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DEPARTMENT OF LABOR

From John Fraw
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Employment and Training Administration

20 CFR Part 655

**Labor Certification Process for the Temporary Employment of Nonimmigrant
 Aliens in Agriculture in the United States; Administrative Measures
 to Improve Program Performance**

[RIN 1205 - AB19]

AGENCY: Employment and Training Administration, Department of Labor

Action: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL or Department) is publishing a final rule amending its regulations relating to the temporary employment of nonimmigrant agricultural workers (H-2A workers) in the United States. The final rule makes two substantive changes to the current regulations.

One change reduces the time that an application for temporary agricultural labor certification must be filed from 60 days to 45 days before the date the employer needs agricultural workers. The other change modifies the requirement that employers shall notify the local State Employment Security Office, in writing, of the exact date on which the H-2A workers depart for the employers place of business.

① Application
 filing time
 60-45

② modifies
 notification to
 local
 empl.
 office

One other previously proposed change is being adopted, in part, though in a manner that can be implemented under current regulations. A fourth proposed change remains open as it is the subject of parallel notice-and-comment rulemaking by the

Immigration and Naturalization Service (INS). One previously proposed regulatory change is not being adopted.

EFFECTIVE DATE: [Insert date 30 days from the date of publication in the Federal Register.]

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SUPPLEMENTARY INFORMATION

I. Introduction

On October 2, 1998, ETA published in the Federal Register a Notice of Proposed Rulemaking (NPRM) which proposed five amendments to ETA's regulations at 20 CFR part 655, subpart B, relating to the temporary employment of nonimmigrant agricultural (H-2A) workers in the United States. 63 FR 53244 (Oct. 2, 1998). The NPRM proposed *NPRM* five regulatory changes pertaining to: (1) the time limits for housing inspections; (2) time limits for filing labor certification applications; (3) a possible exception from using certain Farm Labor Contractors (FLC's); (4) elimination of the requirement that employers notify the local job service office in writing of the date the H-2A workers depart for the employer's place of business; and (5) transfer of the responsibility for approving H-2A

visa petitions for workers coming from outside of the United States (U.S.) to DOL from the INS Commissioner. This document adopts final regulations involving the time limits for filing applications and the requirement that employers notify the local employment service office of the date the H-2A workers depart for the employer's place of business. Another proposed change relating to an exception from using certain FLC's is being adopted, in part, in a manner that can be implemented under current regulations. The Department will take appropriate action to finalize the transfer of petition authority if INS concludes such transfer is appropriate at the completion of its rulemaking. The remaining proposed change will not be enacted for the reasons stated below.

II. Statutory Standard and Implementing Regulations

The decision whether to grant or deny an employer's petition to import nonimmigrant farm workers to the United States for the purpose of temporary employment is the responsibility of the Attorney General's designee, the INS Commissioner. The Immigration and Nationality Act (INA) (8 U.S.C. 1101 et seq.) provides that the Attorney General may not approve a petition from an employer for employment of nonimmigrant farm workers (H-2A visa holders) for temporary or seasonal services or labor in agriculture unless the petitioner has applied to the Secretary of Labor for a labor certification showing that:

- (A) There are not sufficient U.S. workers who are able, willing, and qualified, and

who will be available at the time and place needed to perform the labor or services involved in the petition; and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

[8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.]

The Department of Labor has published regulations at 20 CFR part 655, subpart B, and 29 CFR part 501 to implement its responsibilities under the H-2A program. Regulations affecting employer-provided agricultural worker housing are in 20 CFR part 654, subpart E, and 29 CFR 1910.42.

III. Comments on Proposed Rule and the Department's Response

A. Comments on Proposed Rule

Thirty-six comments were received on the proposed rule. Comments were received from worker advocates, employer organizations, the American Immigration Lawyers Association (AILA), state employment security agencies, the Interstate Conference of Employment Security Agencies, one monitor advocate, and a member of the public. The largest number of comments -- 15 -- were received from State agencies. After the State agencies, the largest number of comments were received from worker

advocates and employer organizations, which submitted 8 and 5 comments, respectively.

The Farmworker Justice Fund (FJF) indicated that its comments were supported by 32 listed organizations. Three comments were received from AILA and two attorneys.

Comments were also received from Congressman Howard Berman of California, ETA's Regional Office in Chicago, one monitor advocate, and one member of the general public.

Many commenters, in addition to commenting on the specific regulatory proposals contained in the NPRM, offered a number of additional suggestions for modifying the H-2A program. These suggestions included, but were not limited to:

- Repealing the adverse effect wage rate (AEWR);
- Increasing the AEWR by 20 percent;
- Eliminating the current definition of "prevailing practice" which is based on the practices of a majority of employers and employees, and replacing it with one based on either a majority of employers, or a majority of the employees in the local area and occupation;
- Imposing user fees that recover the true cost of the H-2A program;
- Eliminating the 50 percent rule, which requires employers to hire any

qualified U.S. worker who applies until 50 percent of the work contract, under which the foreign worker was hired, has elapsed.

- Requiring withholding and placing in escrow sufficient funds from H-2A workers' wages so that they can pay for their return transportation home if they do not fulfill their contracts.

The above suggestions are outside the scope of the proposed rule. Consequently, they are not addressed in this document but may be considered by the Department in any future rulemaking regarding the H-2A nonimmigrant program. Similarly, comments concerning administrative (i.e., non-regulatory) changes in the H-2A program are not addressed in this document, but will be considered by the Department in making administrative changes that can be implemented without amending the H-2A regulations at 20 CFR part 656, subpart B.

The FJF strongly opposed the proposed rule and urged that it be withdrawn. According to the FJF, the proposal is arbitrary and capricious because it allegedly ignores numerous studies concluding that the Department has not adequately implemented worker protections under the H-2A program, and it ignores recommendations that have been made by such studies to improve worker protections. The FJF enumerated a variety of recommendations made and issues identified by the studies cited in its comments. Moreover, addressing the recommendations and issues cited by the FJF, as well as the

many other recommendations made by other commenters would require a much more comprehensive assessment of the H-2A program and extensive consultation with all stakeholders, which -- while such a process has been taking place in other fora-- is outside the scope of this rulemaking.

As indicated in the preamble to the NPRM, the primary purpose of the proposed regulatory amendments was to implement certain changes growing out of a dialogue among the Departments of State (DOS), Justice (INS), and Labor to streamline the H-2A program and address complaints raised by some users of the program without weakening worker protections. Such an effort is particularly important in an environment characterized by program growth and stable or declining resources. The Department believes, as discussed in greater detail below, that the amendments adopted are balanced. The amendments serve to streamline the H-2A program and can help improve operations without weakening worker protections. Further, as stated in the preamble, this rulemaking represents one step towards implementing changes to improve H-2A program operations. The Department will consider the issues raised by various studies of the H-2A program, as well as the recommendations made by the commenters on the NPRM, in any future rulemaking effort that may be undertaken to improve the operation of the H-2A program.

B. Comments About the Proposed Regulatory Changes

The comments received on the specific regulatory proposals in the NPRM and the Department's response to the comments are discussed below.

1. Time Limits for Employer Provided Housing To Be Available for Inspection
(§ 654.403)

no change

Several comments were received on the proposal to reduce the time by which housing that will be provided to a worker must be available for inspection, from 30 to 15 days prior to occupancy. Inspections are performed by State agencies in most cases. See 20 CFR 653.501(d)(2)(xv).

Congressman Howard Berman and several worker advocates objected to the proposal on several grounds. The major issues raised by those comments include:

- State agencies do not always make timely inspections and shortening the lead time to conduct housing inspections will inevitably lead to some needed repairs not being made.
- The Office of Inspector General's (OIG) report concluded, in relevant part, that DOL has certified employers to receive H-2A workers despite lacking

documentary proof that housing inspection had occurred. The OIG finding is consistent with reports that some H-2A housing is not inspected in a timely fashion and that H-2A housing does not comply with basic housing standards.

- The untimely inspection and repair of farmworker housing will worsen as the H-2A program continues to grow, since funding for inspections will not keep pace with the increased need. The H-2A program has been expanding to new States and crop areas during the last three years and is expected to continue its growth.

Employer organizations favored the proposal to reduce the lead time worker housing must be available for inspection prior to occupancy, and assumed that the proposed shortened deadline for housing inspections would allow certifications to be issued even if housing inspection was still pending. The National Council of Agricultural Employers (NCAE) stated that if certification is delayed while housing inspections are still pending, the proposed amendment would have little "real impact on H-2A users." NCAE recommended that the regulations be amended to clarify that housing inspection is not required prior to certification.

Two large employer organizations -- NCAE and the American Farm Bureau Federation (AFBF) -- expressed considerable concern about the increasing difficulty

employers face in obtaining timely housing inspections. The NCAE indicated that this problem has grown worse in recent years with growth in the H-2A program and its expansion into States where H-2A certification has not been sought in recent years. The NCAE further stated that it appears that many states have an extremely limited number of personnel who are capable of performing housing inspections. Although the NCAE supported reducing the application time, it strongly urged that DOL inventory the housing inspection resources available in the State agencies to assure that there are qualified inspectors available to make inspections in a timely manner.

Both the NCAE and AFBF recommended conforming the H-2A housing inspection requirement to that for all other migrant and seasonal agricultural workers in the regulations implementing the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) at 29 CFR 500.135. They contend such a change would address the problem faced by employers in obtaining timely housing inspections. The MSPA regulations require that housing be approved prior to occupancy. They also provide that if the employer has made a timely request for an inspection, and the inspection has not been made, the employer may house workers without inspection, provided that the housing is in full compliance with applicable regulations.

Nine State agencies objected to the proposal to shorten the lead time for housing inspections. The major points they made include:

- Several States objected to the proposal because it would allow certification to be issued before the employer's housing was inspected and approved.
- Other states objected to the proposal based on resource considerations. With the limited resources available, a shorter time frame would make it more difficult for States to inspect and approve housing prior to occupancy. Two States pointed out that they only had one person available to conduct housing inspections; another indicated that normally only one person is available to conduct 150 housing inspections.
- One State pointed out that inclement weather conditions during the winter months requires rescheduling of housing inspections in remote areas. The proposed 15-day time frame would make it difficult for inspections to be completed in a timely fashion.
- Many employers do not request housing inspections in a timely manner.
- Inspection 15-days before occupancy may not provide adequate time for employers to correct deficiencies in their housing.

Four States were in favor of the proposal to shorten the lead time for conducting housing inspections. One State maintained that the shorter time frame would allow more

flexibility for its field staff to work with employers and that the "relaxing" of the regulation "still provides the same level of protection for U.S. workers."

The ETA Chicago Regional Office expressed great concern about reducing the time limit for inspection prior to occupancy, because there would be no way to guarantee that housing will be in full compliance with requirements before certification is granted.

The Department indicated in the NPRM that one reason for reducing the lead time for conducting housing inspections was the commonly expressed concern among employers in Northern States that a 1-month lead time was unrealistic for employers that need workers in March or April. It was also stated in the NPRM that local employment security agency staff have had difficulty inspecting employer-provided housing in Northern States. 63 FR at 53245. Only two comments directly addressed these issues.

