



Georgia Fruit and Vegetable Growers Association

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TO: Thomas Dowd, Administrator
Office of Policy Development and Research
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave. N.W.
Washington, D.C. 20210

FROM: Charles Hall, Executive Director
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RE: Temporary Agricultural Employment of H-2A Aliens in the U. S.
ETA-2009-0004-0001
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Thank you for the opportunity to comment on the U.S. Department of Labor's proposed revision of the 2008 H2A regulations. Georgia Fruit and Vegetable Growers Association commented extensively when the present regulations were proposed and were pleased with the final rule approved in January, 2009. We hope our comments concerning the effects of these proposed revisions on Georgia growers will be given equal consideration.

The Georgia Fruit and Vegetable Growers Association represents more than 400 members who are growers, packers, shippers and industry suppliers in Georgia, South Carolina, Alabama and Florida. Fresh market growers are also employers who depend on large numbers of temporary, seasonal workers to produce their crops. Most of our larger growers have used the H2A program for almost a decade to ensure their agricultural workforce is legal. These growers are the Department's more knowledgeable stakeholders.

Before we detail the changes to the regulation that we consider most detrimental to the continued operation of H2A-staffed farms, we want to comment on the justification offered by USDOL for the proposed revisions. The regulations have been in effect for less than a year, but USDOL is proposing a major and

substantial change because —“...*applications have actually decreased since the implementation of the new program.*” We find this as a major reason for the revisions to be very problematic because:

- When the 2008 regulations were published on December 18, 2008, farmworker advocacy groups immediately filed for an injunction to keep the rules from going into effect. When that effort failed and the rules became effective on January 17, 2009, the Department extended the transition period called for in the new regulations. On March 17, 2009, the Department attempted to suspend the new rule and replace it with earlier regulations. A preliminary injunction kept the Department from suspending the rules and left the 2008 regulations in place. On September 4, 2009, the Department issued proposed rules to completely revamp the 2008 regulations.
- During the same time period, a severe economic downturn caused the loss of a significant number of jobs, making a domestic work force more available to agriculture. These unemployed workers who in good times would not consider temporary, outside work, became more willing to bridge the gap between permanent employment with seasonal, income producing jobs.
- The Department uses only the number of applications which do not accurately reflect either the number of employers represented by those applications or the number of workers requested in those applications. Further, a monthly average of applications filed under the 2008 regulations would better illustrate the contention that applications have decreased than a raw partial-year total of applications received.

Does the Department believe that a nine-month period, most of which has been spent litigating or attempting to change the 2008 rules and during which unemployment figures skyrocketed, is ample time to evaluate the efficacy of a regulation in place only 8 months? It would appear that any decrease in applications, even without considering the apprehension constant litigation or changes has caused, actually affirms the protections the program offers US workers by requiring employers to aggressively seek domestic workers before filing an H2A application. The purported decrease does not indicate less grower interest in the program, only more fear as well as less immediate need for it.

Following are the opinions of GFVGA, on behalf of its H2A-user members, regarding selected provisions of the proposed regulations:

APPLICATIONS

The 2008 regulations created an attestation process rather than a front-end enforcement review for all H2A applications. This change to the 1987 regulations was intended to simplify and streamline the initial approval process. To ensure

that employers complied with their attested responsibilities, USDOL created a comprehensive audit program, adding staff to conduct random, in-depth reviews and investigations of H2A users. This focus on actual program participants rather than potential applicants comports with virtually all of USDOL's other compliance enforcement efforts. The proposed revision reinstates the previous burdensome front-end application review process AND retains the expanded audit program, clearly increasing staff time spent gathering/creating paperwork by both employers and the Department. In this era of budget shortfalls and economic crisis, prudent risk management would dictate that back-end enforcement that focuses on actual non-compliant program participants is more cost effective than duplicative efforts to prevent potential, but unproven, problems.

The Department offers only anecdotal evidence of an increase in non-compliance by attesting employers, failing to provide any comparisons of pre-2008 non-compliance. It further fails to provide any evidence that a significant degree of non-compliance could have been due to the confusion caused by the implementation of new regulations, a changing transition period and failure by the Department to conduct adequate training on new regulations. Without empirical evidence that attestation directly increases non-compliance it is difficult to understand how the Department could reach such a conclusion after fewer than eight months experience.

