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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 H-2B Forms OMB Control Number 1205– 0509)

Dear Mr. Thompson:

We are concerned that the current proposal, with the stated intent to "streamline" and "clarify statutory and regulatory requirements," will have undesirable and unlawful effect of changing the current H-2B regulatory requirements without a full rule-making and indeed exceeds the Department's lawful authority even were the current process an announced rule-making under the Administrative Procedure Act. As the September 7 "Notice of Agency Information Collection Activities" recognizes, the Department of Labor's "consultative" role is simply to advise whether "the petitioning employer's job opportunity" and "a foreign worker's employment in the job opportunity" under terms and conditions, as contemplated by the employer, "will adversely affect the wages or working conditions of similarly employed U.S. workers. See 8 CFR 214.2(h)(6)(A) and (iv)(A)."

The role and prerogative of the United States Department of Labor are not to set the terms and conditions of such employments beyond those that are lawful and in which "similarly employed" U.S. workers are or have been employed, recognizing that as

in the case of hotel and other "domestic service" workers in the Virgin Islands and sugar cane workers in Florida in the 1970's, there are jobs, like hotel housekeeping and related tourist industry jobs and cutting sugarcane, that are important to the U.S. economy and to U.S. workers in other jobs that would not be performed in the U.S. at all but for the availability of temporary foreign workers fill those jobs that U.S. workers neither wish to or need to perform. *See Rogers v. Larson*, 563 F.2d 617, 624 (1st Cir. 1977). The opportunity to provide these economic activities that are beneficial to the whole of the United States economy and the U.S. workforce as a whole should not be precluded or thwarted by unnecessary regulation or restrictions.

The United States Department of Labor is not authorized to make jobs more "attractive" to U.S. workers by enhancing wages above those paid in similar employment under similar conditions in the same area of intended employment. *Williams v. Usery,* 531 F2d. 305, 307 (5th Cir. 1976). Similarly, even under current regulations, the Department is not authorized to deny employers their rights to impose "normal and accepted job qualifications and requirements of employers that do not use H-2B workers for the same or comparable employment in the same or comparable occupations in the same area of intended employment." Instead of providing only restrictive form "space" and opportunities providing information, the Department should allow employers, many of which have highly sophisticated Human Resources functions, to provide details regarding job requirements and duties. We respectfully submit that "form," legally and practically, must follow substance, not the other way around. In the guise of being more efficient or streamlined, the Department may not deny employers their prerogatives to set employment terms and conditions consistent with their statutory rights as interpreted by binding cases analyses.

The above points are separate and in addition to the following points. We adopt and concur with the points made by Wendel Hall, Esquire, in his comments filed on November 6 with respect to the following and add our additional objections to the planned form changes:

Proposed ETA Form 9142B and Instructions

Item F.a.4. is the section in which to describe job duties. This box has the same restriction as Item B.8 – employers must 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 position creates an incentive for employers to list every duty and every job and conduct requirement to which employees will be or might be subject. Item F.a.4., however, limits that ability greatly. The supporting statement does not explain why employers may not use a continuation page for this purpose.

We respectfully submit that a "space" limitation — and for that matter – any limitation on employers' abilities to list job requirements, including conduct requirements, is unlawful and inconsistent with the prerogatives and discretion of the Department in these matters so long as U.S. workers are not adversely affected . This so-called "space" limitation is effectively a change in the current H-2B regulations and moreover, if adopted, would be an unlawful restriction on employers' rights.

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 numbers may be estimates so that the numbers in these boxes do not become a straight-jackets or the basis for worker suits. Also, in some instances, as for example, in the case of workers whose duties make them exempt from overtime under 29 U.S.C. § 213(b)(1), those workers would not be entitled to an overtime premium under Federal law. Suggesting that overtime premiums are routinely applicable, especially without caveat, could lead to costly confusion for employers and workers, unfounded litigation and chaos, not clarity.