Massachusetts indicated that it does not have a problem in inspecting housing in late winter or early spring. The State's records show that employers with employment needs during late winter or early spring normally maintain their housing facilities in conformity with the required standards and have always been inspected in a timely manner. As noted above, another state, pointed out that inclement weather frequently causes housing inspections to be rescheduled and opined that reducing the lead time the employer has to assure that housing will be in full compliance before it is occupied will make it more difficult for State agencies to perform timely housing inspections.

Lastly, one commenter questioned what would happen if -- with a shortened lead time -- the employer's housing is found deficient after certification, and called upon the Department to spell out what happens in such circumstances. The commenter urged that the employer simply be given an opportunity to correct and cure any deficiency before the date of need.

After carefully reviewing all the comments, the Department has concluded that the time the housing needs to be available for inspection should not be not be reduced from 30 to 15 days prior to occupancy. ETA is very concerned that shortening the time that the housing must be ready for occupancy will put increased pressure on States' inspection resources and could result in certifications being granted before the housing was inspected and approved -- potentially resulting in workers being housed in substandard conditions. Such a result, in the Department's estimation, would be contrary to the statute, which requires employers to furnish housing that meets certain minimum health and safety standards, and longstanding policies of the Department. See 8 U.S.C. 1188 (c) (4) and 20 CFR 654.403 (e) (1)(i), (ii), and (iii). Under current regulations, employers should normally provide proof of housing inspection at the time the application is filed. 20 CFR 654.400. The regulations allow for provisional access to the Job Service upon assurance that the housing will be fully compliant 30 days before occupancy. The regulations provide that if the employer's housing is not in full compliance with the applicable housing standards, as assured in the request for conditional access to the interstate clearance system, the local job service office shall immediately :

*No
reduction
in time*

- Notify the Regional Administrator;
- Remove the employer's job orders from intrastate and interstate clearance; and,
- If workers have been recruited against these orders, in cooperation with the employment service agencies in other States, make every reasonable attempt to locate and notify the appropriate crew leaders or workers, and to find alternative and comparable employment for the workers.

The Department has also concluded that amending § 654.403 of the regulations to conform to 29 CFR 500.13 in the MSPA regulations would be inappropriate. Such a change would increase the likelihood of workers being referred to and lodged in substandard housing, which is contrary to the statute and the longstanding policies of ETA. Thus, it is incumbent on the public employment service not to be "utilized to send [U.S. or foreign] workers over long distances to employment providing quarters dangerous to their health and safety." 41 U.S. Op. Atty Gen. 406 (1959). The only effective way for ETA to assure that workers referred for employment will be quartered in housing that meets applicable standards is to withhold certification until the housing is inspected and approved.

The Department has also concluded that shortening the period prior to occupancy

that employers have to assure that their housing will be in full compliance with the applicable standards will make it more difficult for State agencies in northern climes and other State agencies to conduct timely inspections in view of the not infrequent need to reschedule housing inspections because of inclement weather. In addition, maintaining the period at 30 days can protect the employer-applicant by giving it notice and time to rectify problems so as to avoid denial of certification.

2. Reduction in Lead Time to File Labor Certification Applications (§ 655.101(c)) *Advent*

The proposal in the NPRM to reduce the deadline for filing applications from 60 to 45 days before the date of need was strongly opposed by the FJF, other worker advocates, and Congressman Howard Berman. Their major reasons for objecting to the proposal include:

- There has been no showing that a change in the lead time to file applications is justified. Agricultural growers know well in advance their planting and harvesting schedules. Indeed, for decades, growers throughout the eastern United States were able to estimate these needs a full 80 days in advance.
- The time available for interstate and positive recruitment of U.S. workers would be unreasonably shortened if the proposal is implemented. Interstate

recruitment does not begin until the application is accepted for consideration by DOL. It can take 7 days for the DOL's regional office to review the employer's application, and the employer has another 5 days to correct deficiencies. With a shortened lead time, this would place the beginning of the interstate recruitment at the 33rd day prior to the date of need and just 13 days before the date for labor certification. If DOL does not review applications in a timely manner, as is often the case, there could be 10 days or less of interstate recruitment of migrant workers prior to the date of certification.

- Congress insisted that H-2A labor certification be based on proof that there is an actual labor shortage, following a meaningful test of the labor market. Accordingly, it is not sufficient to rebut that the regulations provide that recruitment must continue until the date the foreign (H-2A) workers depart for the employer's place of work.
- Employers do not always hire workers referred to them pursuant to the 50-percent rule.
- The proposal is inconsistent with the recommendations of the General Accounting Office (GAO). Although the GAO report suggested that the Department could reduce from 60 to 45 days the time applications have to

be submitted prior to the date of need, it also stated that such a reduction should only be made if the statutory requirement that certifications be issued 20 days before the date of need is reduced to 7 days.

- The proposal is inconsistent with the regulatory requirement at § 655.102 (a)(2), which requires that H-2A employers engage, at a minimum, in the kind and degree of recruitment efforts to secure U.S. workers that they made to obtain H-2A workers.

Employer organizations supported the reduction in the required lead time to file applications. However, they recommended that the lead time to file applications be reduced by more than suggested by DOL.

The NCAE, for example, maintained that it is the experience of H-2A users that most U.S. workers make themselves available shortly before, or after, the certification date. Furthermore, since under current regulations all qualified U.S. workers who apply to the employer must be hired until 50 percent of the anticipated period of work (the contract period) has elapsed, no qualified U.S. worker would be denied a job even if the deadline for applications were reduced to 40 or even 30 days before the date of need. The New England Apple Council (NEAC) maintained that the "lag time" between recruitment and start of work produces more "no shows" of workers than any other reason.

The Florida Fruit and Vegetable Association (FFVA) stated that for several vegetable crops which are greatly influenced by weather and other production uncertainties, a 45-day lead time may still be too far out to determine a crop's maturity rate.

Comments submitted by State agencies regarding the proposal to shorten the lead time for filing applications were mixed. Four States supported the proposal, indicating that the proposed change would not have an adverse impact on U.S. workers. Two of these States indicated that the deadline for filing applications should be reduced to less than 45 days. The California State agency recommended that the deadline for filing applications be reduced to 30 days prior to the date of need. According to the California State Agency, the shorter lead time would increase the possibility of locating U.S. workers who can commit to the job and it also would be beneficial to employers "who may not know their exact staffing needs or start date until closer to the time the work needs to be done." The Kentucky State agency commented that "(s)uccessfully recruiting any U.S. workers can be achieved through the Agriculture Recruitment System in 30 days if supply states and demand states coordinate specific efforts towards identified populations."

Two states were against reducing the lead time for filing and processing applications. The Idaho State agency noted that the full 60 days is needed because applications are not filled out properly when received. The Massachusetts State agency indicated that the shorter time frame will adversely impact on State agencies' ability to

conduct effective recruitment, especially in regions where master orders are used.

Two other states also commented. The New Jersey State agency indicated that the reduction in time to process applications should not be a problem if there are adequate staff at DOL to respond to the applications when they are received. The Nevada State agency noted that the proposal provides employers with more flexibility in recruitment of agricultural labor, particularly with regard to crops that are more sensitive to weather conditions. At the same time, the proposal may allow employers to be less organized in the planning and execution of their application. The Nevada State agency concluded by stating that because of the way applications are prioritized and processed in Nevada, processing times would remain relatively constant regardless of filing deadlines.

A monitor advocate who commented opined that the lead time to file and process applications should be expanded. This time should not be less than 60 days to enable employers to access all local resources in attracting and identifying a "sufficiently large labor force."

The ETA Chicago Regional Office commented that reducing the time limit to file labor certifications did not leave enough time to for the State agencies to recruit adequately in view of all the administrative steps that must be completed before States can conduct recruitment.

Some commenters also indicated that the employers should still be able to file labor certification applications more than 45-days prior to the date of need for H-2A agricultural workers. One commenter assumed that first-time users of the program would be able to file less than 45-days prior to the date of need if necessary.

With respect to the time limit for filing applications, the Department has concluded, after reviewing all of the diverse comments, to implement the proposal to reduce the lead time for filing H-2A labor certification applications from 60 to 45 days before the first date the employer estimates that H-2A workers are needed. The regulation will provide growers with increased ability to more precisely estimate the need for workers. The Department has concluded, for the reasons discussed below, that reducing the lead time for filing H-2A labor certification applications will not have a significant adverse impact on the recruitment of U.S. workers. The final rule, at § 655.101(c)(3), continues to encourage employers to file in advance of the required filing date, and no change is made in the regulation for emergency applications at § 655.101(f)(2), which refers to agricultural employers who have not made use of H-2A agricultural workers for the prior year's agricultural season.

As noted in the preamble to the NPRM, the overwhelming majority of qualified U.S. workers do not apply and make a commitment to temporary agricultural employment earlier than 45 days before their services are required. The Department does not believe that this is generally attributable to the fact, as some commenters indicated, that

DOL regional offices may spend 12 days, or more, in processing applications before they are accepted for consideration and placed into interstate clearance. Furthermore, the majority of applications filed on behalf of H-2A agricultural workers are by repeat users of the H-2A program. Most such employers are well versed in program requirements, policies, and procedures; consequently, their applications can be accepted for consideration and placed into the interstate clearance system with a minimum of review.

H-2A labor certification applications are filed simultaneously with the local employment service office and the ETA regional office. The local office begins to conduct local recruitment when it receives the application from the employer whether or not it has been accepted for consideration by ETA's regional office. 20 CFR 655.101(c)(2).

As stated above, some commentators noted that it can take longer than the allotted 7 days for regional offices to review H-2A labor certification applications, and that employers may take longer than 5 days to resubmit an amended application in response to any deficiencies found in the application by the regional office, resulting in a reduction in the time allowed for interstate recruitment, since the application has to be certified 20 days before the day the employer first needs agricultural workers. With respect to meeting the 7-day deadline for reviewing applications, ETA intends to increase its monitoring of regional offices to improve its performance in meeting this statutory and regulatory requirement. See 20 CFR 655.101(c)(1); and 8 U.S.C. 1188(c)(2).

With respect to the 5 days allotted for employers to submit amended applications in response to deficiencies noted by the regional office, ETA intends to strictly enforce the regulatory requirement at § 655.101(c)(2). This provides, in relevant part, that when ETA has formally notified an applicant of any deficiencies, any time needed to obtain an application acceptable for consideration after the 5-calendar period allowed for an amended application will postpone the certification decision day-for-day beyond the 20 calendar days before the date of need. This will lessen considerably the possibility that the period of interstate recruitment prior to the date the application is certified will be unduly abbreviated.

Most importantly, notwithstanding comments to the contrary, it is important to recognize that recruitment continues considerably past the date a labor certification application is certified. Positive recruitment conducted by the employer must continue until the time the H-2A workers depart for the employer's place of employment, and recruitment through the interstate clearance system continues until 50 percent of the work contract under which the H-2A workers were hired has elapsed. Under the "50-percent rule," which refers to half the time accounted for by the total period of the contract, the employer must continue to provide employment to any qualified, eligible U.S. worker who may apply. In addition, the employer must offer to provide the U.S. workers with housing and the other benefits, wages, and working conditions provided to H-2A workers. See 8 U.S.C. 1188(b)(4), and 20 CFR 655.102, 655.103(d), 655.105(a), and 655.106(e).