INTERSTATE RECRUITMENT AND ADVERTISING

With the exception of flawed wage determination methodologies, the issue of Department-mandated recruitment and hiring requirements has been the most burdensome aspect of H2A program participation. The Department seems intent on standing by its position that there is an adequate supply of legal, seasonal, US agricultural workers despite years of evidence to the contrary. And yet, the Department and its advocate partners continue to insist that higher wages, better working conditions and stringent protections will attract US workers from permanent, low-skilled jobs. The Department can offer no empirical evidence that the past decade's increased AEWRS, intensely time consuming and expensive advertising and recruitment efforts have resulted in a significantly improved availability of US workers to fresh market growers. In fact, the Department-cited statistics indicating a recent decrease in the number of H2A applications proves that only a temporary downturn in the economy will increase the number of people willing to take temporary agricultural jobs, regardless of whether those jobs are widely advertised or guarantee only minimum wage.

The 1987 regulation requires that H2A applicants utilize the Interstate Clearance System, an unwieldy, paper-wasting, outdated method of conducting recruitment in states that the Department deems likely to produce large numbers of domestic workers. There is no statistical basis for the Department's choice of these states, other than tradition. There is no study of any positive results from use of this system. The requirement presupposes 1) workers are available in numbers

sufficient to justify the cost of recruiting them, and 2) SWAs are effective farmworker recruitment agents, both suppositions that have largely been disproven over the years.

The 2008 regulations required the Department to collect data to support selection of labor supply states. With the elimination of this requirement, no transparency of criteria to be used to determine supply states is in the proposed changes.

The Department also requires newspaper advertising—lengthy ads placed in papers for at least two days, one of which must be a Sunday—and reserves the right to require H2A employers to advertise in other states designated by the Department. Again, no method of determining which states to select is in these regulations.

As a result of *Arriaga v. Florida Pacific Farms* and other successful Fair Labor Standards Act (FLSA)-based lawsuits, in many states reimbursement of transportation costs must be made during the first week of work, in addition to reimbursement or pre-payment of visa fees, etc incurred by the foreign H2A worker. In many cases, the employer advances the cost. This decision did not apply only to H2A foreign workers but to ALL workers outside of a normal commuting distance. To lessen the chances an employer will incur costs for transporting non-agricultural workers who are not likely to complete the contract, USDOL should allow an employer who is recruiting out-of-state to require the applicant to have at least 3 months of agricultural experience. Out-of-state SWAs must ensure the workers they refer as a result of the interstate clearance requirement meet all experience requirements and are work authorized.

The argument that no such experience is required of H2A foreign workers is specious. Regardless of how much experience an H2A worker may have, if he accepts agricultural employment and travels to a distant worksite he is present in the United State in a visa status that requires compliance with the contract he accepted if he is to remain in the US. Workers who fail to comply with their acceptance of work after being reimbursed for the travel to get there are subject to revocation of the H2A visa and removal by DHS. No corresponding penalty exists for a domestic worker whose inbound transportation and subsistence is paid by the prospective employer. While no one is suggesting penalties be imposed on domestic workers who, for reasons beyond their control, fail to complete work contracts, it is reasonable that an employer be able to require experience indicating that out-of-state workers are aware of the duties and work conditions that await them.

The cost in time and money to comply with the Department's inefficient recruiting and hiring requirements are evidenced by Appendix 1.

GFVGA recommends the Department consider:

1. Given the nearly year-round nature of modern fresh market production, can the old “migrant stream” methodology of the Interstate Clearance System

produce enough workers willing to travel long distances to virtually resettle in another part of the country?

For example, in 2007, 57 GA H2A growers received 163 referrals through clearance orders offering more than 6000 jobs. The time period during which workers were referred included the positive recruitment beginning about 45 days before the date of need and the first 50% of the contract period which in most GA cases would be at least another four months. Clearly, the interstate clearance system, as it is presently constructed cannot produce enough Migrant/Seasonal Farm Workers (MSFW) to justify its costs to growers, the Department and SWAs.