Item F.a.10 asks the employer to list "special requirements" for the job. We appreciate that this box does not appear to forbid the use of continuation pages. There is, however, another serious problem 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. As pointed out by Mr. Hall, the emphasized language could be read to forbid requiring 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 adding any requirements that slow the prevailing wage process, especially given the current filing timelines and deadlines. It is also concerning that it will be difficult for an employer to challenge an erroneous decision of 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 as Mr. Hall pointed out in his comments filed also on November 6.

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 to 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 above forty in a single workweek. It would be helpful if the Department clarified its intent 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 the substantive content of a job and ask for a PWD on the "new" job. Employers need direction about when they must disclose the information demanded here if the Department retains this provision.

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 if an employer were allowed to accept additional "work" in the same area of intended employment. Second, even if the form were read to impose a duty of amendment, the burden would be overwhelming. For example, for a small landscaper with five crews working in a single area in intended employment, each crew might work at 10 locations within a single a day and may work 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 and there is no basis to say it is needed to protect American jobs. In fact, such a requirement has the opposite result. It restricts the abilities of the employer and U.S. workers in both H-2B and in non-H-2B jobs to earn what they can based on their labors. It would be rather like saying a restaurant server may only serve restaurant patrons in May if the patrons had made their dining reservations the prior December! 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. This proposed requirement of listing each and every worksite appears to be more geared to allowing government officials to locate the worksites for surprise inspections than to protecting the jobs or U.S. workers and their working conditions.

As Mr. Hall pointed out in his comments submitted November 6, 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, as Mr. Hall pointed out, Appendix A involves rule making. It takes a definition of "worksite" that is not regulatory and then mandates that employers complete Appendix A using that definition. That is a binding norm involving serious social costs that may lawfully only be adopted through notice and comment rulemaking.

Appendix B

As Mr. Hall's comments point out, 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 (1) to "clarify employer assurances and obligations" and (2) to be used in enforcement proceedings. Neither of these is appropriate. The proper and legally sufficient way to "clarify" obligations is through notice and comment rulemaking or, at the very least, through the public FAQ process, although even that process is legally suspect in connection with substantive changes. 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 regulation it promulgated in 2012. Specifically, the Department explained:

> DOL is asking for this emergency revision to use the former l 2050466 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 may now require employers to make attestations not required by law, which surely it may not, the attestations serve no purpose not already served by the regulations. If the attestations differ from the regulations, they are nullities and may not lawfully be imposed by the Department.

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 that the Department's regulations do not authorize.

The Department should seriously consider whether attestations have any purpose. To the extent that the Department believes 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.

We concur with the additional points made by Mr. Hall.

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 issue unilaterally an "Official Correction" to a prevailing wage determination post certification. *Island Holdings*, pp. 10-12. It is inappropriate, under the guise of merely changing a form that is supposed merely to 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 make 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 such payments on behalf of an H-2B worker who is dismissed "before the end of the period of authorized admission" and does not include "workers [who] 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 the statute, any purported conformity with a regulation would not save it.

Attestation No. 17 illustrates a general problem as well. It concludes 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."

The above example presents a general problem 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 compliance with applicable federal anti-discrimination laws such as Title VII, but Title VII has a specific structure for filing complaints, establishing liabilities and defenses and remedies that do not involve the Department of Labor. As the Supreme Court recognized in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), "[e]ven if the interests of justice might be served in this particular case by a bifurcated construction ..., 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 that shows that this provision should be abandoned arises under the Fair Labor Standards Act. FLSA Section 16 places specific limits on what remedies are authorized and how they may be pursued. The attestation, however, appears to

transmute "all laws" into requirements that can be enforced in ways that are contrary to the structures, restrictions and rights Congress created. If so interpreted, the attestation is contrary to statute and must yield. If interpreted consistently with the 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.

Moreover, Constitutional the principles and requirements of Federalism are undermined, in fact, violated when the United States Department of Labor undertakes to interpret and enforce state-created rights.

Conclusion

We respectfully ask that the Department consider these comments and revise the proposed forms accordingly.

Very truly yours,

Ann Margaret Pointer

Ann Margaret Pointer
For FISHER & PHILLIPS LLP

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