As noted above, some commenters indicated that employers do not always hire U.S. workers referred to them pursuant to the "50-percent rule." See 20 CFR 655.103(e). However, no evidence to support these claims was submitted to the Department. Additionally, the Department is not aware of any evidence suggesting that such occurrences are numerous or widespread. Nevertheless, ETA intends to be vigilant of employers' compliance with the "50-percent rule", with violations addressed through the imposition of appropriate sanctions.

3. Exception from Using Farm Labor Contractors (§ 655.103(f))

The majority of comments opposed the proposal to provide a limited exception from the requirement to use farm labor contractors (FLC's) when it is the prevailing practice in an area and occupation for non-H-2A employers to use such contractors as a recruitment source for U.S. workers and to compensate them with an override. This exception would have applied if a particular FLC has a demonstrated history of using undocumented aliens or serious labor standard violations.

Congressman Berman and worker advocacy organizations were strongly opposed to the proposal. They indicated that such an exception would reduce the use of FLC's which are an important recruitment source for U.S. farmworkers. The FJF maintained that recent studies show that an increasing percentage of U.S. farmworkers and most guest workers are hired through labor contractors. Both Congressman Berman and the

FJF maintained that in California it is estimated that between one-half and two-thirds of seasonal farmworkers are hired through crewleaders -- many of whom also transport, house, pay, and supervise workers in the fields.

Objections to the proposal by worker advocates include:

- The provision that employers need not use an FLC on the Wage and Hour Division's (WHD's) list of contractors whose certificates have been revoked is redundant with current law under MSPA and unnecessary. Employers are prohibited by law from contracting with an FLC whose licenses has been revoked and not reinstated.
- The complaint provision proposed provides no due process rights permitting FLC's to challenge the evidence submitted by State agencies.
- The proposed rule could put some FLC's out of business and deny jobs to U.S. workers who are associated with contractors who have been "sanctioned" by the INS for hiring unauthorized immigrants or who have violated labor laws. The Department should not use this rulemaking process to impose additional "punishment" on businesses because affected U.S. workers would be unduly harmed.

- The proposal may lead to workers being “doubly punished” and discouraged from filing complaints. If a worker complains about abusive practices of an FLC, such as nonpayment of wages, the worker may see wages go unpaid and then lose future work because of the secondary consequences of the complaint.
- An H-2A grower which may have hired unauthorized workers and violated labor laws would still receive Government approval to hire H-2A workers; yet, an FLC could be barred, at the grower’s initiation, from supplying lawful U.S. workers to that same U.S. employer.
- The proposal is particularly troubling in that it allows an FLC who is barred as a contractor supplying U.S. workers to apply for H-2A labor certifications.
- The proposal could be subject to manipulation and harmful to workers. An employer could bring a complaint against an FLC who has a large number of available U.S. workers to avoid hiring U.S. workers.

The employer organizations also objected to the proposal to provide an exception from using certain FLC’s. The NCAE pointed out, as did the worker advocates, that the provision in the proposal permitting H-2A applicants to refuse to engage FLC’s who are

on WHD's list of contractors whose certificates have been revoked adds no new protections for H-2A employers. Under the MSPA regulations at 20 CFR 500.71, employers are already prohibited from engaging such contractors.

The NCAE also maintained that the provision that H-2A employers would not be required to employ farm labor contractors on a list of contractors sanctioned by INS is meaningless, because INS does not maintain such a list. NCAE contends that although INS district or regional offices may have such lists, all offices may not have such lists, and to the extent such lists exist, they would include all employers sanctioned by that INS district and would not be limited to FLC's. The lists are not aggregated in one spot and the lists that do exist are not routinely disseminated to the public as is the DOL FLC list. NCAE contended that the only apparent way an employer could avail itself of this regulatory provision is to contact each INS district office and request its list of employers which have been sanctioned for violations of immigration laws and search each list for the names of contractors.

According to the NCAE, the provision in the proposal to permit employers not to use FLC's not on the WHD or INS lists if the employer can document that the FLC "has a history of employing or providing a substantial number of workers who do not have the authorization to work in the U.S. or a substantial history of labor violations" is impractical on several grounds. These grounds include:

- It is unlikely that growers would be able to assemble the documentation on the FLC required to support a credible complaint;
- There is no protection for the employer from retaliation by the FLC; DOL would be creating a procedure in which the employer could incur legal liability by making the complaint; and
- The complaint procedure is flawed, convoluted and ignores the reality of the hiring procedure.

The NCAE recommended that, if the Department is truly concerned about helping employers avoid hiring persons not authorized to work in the United States, it should take appropriate measures to assure that the workers the State agencies refer are authorized to work before referring them. It is the experience of users of the H-2A program that a substantial and growing number of the persons referred as "U.S. workers" to H-2A applicant employers are, in fact, workers with fraudulent documents or, in some cases, no documents at all.

The comments submitted by State agencies on the proposal to provide an exception to permit employers not to use certain FLC's were mixed. The thrust of the comments submitted by three States appeared to be that the current regulation pertaining to FLC's as a recruitment source should be eliminated. On balance the State agencies of

Arizona and Ohio appeared to be against the proposal. The Kentucky state agency stated that the proposal is a commonsense approach to a growing concern on the part of employer's and the State employment security staff and should be implemented.

The one monitor advocate who submitted comments supported the proposed amendment that provided an exception to using certain FLC's as a recruitment source.

After reviewing all the comments received on the proposed amendment to provide an exception to using certain FLC's, the Department has concluded that there are indeed serious due process concerns about potentially stigmatizing FLC's who have not had an opportunity to challenge allegations of wrongdoing in an adjudicatory proceeding. Further, the Department has authority to revoke licenses of FLC's who violate immigration laws (29 CFR 500.51(g)) and will work with INS to ensure that finally adjudicated violating FLC's are excluded from FLC authority. Therefore, the final rule needs to make no change to the regulation at § 103(f). The Department is not implementing its proposal to provide a new means for employers to challenge the requirement to use an FLC the employer believes may have violated immigration or labor laws. Employers must attempt to secure workers through registered FLC's and to compensate them with an override for their services when it is the prevailing practice in the area for non-H-2A agricultural employers to use FLC's. However, no H-2A grower-applicant may or will be required to use any FLC included on WHD's list of contractors whose certificates have been revoked, including those certificates which are revoked

because of violations of the immigration laws. Thus, the Department's proposal is being narrowed and can be implemented under existing regulatory authority.

4. Elimination of Requirement to Provide Notice of the H-2A Workers' Departure Date (§ 655.106(e)(1))

Diverse comments were received on the proposal to eliminate the requirement that employers notify the local employment service office, in writing, of the exact date the H-2A workers depart for the employer's place of employment, and substitute a provision deeming that the workers departed on the day immediately preceding the date of need. The Department stated in the preamble to the NPRM that program experience indicates that the H-2A workers usually depart for the employer's place of business the day before they are needed.

Worker advocates objected to eliminating the requirement that employers notify the local office of the H-2A workers departure dates because:

- There is no evidence that the current regulation imposes an excessive burden on growers utilizing the H-2A program;
- Such change should not occur until DOL addresses workers' needs; and

- Although the proposed change appears innocuous, it is likely to harm U.S. workers. For example, a nursery that was certified for H-2A workers to begin employment on October 15, 1998, did not start employing its H-2A workers until November 15, a full month later. The required notification enabled the local office to determine the appropriate dates for administering the 50-percent rule and advise job applicants accordingly.

The NCAE supported eliminating notice of the departure date, but disagreed that workers typically depart the day before the employer's date of need. The NCAE maintained that typically for workers to obtain their visas, travel to the employer's place of employment, and be settled and ready for work on the date of need, they must depart at least 3 days before the date of need. NCAE recommended that DOL deem 3 days before the date of need as the departure date. Furthermore, since workers' departure dates may be even earlier, depending on where they are coming from, it recommended that DOL continue to allow employers to notify the Department of the date on which their workers depart if it is more than 3 days before the date of need.

One attorney supported eliminating notice of the departure date because it is extremely burdensome to employers, especially when the employer has many H-2A workers who do not always depart for the employer's place of business at the same time.

Divergent comments were submitted by State agencies on this proposal. Three

States commented that the requirement for notification of the departure date should not be eliminated. One of these States maintained that the change will harm U.S. workers, as on numerous occasions H-2A workers have departed up to 15 days after the date of need. Another State also pointed out that the contract period must also be determined for the purpose of determining whether the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker came to work for the employer. A third State indicated that notification of the departure date is helpful in scheduling field checks, which is important to ensure that information is collected timely and for each employer, each crop and for each activity of those crops.

Four State agencies supported eliminating the requirement of notification of the H-2A workers' departure date. One State noted that the requirement is currently being ignored. Two States indicated that eliminating notice of the departure date would have no adverse impact on U.S. workers. A fourth State viewed the proposal as positive, since it does not affect the employer's requirement of notifying the order-holding office of changes in the date of need. This State also noted that it has had problems with H-2A employers notifying it of departure dates, but it can still meet with the H-2A workers after the date of need to review the job order and the employment service complaint system.

In light of the above comments regarding departure date notification, ETA has concluded that its original proposal to eliminate the requirement to notify of the departure

date at § 655.106(e) should be modified to provide, in addition, that employers may notify the local employment service office of the actual departure date (including if the H-2A workers depart for the employer's place of employment before the day immediately preceding the employer's first date of need), and to provide that employers must provide notification of the actual departure date if the H-2A workers leave anytime after the day immediately preceding the employer's date of need. This modification will relieve employers of the administrative burden of notifying local employment service offices, in writing, of the H-2A departure date if the aliens depart on or before the day immediately preceding the date of need and will protect the interests of U.S. workers by requiring such notification, in writing, if the H-2A workers depart anytime after the day immediately preceding the date of need.

5. Transfer of Adjudication of Visa Petitions

Worker advocates indicated that there should be no transfer of adjudication of H-2A visa petitions from INS to DOL, absent a comprehensive approach to improving administration of the program.

AILA and two attorneys opposed the proposal to transfer the adjudication of visa petitions to the Department. They cited the lack of DOL's experience in adjudicating visa petitions, that training DOL personnel in visa petitioning issues and procedures would be duplicative of the training INS adjudicators already receive on these issues, that DOL does

not have the resources or personnel to adjudicate visa petitions, and that they believe it is doubtful that DOL could be any more efficient than INS in processing H-2A visa petitions -- in fact, because of the lack of personnel familiar with the issues, as well as the budgetary problems experienced by ETA in immigration-related processing, they contend it is likely to be worse.

Further, AILA and one attorney pointed out that it is impossible to know how delegation will work without seeing specifics of a rule implementing the proposed delegation. The AILA suggested that, if the proposed transfer of adjudication of visa petitions to DOL goes forward, it should be published in the Federal Register for comment.