2. No other employment-based visa program requires such intense recruitment despite ongoing evidence that H1B jobs are being denied to highly educated US workers across the nation. The Department should concentrate its attention on workers who are much more likely to relocate? Yet only temporary, unskilled, lower-paying jobs are so intensely protected for US workers by the Department.
3. During a downturn in the economy, workers are likely to be available locally. Conversely, when the economy is good, jobs are likely to be available locally. Why then require that agricultural employers cast such a wide, expensive net, good times and bad? The practice is counter-intuitive at best.
4. If the Department contends that workers are available, is it not the Department's tax-payer funded mission, through its SWAs, to produce them at the time and in the numbers necessary to sustain this industry? If, over a period of years, the Department fails to find an adequate supply of workers, shouldn't it revisit its own contention regarding labor supply or at the very least, assess its internal capabilities? Why should a grower with fewer resources, less experience and knowledge be expected to succeed where a professional governmental agency has failed?
5. Does the Department offer any statistical study of the efficacy of expensive newspaper advertising? For instance, the proposed regulations require that the employer place an ad for two days (including Sunday) in a local newspaper. The ad is detailed and costly. In 2007, 57 GA growers spent more than \$52,000 on newspaper ads. This cost did not include staff time involved in preparing the ad, contacting the paper, etc., all of which would be complicated by having to do it in unfamiliar states should the Department require additional out-of-state advertising.

The waste of time and money spent on advertising is further illustrated by three GA growers within a 20 mile area who advertise for approximately 1200 workers twice yearly. The number of unemployed workers from every occupation in this county is, on an average, considerably fewer than 1200

at any time. Yet these three growers have been placing simultaneous ads in the same local newspaper at least twice a year for almost ten years. The same is true of four peach growers in Middle GA.

In 2007, 700 North Carolina growers advertised for approximately 6200 workers. There were approximately 129 responses but of the 54 domestic workers who reported for work, less than 6% completed the entire season for which they were hired.

6. Prior to proceeding with the proposed regulations, GFVGA recommends the Department conduct a comprehensive study of the past 10 years' H2A recruitment results, including local, intra- and inter-state dissemination of job orders. This study should report:
- Total number of referrals to H2A growers by each method
 - Number of referrals classified as MSFWs by the SWA
 - Number of referrals who appeared or responded to pre-hire interviews/orientation from each category
 - Total number of workers referred BEFORE the work start date who reported to work as scheduled
 - Total number referred during 50% period who reported to work as scheduled
 - Total number of domestic workers hired by H2A growers who remained on the job:
 - Less than 6 days
 - Less than 1 month
 - Less than 2 months
 - Total number of domestic workers who completed the work contract
 - Of those who did not complete their contract, the reasons for self termination including but not limited to the following categories:
 - Did not like the work
 - Could not do the work
 - Did not know what the job entailed prior to hire
 - Wanted year-round work
 - Found other employment
 - Inadequate pay
 - Health issues
 - Other

- Of those who were terminated for cause by employers, the reasons for the terminations, including but not limited to:
 - Could not do the work
 - Excessive tardiness
 - Excessive absences
 - Job abandonment
 - Failure to follow rules

Most of the above information is readily available through the local SWAs who coordinate all job orders and referrals, as well as conduct field checks on H2A farms where domestic workers are employed. Information on terminations is available from growers who must complete Separation Notices for domestic workers for purposes of potential unemployment insurance claims. Employers and SWAs have contact numbers for domestic workers if follow-up is required to verify reasons for failing to complete work contracts.

The study described above should also include research to determine the per-referral cost to employers and SWAs. A separate cost category should determine the additional costs of clearing H2A orders to other states. Rather than continuing to support a costly and ineffective system, USDOL funding should be used to explore better and more cost-effective ways for growers to utilize the available domestic FARMWORKERS identified by SWAs.

Without some type of factual assessment of the results of years of expensive and time consuming domestic recruitment efforts, USDOL should not continue to rely on anecdotal claims that use of H2A deprives US farmworkers of jobs. In fact, a preponderance of the individuals that respond to ads and SWA recruitment has little or no agricultural experience. Further, such a study would provide insight into the failure of the present system to locate farmworkers who need and are willing to accept agricultural work.

