such workers' return transportation to the place of recruitment and daily subsistence if the workers have no immediate subsequent H-2B employment.

This attestation is intended to remind employers of 8 U.S.C. § 1184(c)(5)(A):

> In the case of an alien who is provided nonimmigrant status under [H-1B or H-2B] and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

The statute requires reimbursement of an H-2B worker who is dismissed "before the end of the period of authorized admission" and does not include "workers work until the end of the certified period of employment" as the proposed attestation states. The statute limits the employer's liability to "reasonable costs" while the attestation has no such limitation. Unlike the attestation, the statute does not impose a requirement to pay daily subsistence. The statute states that the employer is required to pay for return transportation "abroad." The attestation uses the vague term "place of

recruitment." The regulation uses "place where the worker departed to work for the employer." Please note that because the attestation differs from a statute any purported conformity with a regulation would not save it.

Attestation No. 17 illustrates a general problem as well. It conclude with the statement that "All employer-provided transportation must comply with all applicable Federal, State, or local laws and regulations." This statement is overbroad. If an employer buys a worker a plane ticket on Delta and unbeknownst to the employer, the plane is out of compliance with a Federal Aviation Administration regulation, this language could be construed to punish the employer. This language should be clarified to indicate that "applicable" means 'applicable to the employer."

This is a general issue with various attestations involving "applicable" laws. To remain in conformity with the statute, there need to be qualifications that ensure that the scope of the attestation does not exceed the scope of the statute. For example, employers attest to comply with applicable federal anti-discrimination laws such as Title VII. But Title VII has a specific remedial scheme that does not involve the Department of Labor, adherence to which is essential to enforcement of Title VII and the extirpation of unlawful discrimination. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("Even if the interests of justice might be served in this particular case by a bifurcated construction of that word, in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.")

Another example is the Fair Labor Standards Act. Section 16 of the FLSA places specific limits on what remedies are authorized and how they may be pursued. The attestation, however, appears to transmute "all laws" into something that can be enforced in a manner Congress never authorized. If so interpreted, the attestation is contrary to statute and must yield. If interpreted consistently with statute, it adds nothing except complication and confusion. The Department should look carefully at the forms and make sure they simplify H-2B processing rather than hindering it.

Conclusion

For many years, H-2B Program forms have become increasingly complex. Some of the reason is that the 2015 Interim Final Rule imposes onerous burdens on the H-2B community and the forms reflect that. But the most important reason is that the forms, and the use of the forms, are straying from their intended purpose. Their purpose is "to secure information sufficient to make factual determinations" about the existence of qualified U.S. workers and potential adverse effect. 20 C.F.R. § 655.0. It is not to "clarify" obligations. It is not to set up post-adjudication enforcement by either the Wage and Hour Division or the Department of Justice. It is to help make a simple factual determination.

All sorts of problems arise when this is forgotten. Arguments over "clarifications" arise; gaps between attestations and regulations and statutes arise leaving employers and enforcers alike confused. The only question is what is the minimum information needed under § 655.0. Every

other question belongs in notice and comment rulemaking. We respectfully ask that the Department consider these comments carefully and revise the proposed forms accordingly.

Sincerely,

Wendel V. Hall