The NCAE expressed "grave" concerns about any interim procedures that might be established to process H-2A visa petitions. It noted the interim procedures were not described in sufficient detail to permit an analysis of whether they, in fact, will be more streamlined and save time, or whether they might have the opposite effect. It also opined that the bottleneck in the current system is not the INS but the DOL. The only way to save time and increase the probability of timely arrival of workers is if the employer is permitted to include a completed visa petition in the same submission as the labor certification application, and if the issuance of the labor certification and approval of the visa petition are done in one action.

The NCAE concluded its comments by stating it strongly supported efforts to streamline the H-2A paperwork process. Combining the temporary labor certification application and visa petition into a single document, which is acted upon at the time of certification and immediately transmitted to the consulate or port of entry, could result in a significant improvement. Before undertaking this change, however, DOL should propose the precise regulations and procedures under which it intends to operate, and, at the same time, the INS should propose its regulations so both proposals can be evaluated together. Until this can be done, NCAE stated that it strongly objects to the proposed change and recommended that the proposal to transfer adjudication of visa petitions be withdrawn from the rulemaking effort at this time.

The NEAC and the AFBF also expressed concerns similar to the NCAE regarding the transfer of the adjudication of the visa petition function to DOL; only the FFVA approved of this proposal.

Three State agencies supported transferring adjudication of H-2A visa petitions to DOL from the INS as it would result in reducing the time needed for employers to obtain foreign workers. Four States indicated that visa petitioning authority should not be transferred to DOL, unless additional funding is made available to the regional offices to adjudicate the visa petitions. The Ohio State agency "guardedly" agreed with the change based on a concern that work may be delegated to the States which are already underfunded to complete existing duties.

The Department believes that transferring the visa adjudication function to the Department would save substantial government resources and would eliminate one administrative step employers would have to complete under the program. Reducing the number of steps and paperwork involved in the process of obtaining H-2A workers -- from the filing of an application with the Department of Labor to the issuance of a visa by the Department of State -- should reduce both the paperwork burden and the number of instances that foreign workers do not arrive by the first date of the employer's need. The Department anticipates that the streamlined process would involve the development of a single consolidated labor certification application and visa petition form that will eliminate otherwise redundant information and support both labor certification and visa petitioning requirements. This would eliminate the necessity of employers filing visa petitions with INS for H-2A workers who are outside of the United States. The Department is committed to completing the necessary rulemaking and associated procedural changes as soon as possible, if INS delegates to DOL the authority to adjudicate H-2A visa petitions. INS has begun rulemaking to implement the transfer and the comment period on its proposed rule concluded on February 5, 1999.

EXECUTIVE ORDER 12866: The Department has treated this proposed rule as a "significant regulatory action" within the meaning of Executive Order 12866 because of the great interest in the H-2A program and the legal and policy issues raised by the rulemaking. However, this rule is not an "economically significant regulatory action" which requires an economic analysis because it will not have an economic effect on the

economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

REGULATORY FLEXIBILITY ACT: When the proposed rule was published, the Department notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule would not have a significant impact on a small number of entities. The Chief Counsel did not submit a comment.

PAPERWORK REDUCTION ACT: Compared to current regulations, the final rule creates no additional collection of information requirements and, in fact, largely eliminates an existing requirement. The new provision requiring employers to file an application for certification no later than 45 days before the date of need (rather than 60 days as required by the current regulations) has no effect on the existing burden. The rule also relieves employers of the current regulatory requirement of written notification of the exact date the workers depart for the employer's place of employment in most circumstances, requiring such notification only where employers depart later than the day before the date of need.

As discussed in the preamble, the Department anticipates further rulemaking to transfer the adjudication of H-2A visa petitions from the INS to DOL. Although this

requirement would create a new collection of information requirement for DOL, we expect a net reduction in requirements for employers. This rulemaking will be subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (PRA'95), 44 U.S.C. et seq., and the regulations at 5 CFR 1320. PRA'95 defines collection of information to mean, "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format." (44 U.S.C. 3502(3)(A)).

CATALOGUE OF FEDERAL DOMESTIC ASSISTANCE NUMBER: This program is listed in the Catalogue of Federal Domestic Assistance as Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment."

LIST OF SUBJECTS :

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Forest and forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and record keeping requirements, Specialty occupation, Students, Wages.

FINAL RULE:

Accordingly, part 655 of chapter V of title 20, Code of Federal Regulations, is

amended as follows:

PART 655 -- TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for part 655 continues to read as follows:

AUTHORITY: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 et seq.; sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); P.L. 103-206, 107 Stat 2419; and 8 CFR 214.2(h)(4)(i).

Section 665.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 et seq.; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 et seq.; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 et seq.

Subparts D and E issued under 8 U.S.C. 1101(a)(15) (H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 et seq.; and sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c) and

(d); and 29 U.S.C. 49 et seq.; and P.L. 103-206, 107 Stat 2419.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 et seq.; and sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 et seq.; and sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

§ 655.100 [Amended]

2. In § 655.100, paragraph (a)(1) is amended by removing the phrases “60 calendar days” and “60-calendar-day period” and adding in lieu thereof the phrases “45 calendar days” and “45-calendar-day period”, respectively.

§ 655.101 [Amended]

3. In § 655.101, paragraph (c) is amended as follows:

- a. In the introductory text of paragraph (c), the phrase “60 calendar days” is removed and the phrase “45 calendar days” is added in lieu thereof.
- b. In paragraph (c)(1), the phrase “60 calendar days” is removed in the two places it appears and the phrase “45 calendar days” is added in lieu thereof.
- c. In paragraph (c)(2), the phrase “60-calendar-day filing requirement” is removed and the phrase “45-calendar-day filing requirement” is added in lieu thereof.
- d. In paragraph (c)(3), the term “60-calendar-day” is removed in the two places it appears and the term “45-calendar-day” is added in lieu thereof.

§ 655.106 [Amended]

4. Section 655.106 is amended by revising paragraph (e) to read as follows:

§ 655.106 Referral of U.S. workers; determinations based on U.S. worker availability and adverse effect; activities after receipt of the temporary alien agricultural labor certification.

* * * * *

(e) Approvals of applications -- (1) Continued recruitment of U.S. workers. After a temporary agricultural labor certification has been granted, the employer shall continue its efforts to recruit U.S. workers until the H-2A workers have departed for the employer's place of employment. Unless the local office is informed in writing, the date the workers depart for the employer's place of employment shall be deemed for the purposes of this part to be the day immediately preceding the employer's first date of need, unless the workers depart for the employer's place of employment subsequent to the day immediately preceding the date of need. If the workers depart subsequent to the day immediately preceding the date of need, the employer shall notify the local office, in writing, of the exact date on which the workers departed for its place of employment. The employer may notify the local employment office in writing if the H-2A workers depart for the place of employment prior to the day immediately preceding the employer's first day of need.

(2) Requirement for Active Job Order. The employer shall keep an active job order on file until the "50-percent rule" assurance at § 655.103(e) of this part is met,

except as provided by paragraph (f) of this section.

(3) Referrals by ES System. The ES system shall continue to refer to the employer U.S. workers who apply as long as there is an active job order on file.

Signed at Washington, DC, this _____ day of _____, 1999.

Raymond L. Bramucci,
Assistant Secretary
for Employment and Training

and contrary to sound policy.

The organizations submitting these comments have a common interest in improving the living and working conditions of farmworkers and their family members. The Farmworker Justice Fund, Inc., which coordinated these comments, is a national litigation and advocacy group for migrant and seasonal farmworkers that was established in 1981 as a nonprofit corporation. Throughout its history, FJF has been recognized as an expert on agricultural guestworker programs, including the H-2A program and its predecessors. In recognition of that expertise, Congress has repeatedly asked FJF to testify regarding guestworker issues. For example, FJF's Co-Executive Director, Bruce Goldstein, testified before the House Subcommittee on Immigration and Claims on September 24, 1997, regarding agricultural guestworker issues. FJF's recent publications on this issue include, Bruce Goldstein, "Agribusiness Lobbies for a New Temporary Foreign Worker Program," in Lydio Tomasi (ed.), *In Defense of the Alien* (Center for Migration Studies, New York, 1998). FJF has also commented on H-2A regulatory proposal in the past, and has served as counsel to clients who have challenged in court the Department of Labor's rulemaking under the H-2A program. See, e.g., *Joseph v. Department of Labor*, 787 F. Supp. 247 (D.D.C. 1992). FJF also issues newsletters and other materials to educate farmworkers, advocates and the public about guestworker-related issues.

I. THE PROPOSED RULE ARBITRARILY EASES EMPLOYERS' ACCESS TO GUESTWORKERS WHILE FAILING TO ADDRESS LEGITIMATE NEEDS OF FOREIGN AND DOMESTIC FARMWORKERS AND MAJOR SHORTCOMINGS IN DOL'S IMPLEMENTATION OF THE H-2A PROGRAM

A. THE PROPOSED RULEMAKING IS ARBITRARY AND CAPRICIOUS BECAUSE IT IS ONE-SIDED AND IS BIASED IN FAVOR OF EMPLOYERS AND AGAINST FARMWORKERS

The proposed rule would make five changes that would benefit employers and undermine protections against abuses of both domestic and foreign workers. The proposed changes are discussed in detail in a later section of these comments.

In summary, the proposal would reduce the regulatory effort to implement the requirements of the H-2A provisions of the Immigration and Nationality Act. Permission to hire temporary foreign workers may not be granted unless (1) the applicant-employer demonstrates that it cannot reasonably locate available, qualified U.S. workers to work at the place and time needed, and (2) the employer's job offer would not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. § 1188(a)(1). Recruitment of U.S. workers under the proposed rule would be curtailed in several ways, including by changing the deadline for filing employer applications. Consequently, employers could secure guestworkers even when adequate U.S. workers would be available. In addition, employers could delay repairing substandard housing and increase the likelihood that government agencies would not be able to inspect the housing prior to the beginning of occupancy or the employment. In short, the Department proposes to "streamline" the H-2A program for the benefit of employers who wish to hire temporary foreign workers.

The proposal should be withdrawn because it is one-sided. No reforms are targeted at the substantial needs of workers affected by the H-2A program. No valid justification exists to press forward with pro-employer regulatory amendments while ignoring pro-worker reforms. It would be arbitrary for the Department to adopt a set of regulatory changes that benefit some employers,² and fail to offer an improvement in the implementation of the law's protections for foreign and domestic farmworkers. For this reason alone, the proposal should be withdrawn.

Moreover, there is virtually no need to ease growers' access to foreign workers. The Department has been approving 99% of employer applications for H-2A certification, according to the U.S. General Accounting Office report on the H-2A program. U.S. General Accounting Office, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, Rept. No. GAO/HEHS-98-20 (December 31, 1997) at p. 44. Many employers who use the program stop hiring U.S. farmworkers. Many employers prefer H-2A workers over U.S. workers because the H-2A workers will often work for less and are justifiably too fearful of being discharged and deported if they challenge the fairness or lawfulness of their job terms and conditions. One of the results of this regulatory proposal would be the denial of access to jobs thousands of U.S. workers by employers who would prefer to hire temporary foreign workers.