PROPOSED ELECTRONIC JOB REGISTRY

For decades the Department operated an electronic data system for SWAs to upload job opportunities for nationwide recruitment. This “Job Bank” proved so costly and inefficient that it was abolished by the Department in 2007. (An OIG study is available to the Department detailing the shortfalls of that version of an electronic job registry.) Unless there has been additional study and follow up, the notion of revisiting the same kind of system for farmworkers (who are less likely than other jobseekers to utilize the Internet) appears to be ill-advised and wasteful.

If such a registry is created, requiring use of newspaper advertising and the Interstate Clearance System will be duplicative, time consuming and expensive not only for employers, but for the Department and SWAs. Those requirements should be eliminated.

Additionally, no details were provided regarding the format or functions of this “Job Bank.” If employer names and addresses are redacted and interested parties directed to local SWAs for additional information and instruction, as was the case in the earlier experiment, this experiment is no different from the earlier failure except that it extends the resulting cost and inefficiency for months beyond the jobs’ starting dates.

However, if employer names and addresses are posted on the Internet to eliminate the SWA role, privacy issues arise as well as chaos that must be managed by farmers dealing with random, uninformed referrals from across the country. For the Department to subject employers to this kind of costly harassment and confusion throughout their busiest seasons is unconscionable.

Without further information about the design and operation of this job registry, it appears that the Department is simply creating a publicly accessible “pool” of H2A employers in which advocacy litigators can fish easily and at will.

50% RULE

H2A users have long decried the requirement that domestic workers who show up after work has begun must be hired up to 50% of the work period as being unnecessarily disruptive and unproductive. Prior to promulgating the 2008 regulations in which the 50% rule was abolished, the Department contracted a survey of H2A growers, SWAs, Domestic Farmworker Assistance Organizations and State Monitor Advocates to gauge the value of the rule. Appendix 2 is a copy of the questions asked of a large Georgia grower for this survey.

Unless the Department can produce a study that proves that the 50% rule produces demonstrably more employment of domestic workers on H2A farms, it should stand by the findings of its own contracted survey:

- There is a very small number of hires that result from these referrals.
- Generally domestic workers hired under the “50 Percent Rule” do not stay on the job when hired, and further these workers are not interested in this type of work when they learn about the requirements for the job.
- There are similar opportunities for domestic workers in agriculture without the “50 Percent Rule.

ADVERSE EFFECT WAGE RATE (AEWR)

In 2010 the AEWR for Georgia will be between \$9.16 and \$9.25. According to the Bureau of Labor Statistics Georgia’s present average entry wages for all construction/extraction, installation/maintenance/repair and production

occupations are \$10.40, \$11.62 and \$8.84 respectively. These averages include education and training requirements as well as varying levels of responsibilities. They also include the higher wages usually paid in metropolitan areas. Given these findings, how can the Department contend that “large numbers of foreign workers entering a specific labor market...may produce wage stagnation”?

It is difficult to understand how the Department could possibly believe that a \$9+ rural area, entry-level temporary, farm hand-labor guaranteed wage is justifiable. And it should be noted, this guaranteed wage does not include such benefits as mandatory free housing, free local transportation, reimbursement for in- and out-bound travel expenses, visas etc. Nor do these jobs require any experience or education.

Why then, if as the Departments contends, the answer to farmworker shortages is higher wages and benefits, do so few work-authorized domestic workers avail themselves of jobs that until January 2009 usually paid at least \$1.50 more than prevailing wages in similar occupations in local areas?

Further, the Department offers no empirical or statistically valid evidence that changing H2A wages to OES and/or federal minimum wage actually resulted in “significantly” lower farmworker wages. Consider the following:

- Many long-time H2A users did not lower the most recent wages of their returning workers. Rather, the 2008 wage determination methodology simply kept the high artificial AEWWR wage from increasing 4% every year. Over a very long period, farm wages on many of the larger, longtime H2A farms may stagnate, but overall, will not be “significantly” lower.
- H2A workers account for less than five percent of all farmworker employment. No other agricultural employers are required to pay more than minimum wage. How then can freezing or even lowering five percent of farm worker pay result in an overall “significant” decrease? If the decrease is only in the H2A program which accounts for less than five percent of workers and a small percentage of agricultural employers, how can the Department justify the costs of promulgating new regulations and ensuing confusion among its employer stakeholders?

The further requirement that if Department surveys produce higher than AEWWR wages the employer must immediately raise H2A wages is patently unfair and illogical unless wages can also be lowered to the level any Department survey determines to be prevailing. And if its surveys are more dependable than USDA’s survey in setting wage rates, why isn’t the Department willing to assume that responsibility?