B. THE PROPOSAL IS ARBITRARY AND CAPRICIOUS BECAUSE IT IGNORES NUMEROUS STUDIES CONCLUDING THAT THE DEPARTMENT HAS NOT ADEQUATELY IMPLEMENTED H-2A WORKER PROTECTIONS, AND IT IGNORES RECOMMENDATIONS TO IMPROVE ADMINISTRATION OF WORKER PROTECTIONS

Introduction

The proposed rule is also unreasonable because it fails to adopt any of the numerous proposals to improve implementation of the workers' rights and interests under this program. Nor has the Department explained its failure. The Department has acknowledged that it must "effectuate the purpose of the [statute] that U.S. workers rather than aliens be employed wherever possible," and that where H-2A workers are employed, "the terms and conditions of their employment must not result in a lowering of the wages, terms, and conditions of domestic workers similarly employed." 20 C.F.R. § 655.90(d).

Several government bodies have found serious problems facing farmworkers under the H-2A program and have made recommendations to improve the Department's administration of the H-2A program. The Farmworker Justice Fund, Inc. and other organizations have requested, during the last few years, needed administrative reforms in the operation of the H-2A program. The

² Law-abiding employers who are willing to compete in the marketplace for U.S. farmworkers are also harmed by policies that create incentives to bring in vulnerable foreign workers at inadequate wages and working conditions. Such employers have difficulty competing because their labor costs are higher than companies that hire undocumented workers and guestworkers.

Department's unexplained failure to propose any regulatory reform to address these recommendations for the benefit of workers is arbitrary and capricious.

The agency also needs to be more sensitive to concerns about the appearance of bias in favor of employers. Several H-2A program officials have retired from government and gone on to assist employers on these issues. The person who headed the H-2A program for about a decade, John Hancock, now serves as a consultant who testifies in Congress about H-2A program issues on behalf of agricultural employers. Robert Haverkamp, who assisted Mr. Hancock and his successor (Richard Kauffman), went to work for McGuinness & Williams, the law firm of Monte Lake, who is the principal lobbyist on behalf of the agribusiness employers that challenge the H-2A program as too burdensome. Other officials at the state and federal levels who have worked on H-2A issues (e.g., Stan Eury of the North Carolina Growers Association, formerly of the state Employment Security Commission) have also left government to work for H-2A employers or open businesses serving H-2A employers. The Department should be concerned with the perception that the prospect of future lucrative employment with employers may be encouraging H-2A policies and practices that are tilted toward growers' interests.

Regardless of the Department's motivation, it has not proposed reforms necessary to protect workers' legal rights. Some of the studies which have suggested pro-worker H-2A reforms are summarized below.

The Recommendations of the Helsinki Commission

The Commission on Security and Cooperation in Europe, comprising U.S. government officials, is mandated to monitor human rights compliance in the United States under the Helsinki Final Act of 1975. Known as the Helsinki Commission, it conducted hearings on migrant farmworkers in several locations around the United States during 1992 and 1993. Concluding that the H-2A program failed to protect workers as intended, the Commission recommended that it either be abolished or that the Department of Labor substantially improve its H-2A policies and enforcement. The Commission's report includes testimony on the H-2A program and the following recommendation:

The H-2A and H-2B visa programs, which enable agricultural employers to import temporary foreign workers into the United States, should be discontinued because domestic workers are displaced and foreign workers have been subject to abuse. If the program is to continue, the Department of Labor must be required to improve enforcement of existing protections and revise policies to prevent future abuses.

Briefings of the Commission on Security and Cooperation in Europe, *Migrant Farmworkers in the United States* (U.S. Gov't Print'g Office, May 1993) at p. v, ¶ 6.

The Recommendations of the General Accounting Office

The United States General Accounting Office (GAO) has issued several reports

criticizing the administration of the H-2A program over many years. Although some of the specific policy issues have changed during these years, the longstanding pattern of the Department's failure to implement the worker protections of the H-2 and H-2A program are well documented. That pattern continues in the DOL's refusal to address worker concerns in the proposed regulation.

GAO H-2A Report of 1992

On July 28, 1992, the GAO released a report criticizing the Department of Labor for failure to enforce laws protecting employees of the Florida sugar cane growers who hired H-2A workers. *Foreign Farm Workers in U.S.: Department of Labor Action Needed to Protect Florida Sugar Cane Workers* (GAO/HRD-92-95). Some of the violations also affected several thousand east coast apple workers under the H-2A program. The report found:

The Department of Labor has been slow or done little to enforce certain laws and regulations pertaining to transportation costs, the health and life insurance plan, or the savings plan for Caribbean workers employed by Florida sugar cane growers.

The GAO investigation arose from similar findings contained in a House Committee on Education and Labor staff report completed in July 1991. The GAO report uncovered wide-ranging problems in the Florida foreign workers' program despite claims by the sugar cane companies and the West Indies Central Labor Organization (WICLO), a government-sponsored organization, that they had cured the problems identified by the Education and Labor Committee Report. The GAO found that DOL had been unwilling to take action to remedy abuses or said that it would seek only partial remedies. Even if DOL found violations, it told GAO, it would not seek remedies prior to the 1991-92 season. In response, GAO said, "[W]e believe that Labor should attempt to deal with prior inequities against the workers." Nonetheless, in most cases, the workers were either forced to sue on their own behalf or simply accept the mistreatment.

GAO Report of December 1997

In 1996, Congress ordered the GAO to conduct a review of the H-2A program. The GAO's report, despite conducting only a limited review of worker protections, contains several findings of systemic violations of workers' rights under the H-2A program. The report also discusses ways to streamline the H-2A process for the benefit of employers, including a proposal to shorten the 60-day application deadline.

The GAO report's balanced approach, which is reflected in the report's title, is not followed by DOL. The report is entitled *H-2A Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, GAO/HEHS-98-20 (Dec. 31, 1997). DOL's proposed rule adopted GAO proposals that benefit employers but, for unexplained reasons, does not follow any of the proposals regarding worker protections. This imbalance is unjustifiable.

The GAO's recent findings include the following:

- ◆ The DOL frequently fails to act in a timely manner in reviewing employers' H-2A orders. Report at 47-48. U.S. workers (as well as employers) suffer by such delays "because employers and SESAs [state employment security agencies] cannot begin full efforts to recruit domestic workers for H-2A job openings"... Rept. at 47. Since employers know that they will ultimately receive approval from the DOL, which approves 99% of H-2A applications (Rept. at 44), the employers can begin recruiting in foreign countries while delaying recruitment for U.S. workers.
- ◆ DOL approved "emergency" applications for H-2A workers but lacked information to justify the conclusion that there was a true emergency. Rept. at 48. In some instances, employers who prefer foreign workers to domestic workers may be hiring undocumented workers and, if the INS threatens to enforce the immigration law, some then claim an "emergency" need to hire guestworkers. No "emergency" exists where the employer has failed to seriously recruit U.S. citizens and lawful resident immigrants using competitive methods and job terms.
- ◆ GAO rightly expressed concern that "H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers and are less likely to file a complaint." *Id.* at 58. DOL must improve foreign workers' access to information and overcome the pressure some employers exert on workers to "work hard and keep your mouth shut."
- ◆ H-2A employers are required to engage in "positive recruitment" in the private labor market but the GAO found that these efforts rarely succeed. "While several H-2A employers told us that positive recruitment was a waste of time and money because no domestic workers were willing to accept the work, non-H-2A employers joined others in asking why one agricultural employer would be unable to find a single domestic worker, while a neighboring employer could find all he or she needed." *Id.* at 59.
- ◆ "Federal and state Labor officials expressed concern that the increasing role of agricultural employer associations in accessing the H-2A program for individual employers may pose problems for positive recruitment." *Id.* They also "told us that when associations represent employers from a large geographic area (for example, an entire state), domestic workers may be less likely to accept job offers for H-2A openings and, if hired, exhibit high turnover." *Id.*
- ◆ GAO expressed concern that the H-2A three-fourths minimum-work guarantee and the obligation to pay a workers' travel costs home upon completion of the end of the season may be routinely violated. "Data from a major employer showed that almost 40 percent of their H-2A workers (1,763 workers) left prior to the end of the contract, losing their right to both the three-quarters guarantee and transportation home." *Id.* at 61. The lengthy work season stated by employers may not represent the true job opportunity for many workers. When workers leave because work has declined or ended, the employer may be characterizing some leaving before the "end" of the season and therefore

forfeiting their end-of-season benefits.

- ◆ While employers under the H-2A program must promise to pay U.S. workers their first-week wages if work does not materialize (and advance notification is not given), this provision appears only in the Job Service regulations, which apply only to U.S. workers. GAO suggested that this first-week wage guarantee should also be applied to H-2A workers. *Id.* at 62.
- ◆ GAO also recommended consolidation of responsibilities within DOL to improve ETA's administration of the H-2A program and improve the effectiveness of the Wage and Hour Division's enforcement of workers' rights. *Id.* at 66, 67.

DOL's proposed rule addresses *none* of these problems experienced by workers that were documented by the General Accounting Office.

The Recommendations of the U.S. Commission on Immigration Reform

The U.S. Commission on Immigration Reform recommended changes in immigration law, including as to the admission of temporary foreign workers. The strict labor-market test it proposed is similar to the existing H-2A program. However, the Commission would have added protections against abuse that the Department of Labor could implement as regulations.

Such employers should continue to be required to demonstrate that they have sought, but were unable to find, sufficient American workers prepared to work under favorable wages, benefits, and working conditions. They also should be required to specify the steps they are taking to recruit and retain U.S. workers, as well as their **plans to reduce dependence on foreign labor through hiring of U.S. workers or other means**. (For example, sugar cane growers in southern Florida who had petitioned for foreign workers had success in reducing their dependence on H-2A workers through mechanization.) Employers should continue to be required to pay the highest of prevailing, minimum, or adverse wage rates, provide return transportation, and offer decent housing, **health care**, and other benefits appropriate for seasonal employees.

U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy*, at 98-99 (emphases added). DOL does not propose these sensible reforms. Employers are not required to devise a meaningful plan for reducing their dependence on foreign workers; nor are they required to provide foreign or domestic employees with health insurance or health care for non-occupational injury or illness.

In discussing high-skilled work visa programs, the Commission said that if government eases employers' access to foreign workers, the Department of Labor must receive additional resources to enforce the law's requirements against employers who exploit that easier access. "To prevent abuse of an expedited system, an effective postadmission enforcement scheme is necessary." *Id.* at 173-174 (1997). Here, DOL irrationally proposes to reduce the pre-admission

scrutiny during the application process for securing guestworkers with no plan for enhancing post-approval enforcement to ensure that the law was followed.

Report of the DOL Office of Inspector General

The Inspector General of the Department of Labor issued a report in March 1998 which found numerous problems in the administration of the worker protections under the H-2A program. U.S. Department of Labor, Office of the Inspector General, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Final Audit Report No. 04-98-004-03-321 (March 31, 1998). While we do not agree with all the findings and recommendations of the OIG, it is nonetheless a powerful criticism of H-2A program operations. The explanation to the DOL proposed rule mentions the OIG audit to justify its changes, but irrationally excludes from the proposed regulatory change any response to the audit's numerous concerns about worker protections.

In one of its major findings, the OIG concluded that although the numbers of employers and workers participating in the H-2A program are only a small fraction of the overall farm labor market, the H-2A employers' recruitment efforts in the United States were "ineffective." *Id.* at p. 5. Some of the reasons for the inability of H-2A employers to recruit U.S. workers are highlighted below:

- ◆ In some labor supply areas, state employment agencies have been "hesitant" to refer job applicants to H-2A program employers "because it was their perception that the workers referred to certain H-2A employers would not be hired. They believe some employers delayed the applicant interviews or discouraged domestic workers from accepting jobs. *Id.* at 10.
- ◆ Officials also indicated the numbers of available workers who could be referred was reduced because some growers would not pay the 'override' (fee) crew leaders require." *Id.* at 10.
- ◆ The Inspector General, focusing on the existence of large employer associations in the H-2A program, "identified instances involving master orders in **which we do not believe positive recruiting efforts were sufficient for ETA to have issued a certification.** In one state, ETA certified 8 H-2A master applications, involving 467 agricultural employers and 3,873 job openings, or 38 percent of all H-2A crop openings in our FY 1996 sample. The job openings that related to the master orders were in many locations throughout the state and involved a joint employer." *Id.* at 13 (emphasis added). Some of the specific problems were:
 - "While the advertisements may have satisfied the H-2A program requirement . . . , we do not believe the effort was sufficient to have reached any interested local applicants. [fn omitted]" *Id.* at 13.
 - "SESA staff also indicated that wide geographical areas where associations ask U.S. applicants to work may also reduce local interest in the jobs. Decisions related to the movement of workers rest with the joint association. . . . In addition, the workers are

subject to transfer to other member employers throughout the duration of the contract period to harvest a variety of crops. Therefore, a worker may be unable to accept the job offer due to travel restraints or family obligations.” *Id.* at 13-14.

- “We were also told by some SESAs and interested organizations that groups of migrant and seasonal farmworkers who otherwise may be available do not have an interest in the jobs because there is no assurance they will remain together.” *Id.* at 14.
- Some associations will not pay overrides (fees) to crew leaders who represent groups of farmworkers, because it had not been established as a prevailing practice in the area.” *Id.* at 14.

The OIG found, in addition, that DOL certified employers to receive H-2A workers despite lacking documentary proof that housing inspections had occurred or housing standards had been satisfied. *Id.* at 15.

The OIG Report also concluded that DOL’s enforcement responsibilities are fragmented and need to be consolidated to “improve protections afforded both U.S. and foreign workers.” *Id.* at 17.

The proposed rule does nothing to improve these serious shortcomings. Moreover, it would not be sufficient for DOL to claim that it will, sometime in the future, address workers’ needs. If the agency can streamline the program to assist growers, it can propose rules to assist workers at the same time.

Academic Studies on H-2A Wage Rates

The Department of Labor has been criticized for failing to protect farmworkers’ wages against the adverse effect of the presence of foreign workers in American agriculture. One critique of the methodology for setting the H-2A “adverse effect wage rate” (AEWR) appears in a law review note by Susan LaPadula Buckingham, “The DOL Fails U.S. and Foreign Laborers with New AEWR Methodology,” 4 *Georgetown Immigration Law Journal* 477, 479 (1990). The author wrote:

The DOL failed in its role as a balancer when it promulgated its final regulations to implement the H-2A program on June 1, 1987. [fn. omitted]. The DOL regulations put domestic workers in danger of being adversely effected [sic] by foreign laborers, instead of protecting them, by instituting regulations changing the method used to calculate the Adverse Effect Wage Rate (“AEWR”). * * *

This new manner of calculating the AEWR lowers wages by about twenty percent. It thus discourages U.S. workers from farm jobs [fn. omitted].

Court decisions have said that Congress delegated significant discretion to the Secretary to determine how to prevent adverse impact on U.S. workers’ wages from the presence of

undocumented workers and guestworkers. *AFL-CIO v. Secretary of Labor*, 923 F.2d 182, 184, 187 (D.C. Cir. 1991); *AFL-CIO v. Brock*, 835 F.2d 912, 915 n. 5 (D.C. Cir. 1987). The Secretary has adopted a methodology for the adverse effect wage rate that perpetuates the depression in wages caused by the presence of foreign workers. The methodology is simply the regional average hourly wage rate for field and livestock workers, which reflects the depression of wage rates paid by employers who can take advantage of vulnerable unauthorized immigrants and guestworkers.

Conclusion

Given the numerous studies calling for the DOL to better implement the statutory protections for workers affected by the H-2A program, the agency's silence on this point in the proposed H-2A regulation revision is unreasonable. In the third section of these comments, we highlight some of the farmworker advocates' views of specific reforms that should be proposed and adopted.

II. THE SPECIFIC REGULATORY CHANGES WOULD NOT BE PROPER

The DOL should not adopt the specific regulatory changes in the proposed rules for the reasons stated below.

A. The Housing Inspection Provisions Should be Strengthened, Not Weakened

The proposed rule would allow H-2A employers with substandard housing to delay making repairs and government inspections. There is no justification for such a proposal. In fact, the inability of state and federal inspectors to investigate H-2A housing prior to occupancy demands that greater resources and more time be allocated to ensure that employers who secure the privilege of using government visas to hire foreign workers are complying with housing laws.

Currently, an H-2A employer with substandard housing may receive conditional approval to use the Job Service to recruit workers and receive approval to hire H-2A guestworkers. Such employers must ensure, however, that their housing fully complies with applicable housing standards no less than 30 days before the housing is to be occupied, and government inspections are supposed to occur by that date. 20 C.F.R. § 654.403(a)(3), (e). The new proposal would allow employers to delay such repairs and the inspection to the date 15 days prior to occupancy. Thus, DOL would close tighter the window of opportunity for government agencies to ensure compliance by the date of occupancy. See proposed § 654.403, 63 Fed. Reg. at 53247.

Closing the window of opportunity to conduct housing inspections will interfere with DOL's fulfillment of the obligation to ensure that farmworkers are provided safe, sanitary housing. Inspections will be further delayed and, inevitably, some needed repairs will not be made in time for occupancy. The Office of Inspector General, as noted above, concluded that DOL has certified employers to receive H-2A workers despite lacking documentary proof that housing inspections had occurred or that recruitment requirements had been satisfied. OIG Rept. at 15. This OIG finding is consistent with reports from around the country that some H-2A housing is not inspected in a

timely fashion and that some H-2A housing does not comply with basic housing standards. The DOL proposals run counter to the evidence and to the agency's obligations.

The untimely repair and inspection of farmworker housing will worsen as the H-2A program continues to grow, since funding for inspections will not keep pace with the increased need for inspections. The H-2A program has been expanding to new states and new crops during the last three years and is expected to continue its growth. See GAO Report at p. 50, Figure 3.4. Because the fee charged to H-2A employers is limited (to a maximum of \$1000 per employer), the financial burden of conducting housing inspections largely falls on state and federal agencies. These agencies will not have the resources to expedite the inspection of all housing, or ensure its compliance, during a window of only 15 days.

It is irrational, moreover, to permit an employer -- who must plan all year long to efficiently harvest its crop during a short harvest season -- to delay addressing this most basic of human needs to a few days before the rush of the harvest begins. The workers deserve higher priority and the employer seeking an efficiently-run business should be expected to act more quickly. Further, DOL is obligated to ensure that available U.S. workers are not deterred from these jobs by the presence of substandard housing. It should be no undue burden on law-abiding employers in most instances to address the housing issue at least 30 days before the workers arrive, rather than fifteen.

B. Shortening the Time Period for H-2A Applications Would Unreasonably Reduce Recruitment of U.S. Workers and Contravene the GAO Recommendations

We oppose the proposed rule because it would unnecessarily quicken the H-2A application process for employers by reducing the amount of recruitment of U.S. workers.

Prior to the Immigration Reform and Control Act of 1986, the H-2 program required employers to apply for temporary labor certification at least 80 days in advance of the estimated date of labor need. 20 C.F.R. § 655.200(a) (1986). The amendments in IRCA provided that employers could not be required to apply more than 60 days in advance. 8 U.S.C. § 1188(c)(1). The Reagan Administration issued regulations adopting the 60-day time period (rather than a shorter period) because it "permits time for review of the application, time for an employer to submit an amended application (if necessary), and adequate time for the recruitment of U.S. workers. . . . : 52 Fed. Reg. 20498, (June 1, 1987); 20 C.F.R. 655.100(a)(1), 655.101(c). The Reagan administration, as borne out by the subsequent evidence, correctly concluded that the full sixty-day period was needed to fulfill the statutory mandate.

The filing of an H-2A application begins a process which leads to recruitment of U.S. workers and the application deadline is of critical importance to the recruitment efforts that follow. DOL takes 7 days to review the employer's H-2A application to ensure that the job terms meet the law's standards. At best, only local recruitment by the Job Service occurs during the time DOL considers the application. §§ 655.655.101(c)(2) and (4); 655.104; 655.105. If the application is unacceptable, the employer may submit an amended application within five days to correct the deficiencies. § 655.101(c)(2). *Interstate recruitment does not begin until the application is*

accepted as complying with the law's required job terms. Id. and § 655.104(a). Moreover, any other delays in the employer's interstate recruitment and circulation of the job offer that are attributable to the DOL "will not postpone" the issuance of labor certification and visas. § 655.101(c)(2). *The labor certification – stating that the employer could not locate sufficient workers despite recruiting under reasonable wages and working conditions -- must be issued no more than 20 days prior to the date of need. Id.; § 655.105(d).* Delays in processing an application (which were confirmed by the GAO and OIG reports) can substantially shorten the recruitment prior to the time a "labor shortage" is "certified."

The proposed rule would permit employers to submit their H-2A application and job offer only 45 days prior to the date of need. See 63 Fed. Reg. at 53245. Other time frames would remain in place. Thus, the employer's application would be considered for at least 7 days, and amendments to correct deficiencies could take another 5 days. This would place the beginning of interstate recruitment at the 33d day prior to the date of need and **just 13 days before the date for labor certification**. If DOL delays approval of the application, as it often does, then there could be 10 days or less of interstate recruitment of U.S. migrant workers prior to the date of labor certification.

This shortened time period will reduce the effectiveness of recruiting U.S. farmworkers. There will be less time to circulate job offers to geographic areas where migrant farmworkers reside inside the United States.

It is not adequate to answer that recruitment of U.S. workers must continue after the date of labor certification up to the time that the foreign workers have departed for the employer's place of employment. See § 655.106(e). Congress insisted that the labor certification be based on proof that there is an actual labor shortage, following a meaningful test of the labor market. The proposed rule would install an unreasonably short period of recruitment and relegate the labor certification to an unsubstantiated assertion. In this way, the proposal contravenes not only good policy and the evidence, but legislative intent.

Discrimination against U.S. workers will also be furthered *because the employers could spend many months recruiting foreign workers in sending countries and yet this regulatory change would permit such employers to recruit U.S. workers for only a few days*. Employers under the H-2A program and their recruiters spend considerable time in the off-season to establish and maintain relationships with workers living in foreign countries. This policy proposal is inconsistent with the DOL's recognition that H-2A employers should engage, at a minimum, in "the kind and degree of recruitment efforts [to secure U.S. workers] which the potential H-2A employer made to obtain H-2A workers." § 655.105(a)(2).

Moreover, the employers are not burdened unduly by the 60 day application period. Employers must plan for many other inputs in their businesses in advance of the harvest. There is no reason they cannot plan 60 days in advance for their labor needs. Indeed, employers who fear labor shortages should be expected to spend considerable time evaluating and addressing the reasons for their inability to find workers. Neither the DOL regulations nor we demand that

employers be prescient, however. The H-2A regulations provide growers with ample flexibility to change their dates of need, revise the numbers of workers needed, alter the terms of employment and in some cases to transfer unneeded guestworkers to other employers. §§ 655.93 (special procedures); 655.100(a)(2), 655.101(d), (e) (amendments to applications without requiring additional recruitment); 655.101(f) (emergency applications); 655.105(c)(modifications to job offers without requiring additional recruitment); 655.106(c)(3)(changing the length of the job); 655.106(h)(expedited labor certification if U.S. workers do not appear); 655.106(c)(2) (transfer of workers).

The proposal also contradicts the recommendation of the GAO report. The GAO suggested that DOL could reduce the application period to 45 days before the date of need *but only if the issuance of the labor certification was also delayed so that U.S. workers would not be harmed by reduced recruitment and the meaning of the labor certification would not be diluted.* The GAO (p. 65) wrote:

Delegating INS' approval role in the H-2A program could reduce total application processing times by 2 weeks. This would permit Labor to modify to 45 days the existing administrative requirement that applications be submitted at least 60 days before the date of need. **However, to ensure that agricultural employers have sufficient time to positively recruit for domestic workers, obtain inspections of farmworker housing, and show proof of workers' compensation coverage, it will also be necessary for the Congress to modify to 7 days the statutory requirement that applications be approved 20 days before the date of need. Without modifying this requirement, employers will not have sufficient time to meet their duties as required by the program and domestic workers will not have ample opportunity to compete for agricultural employment.**

Both the GAO and the Office of Inspector General concluded that H-2A growers' recruitment inside the U.S. is rarely effective. This proposal will make it less so.

We oppose the shortening of the deadline for H-2A applications, but even if DOL disagrees with our view, it would be irresponsible to reject the double-sided GAO approach and adopt the proposed rule's one-sided approach.

C. Limiting Growers' Recruitment Through Farm Labor Contractors in this Context and Manner Would be Arbitrary, Capricious and Contrary to the Statutory Obligation to Hire U.S. Workers

The proposed rule would add a provision to the employer's recruitment procedures regarding the already-limited circumstances under which H-2A employers must utilize farm labor contractors ("FLC's" or "crewleaders") to secure U.S. farmworkers. It is unjustified.

The proposed rule would: (a) confirm that the employer need not cooperate with farm labor contractors whose licenses to operate have been revoked; (b) permit employers to refuse to utilize any farm labor contractor appearing "on a list of employers that have been sanctioned for violations

of immigration laws and regulations maintained by the” INS; and (c) establish a complaint procedure for employers that wish to refuse to hire a farm labor contractor who is not on any DOL or INS list but who “has a history of employing or providing a substantial number” of unauthorized immigrants “or a history of serious labor standard violations. . . .” 63 Fed. Reg. 53248, proposed 655.103(3). Under the complaint procedure, a regional administrator of the DOL Employment and Training Administration could issue a final decision on behalf of the Secretary of Labor, without a hearing, permitting an H-2A employer to avoid retaining a farm labor contractor and avoid hiring the FLC’s crew members who are U.S. workers.

U.S. workers possess a legal preference for these jobs that would be diminished substantially by this proposal to further reduce recruitment of U.S. farmworkers. We share the DOL’s interest in reforming the farm labor contracting system. But this proposal is not the answer to that complex problem. U.S. workers should not lose jobs to exploitable guestworkers as the price to reform the farm labor contracting system.

The proposal’s provision described above in subsection (a) is redundant with current law under the Migrant and Seasonal Agricultural Worker Protection Act and unnecessary. Employers are prohibited by law from contracting with FLC’s whose licenses have been revoked and not reinstated. Of course, employers under the H-2A program should not use FLC’s who are unlicensed.

The proposals in subsections (b) and (c) above do not consider the current farm labor market. Generally, farm labor contracting is a common method for matching workers to jobs. Large numbers of U.S. farmworkers and most guestworkers are hired through labor contractors. Recent studies show that an increasing percentage of farmworkers secure their jobs at farms through labor intermediaries – farm labor contractors or crewleaders – that have engaged in a contractual relationship with farmers. In California, it has been estimated that more than one-half and as much as two-thirds of seasonal farmworkers are hired through crewleaders, many of whom also transport, house, pay and supervise workers in the fields. More specifically, under the H-2A program, employers routinely use labor intermediaries (such as Jorge del Alamo of Del-Al in San Antonio, Texas and its network in Mexico, or the West Indies Central Labour Organisation in Jamaica) to recruit H-2A workers from other nations. Many employers under the H-2A program have banded together through their employer associations – such as the North Carolina Growers Association, the Florida Fruit and Vegetable Association, the Snake River Farmers Association and others – to recruit foreign workers. These H-2A employers have formed their own labor contracting entity, at least to secure foreign workers.

In these circumstances, it would be irrational to eliminate or significantly reduce the use of labor contractors under the H-2A program.

The DOL proposal is the wrong solution to a serious problem. Growers – either individually or collectively -- have the economic power to establish their own recruitment entities and/or control their farm labor contractors to ensure compliance with the law. The H-2A program should use the “joint employer” doctrine to insist that growers who use crewleaders demand proof

of licensing and ensure that workers receive the benefits guaranteed by law. See 20 C.F.R. § 655.100(b) (definition of “employer,” referring to “joint employer” relationships). The answer is not to deny U.S. farmworkers jobs merely because they apply through crewleaders.

The proposal also ignores the many other factors (beyond the use of FLC’s) that contribute to the relatively high rate of unauthorized immigrants in agriculture compared to other industries, as well as other solutions to these problems. If employers want to attract documented immigrants and citizens – whether through labor contractors or otherwise -- and reduce their high employee turnover, often they will need to improve wages and conditions. Agricultural employers attract undocumented workers through their low pay and poor working conditions. And the DOL’s H-2A job terms generally perpetuate those inadequate job terms. DOL has not explored other solutions it should have considered.

The proposed rule’s crewleader provision raises serious issues of due process and discrimination. First, the proposed rule effectively could put FLC’s out of business and deny jobs to U.S. workers (citizens and lawful resident aliens) who are associated with those contractors merely because, in the past, the contractor has been “sanctioned” by the INS for hiring unauthorized immigrants or has violated the labor laws. If the FLC does not meet the law’s standards for receiving an FLC license, then of course the license should be denied or revoked. On the present record, however, DOL should not use this forum to impose additional punishment on businesses because affected U.S. workers would be unduly harmed.

Second, the H-2A grower, which may have committed the same conduct as the FLC – violating labor laws and hiring unauthorized immigrants -- will receive government approval to hire temporary foreign workers under our immigration laws. Yet the FLC could be barred, at the grower’s option, from supplying lawful U.S. workers to that same H-2A employer. (In addition, the FLC could become an H-2A “employer” under this proposal, even though it would be barred from serving as a contractor supplying workers.).

Third, the proposed complaint procedure would be one-sided, subject to manipulation by growers and harmful to workers. Employers could bring a complaint to a local state employment office alleging that a labor contractor had been hiring many undocumented workers or had violated the labor laws. It would be irrelevant that the employer’s sole motivation in filing the complaint would be to avoid hiring U.S. workers and secure access to guestworkers. The Regional Administrator would then issue a decision as to whether the employer needed to accept U.S. workers offered by the labor contractor. A labor contractor with 100 U.S. workers available to an H-2A employer conceivably could be rejected by that employer for the FLC’s past conduct. Every one of those U.S. farmworkers could be denied employment and displaced by temporary foreign workers (based on a DOL certification that there are no U.S. workers available at the place and time needed). The U.S. workers may have no way to hook up with the H-2A employer because the H-2A employer may refuse to recruit those workers individually or look for another crewleader. The workers may also have been dependent on that FLC for transportation to the place of employment because the H-2A program does not require employers to advance transportation costs. Despite these harsh consequences, the U.S. workers would have no recourse. They would not have to be

interviewed or given a hearing (proposed 655.103(f)(3)(ii)) and the Regional Administrator's decision would be final (655.103(f)(3)(iv)). If this does not amount to a deprivation of a constitutional property interest without due process of law, then it is nonetheless an unsound policy proposal.

D. DOL Should Not Eliminate the Grower's Obligation to Notify DOL of the H-2A Workers' Departure Date

The proposed rule would relieve employers of the need to inform DOL of the date of departure of foreign workers from their homelands. See § 655.106(e)(1). DOL would assume that the foreign workers left for the United States on the day before the employers' stated date of need.

Relieving employers of any such obligations should not occur until DOL addresses workers' needs.

E. The Administration Should Not, At This Time, Transfer Adjudication of H-2A Visa Petitions Out of INS and to DOL

DOL should not transfer adjudication of H-2A visa petitions from INS to DOL in the absence of a comprehensive approach to improving administration of the H-2A program. DOL should reorganize the H-2A program's administrative structure, but DOL should not move forward piecemeal with changes in the INS functions. The proposed rule attempts to "streamline" the program to aid employers without addressing any of the workers' needs. The proposal also fails to address the GAO's significant concern about DOL's seeming inability to maintain records to allow monitoring of the H-2A program's operations. Any reorganization of responsibilities in DOL should be accompanied by meaningful plans to improve this information deficit and the overall administration of the program.

III. DOL SHOULD REFORM THE H-2A PROGRAM TO MEET THE LAW'S REQUIREMENT THAT U.S. WORKERS NOT BE ADVERSELY AFFECTED BY THE HIRING OF TEMPORARY FOREIGN AGRICULTURAL WORKERS

A. Reforms Are Needed

For several years, farmworker advocates have been requesting a number of administrative reforms in the H-2A program to begin to ensure that U.S. farmworkers do not suffer adverse effects from the employment of temporary foreign workers and that the "guestworkers" do not experience unlawful or unfair employment practices. The need for these reforms has become more urgent recently as the number of employers securing H-2A workers has increased and the program has spread to new states and crops. It is irrational now for DOL to propose rulemaking under the H-2A program without adopting or even discussing such suggestions by worker representatives. The proposal to shorten the application period from 60 days to 45 days, in particular, is diametrically opposed to the evidence possessed by the Department of Labor.

The need for substantive reform is evidenced by several basic truths, most of which are documented in the reports of the Commission on Agricultural Workers, the U.S. Commission on Immigration Reform, the General Accounting Office report on the H-2A program, or other studies.

First, there is a significant surplus of United States migrant and seasonal agricultural workers, including in states where H-2A employers exist. U.S. workers are suffering substantial periods of unemployment and underemployment, contributing to average earnings levels below the poverty line and declining real wages. Recent public-benefits legislation is causing even more people, many with significant work experience, to enter the low-wage job market.

Second, U.S. farmworkers want the jobs that H-2A program employers are giving to temporary foreign workers. Apple-picking, for example, is relatively desirable farmwork among U.S. farmworkers, who fill the jobs in big apple producing areas like Pennsylvania, West Virginia, and Washington State. But many U.S. workers will not take H-2A jobs at current wages and benefit levels, and some are deterred by the notorious reputation of the H-2A program.

Third, the U.S. Employment Service -- which is most H-2A employers' primary method of recruiting U.S. workers -- is not utilized by even a significant minority of U.S. employers or farmworkers. Thus, employers should and can be more responsible for conducting their own "positive recruitment" as required by statute. The reality is that recruitment is a process that is difficult to regulate. Reform must focus on substantive job terms because they largely determine who applies and re-applies for jobs.

Fourth, employers benefit from the restricted legal status and poor economic status of temporary foreign workers: H-2A workers are docile, young, single males and highly productive.³ H-2A workers' high productivity levels, as compared to many U.S. workers, result in part because H-2A wage levels are low for U.S. workers relative to the cost of living in the U.S. economy, but are very high for workers from third world economies. Moreover, H-2A workers, as "non-immigrants," fear -- often correctly -- that unless they silently comply with their employers' harsh employment practices, they will be fired and immediately repatriated.

Fifth, the wages, working conditions and recruitment obligations prescribed by the Department have formed a ceiling, rather than, as intended, a set of a minimum job terms. U.S. workers who demand higher wages are deemed "unavailable" and will be replaced by H-2A workers.

Sixth, although the H-2A program was intended to be a short-term, last-resort solution for temporary labor shortages, for most H-2A employers the program has become permanent. Some employers have been in the program for 30 years, despite huge farm labor surpluses -- by any

³ Contrary to our national employment policies, H-2A employers are permitted to hire whole labor forces of workers of a single gender, one national origin, a single race, and without disabilities. We understand that a Georgia employer recently hired the first female H-2A workers ever.

measure -- for large periods of time during those years.

The most urgently needed policy reforms involve (1) wages (particularly the “adverse effect wage rate” and piece-rate issues), (2) transportation cost advances, (3) prevailing practices, and (4) crewleader utilization, because DOL's positions with regard to these matters are the most important cause of the adverse effects on U.S. farmworkers and the exploitation of vulnerable temporary foreign workers. These are addressed below.

B. Summary of Needed H-2A Reforms

The H-2A program needs to be reformed. Some of the most pressing areas requiring attention are highlighted below, but many others are needed.

Transportation Costs to the Place of Employment

Transportation Cost Advances. H-2A employers must be required by regulation to provide U.S. workers with transportation to the place of employment or transportation cost advances, including actual subsistence costs during travel. Job service personnel have repeatedly said that a large percentage of H-2A jobs would be filled by U.S. workers if they had transportation cost advances. Through various financial systems in which the employers participate, foreign workers in distant lands -- no matter how impoverished -- have been able to secure travel financing to arrive in isolated rural areas in the U.S. The lack of such systems for U.S. migrant workers denies them jobs. Moreover, DOL's past efforts to regulate travel advances in part because its policies were not simple or strict. Employers' allegations of risks of loss of travel advances can be addressed, just as many costs related to high employee turnover can be and routinely are addressed.

Wage Rates and Productivity Standards

Reform of Adverse Effect Wage Rate. It is critically important that DOL change the Adverse Effect Wage Rate (“AEWR”) methodology because it has allowed adverse effects on U.S. workers' wages. The AEWR is now based on average regional farmworker wages. §§ 655.102(b)(9), 655.107. These wage rates have been depressed by the current and historical presence of H-2A and undocumented farmworkers. Moreover, an employer who claims difficulty finding job applicants should not offer an “average” wage level, but rather a wage rate at the high end of the range. Several reasonable alternatives exist and Congress granted DOL flexibility on this issue. We would like to provide further input as DOL further examines this priority.⁴ One suggestion, for example, would be to set the AEWR at

⁴ AFL-CIO v. Dole, 923 F.2d 182, 184 (D.C. Cir. 1991), held that Congress “left it in the Department's discretion how to ensure that the importation of farmworkers” did not adversely affect U.S. workers' wages, *id.* at 184, and that this discretion is “rather broad.” *Id.* at 187. Although the current AEWR methodology was upheld, the Court indicated quite clearly that in the face of “imprecise” measures and “inconclusive data,” there was a “range of reasonable methodological choices open to the Department.” *Id.* Moreover, since the time of that rulemaking, more evidence of adverse effect has appeared.

the level of the top-paid ten percent of workers in the local market, or the top-paid 20th percent on the regional wage survey, whichever is higher (since local wages are often affected more acutely by the presence of foreign workers). Another, more-direct option to offset the depression in wage rates would be to increase the current AEWRs by 30 percent.

Prohibit Employers From Fixing Uniform Wage Rates H-2A employers have formed cartels which offer workers identical wage rates across entire states or large portions of states. Such uniform wages restrain competition among employers. Individual growers do not attempt to lure productive workers to particular growers by offering higher wages; instead, they form employer associations which fix wages at depressed levels and allocate productive (and less productive) workers among the various growers. DOL, with assistance from the Justice Department, should end such antitrust-law violations.

Piece Rates Must Be Linked to the AEWR. Piece rates --which are still the most common form of wage rates in agriculture -- must increase proportionally to increases in the Adverse Effect Wage Rate, or else the AEWR is almost meaningless. Piece rates are generally intended to stimulate greater productivity by offering an opportunity to earn more than the usual hourly rate. Regardless of the precise methodology, a new regulation should state that the piece rate must generate earnings at least 30% above the hourly-rate AEWR for the average worker (a common incentive interval in agriculture).

Productivity. Equally important, the regulation must prohibit employers from increasing productivity standards to avoid the effect of AEWR increases.

"Task Rates" And Other Incentive Systems Must Be Regulated. All wage systems must be regulated to ensure that they do not cause adverse effects. DOL must state that it prohibits use of so-called "task rates" under the H-2A program, since they usually are disguised variable-piece-rate systems intended to evade enforcement of minimum wage requirements.

Working Conditions

Prevailing Practices. All non-wage practices and benefits should be subjected to a prevailing practice standard, including productivity standards and crop quality standards. The job service regulations, 20 C.F.R. § 653.501, already require this, but the H-2A Program Handbook differs and should be revised through rulemaking. The Handbook discriminates by setting a difficult-to-satisfy standard for benefits to be provided to workers, but allows an easier standard for employment practices that growers seek to impose on workers.

Definition of "prevailing practice." DOL should eliminate the unique, anti-worker definition of "prevailing practice." A prevailing practice should be one that is engaged in by a majority of employers or is experienced by a majority of the employers in the local area and occupation. DOL, by contrast, does not require a benefit for employees unless *both* a

majority of workers in the area receive it and a majority of employers in the area provide it. This standard is rarely met and exempts H-2A employers from competing with other businesses.

Productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A growers. They must be bona fide, objective, quantifiable, fully disclosed and implemented on a fair and equal basis. Such standards are often subjective, bogus, and discriminatorily applied to avoid retention of U.S. workers.

Recruitment

Employer Recruitment and Job-Retention Efforts. The agency's limited resources for the H-2A reform effort should focus on ensuring that the substantive terms of employment are attractive to U.S. workers. Wages and working conditions are more severe impediments to U.S. worker hiring and are more amenable to government enforcement as contrasted with the employers' inadequate recruitment efforts. Nevertheless, two needed regulatory reforms are the following:

Use of Labor Contractors. DOL should issue a policy directive to implement the employers' current regulatory obligation to engage in at least the same kind and degree of recruitment efforts for U.S. as for H-2A workers. 20 C.F.R. § 655.105(a)(1)-(2). If employers rely on employer associations or use other third parties to help recruit H-2A workers, then DOL should require them to do the same for U.S. workers. DOL must investigate whether crewleaders are used and if so the types of services provided and, most importantly, the compensation. Growers should not be permitted to escape this obligation by arguing, as some do, that their past hiring of crewleaders who violated the law should not be considered as the retention of a crewleader. When use of crewleaders is a "common" or "normal" practice in an area, it should be required of H-2A employers, with the common or normal compensation for the type of service provided by the crewleader. Crewleader compensation should be competitive. Of course, the employers must ensure that the farm labor contractors comply with federal and state law.

Call-Back Rights. DOL should require that any H-2A worker (or U.S. worker) who completes the season be given a hiring preference over other H-2A workers, subject to the job opportunity being available and the absence of qualified U.S. workers. Among other things, this will reduce H-2A workers' fear of reporting labor violations to the government and seeking legal advice.

Allocating Economic Costs

Increase Employers' H-2A Fees. Impose fees that reflect the true cost of the H-2A program and end the substantial subsidy and incentive employers receive to hire H-2A workers. Professor Philip Martin estimated that DOL and the state job service system spent about \$15 million annual to process labor certification requests. This subsidy amounts to about \$750 for each H-2A job (in

1993). Martin found that DOL collects less than \$500,000 annually from the H-2A employers. Taxpayers should not be paying for 97% of the government's cost.

Reform of the H-2A regulations will not be effective if the Department of Labor continues its weak enforcement of H-2A policies. Implementation and enforcement should be substantially improved through better training, leadership changes, and greater resources.

Thank you for the opportunity to comment on the proposed regulation.

Sincerely,



BRUCE GOLDSTEIN
FARMWORKER JUSTICE FUND, INC.

Arizona Interagency Farmworkers Coalition
Association of Farmworker Opportunity Programs
California Rural Legal Assistance Foundation, Inc.
Comite de Apoyo a Los Trabajadores Agricolas (Farmworkers Support Committee)
Everglades Community Association (Fla.)
Florida Impact
Home Education Livelihood Program, Inc. (New Mexico)
Housing Assistance Council
Immigrant Legal Resource Center (California)
International Labor Rights Fund
Latin America Immigrant & Refugee Organization (Fla.)
Lawyers Committee For Civil Rights Under Law of Texas
League of United Latin American Citizens
Mexican American Legal Defense and Educational Fund
Mexican American Council (Fla.)
Migrant Farm Worker Division of Texas Rural Legal Aid
Migrant Farmworker Justice Project of Florida Legal Services, Inc.
Migrant Legal Action Program
National Council of La Raza
National Immigration Law Center
National Immigration Law Project of the National Lawyers Guild, Inc.,
North Carolina Justice and Community Development Center
North Texas Immigration Coalition
Pineros y Campesinos Unidos del Noroeste (Ore.)
South Texas Civil Rights Project
Texas Appleseed Advocacy Fund
Texas Immigration and Refugee Coalition

Virginia Justice Center for Farm and Immigrant Workers
Washington (State) Alliance for Immigrant and Refugee Justice

cc: Administrator, Wage and Hour Division, U.S. Department of Labor