Where is the study that the Department used to determine that 1) wages decreased “to a significant extent” (\$1.44) under the 2008 regulations, 2) higher

wages result in more domestic farmworker availability, 3) SWA prevailing wage surveys more accurately reflect prevailing wages than does the NASS survey or OES results? Until such a study is conducted and/or made available, the department, using anecdotal evidence alone, should not reinstate the USDA NASS wage rates nor should it require that employers raise wages mid-contract.

HOUSING AND TRANSPORTATION

With, the exception of H2A housing, USDOL does not mandate pre-occupancy inspections of farmworker housing. While the Department's Wage and Hour Division is charged with inspecting all housing occupied by migrant and seasonal farmworkers, the majority of these inspections default to a "self-attestation" by employers. In reinstating the requirement that all H2A housing be inspected prior to its occupancy, the Department should consider:

- Its own Wage and Hour Division allows non-H2A growers to self-inspect and rarely follows up unless there is a complaint or an investigation. This practice indicates that temporary agricultural housing is not a priority for the Department except in the H2A program. Therefore, if H2A accounts for less than 5% of all farmworkers, 95% are unprotected as regards safe, healthful housing, whether it is owner-provided or community-provided.
- SWAs are not allowed to conduct housing inspections if the housing is occupied, creating difficulties if 1) the grower's H2A application is to augment his existing workforce, 2) another grower is renting the housing during the H2A employer's off season, or 3) if the SWA is unable to schedule an inspection timely.
- SWA inspectors receive minimal training in conducting inspections. This problem is exacerbated by turnover in state agency staff.
- With its centralized processing centers, the Department should easily be able to quantify the number of certifications delayed by housing inspections. If it cannot, SWAs are a source of that information as are growers whose certifications are late.

Adding the cost of transportation from the foreign H2A worker's home to the US Consulate is expensive and confusing for the following reasons:

- Employers have no way of knowing the most economical costs of various means of transportation within a foreign country.
- This cost, in addition to the visa expenses and all other border-crossing fees significantly increases the front end cost for growers, especially in light of the Department's FLSA interpretation that most of these costs must be reimbursed during the first week of employment. If the Department and its partner, Department of Homeland Security, are truly concerned that H2

visa holders enter and stay in the US for legitimate reasons, workers' initial investment in some of the work-related expenses would prevent "free rides."

- Why include "all other employer-provided" transportation if other regulations already require a certain level of compliance? Does the Department intend to so acknowledge every requirement found in other regulations that may also relate to H2A? It is just this kind of unexplained reference that makes compliance confusing to non-government people and creates a "gotcha" for litigation. If something needs to be in this regulation, state the rules in their entirety.

EMPLOYMENT VERIFICATION OF SWA REFERRALS

The Department's refusal to accept responsibility for the legitimacy of its SWA partners' referrals is inconceivable. Of all the protections owed to a US worker, the most basic is that he/she not be supplanted by someone who is not authorized to work in this country.

Through the changes to the 2008 regulations, the Department purports to have as its only motive the protection of domestic agricultural workers. Throughout the proposed regulation, it states a critical (unsubstantiated) need for higher pay, intense recruitment, improved availability of job opportunity well beyond the job start date, creation of compliance audit programs, free inspected housing and increased fines for non-compliance with labor laws.

All of these changes increase the costs of program participation by growers, subject them to complicated application processes, require extensive documentation creation and increased liability for fines and lawsuits by advocacy litigators.

The Department says that growers must find the resources (both financial and human) to perform these processing activities, pay higher wages and transportation costs, provide housing, keep documents, interview and hire workers for months after the work begins, study and understand all labor laws and prepare themselves for compliance audits at any time. Even though, unlike the Department, a grower's business is producing food, the Department says that protection of domestic workers deserves equal time and attention.

Yet, by eliminating the 2008 requirement, the same Department supports the real reason agricultural wages are low, housing is either poor or non-existent, non-compliance is widespread and job opportunities fewer—the availability of large numbers of undocumented workers. The cost of verifying work eligibility is too high, says the Department, and the work involved is time consuming. It also says that SWAs do not have the resources necessary (financial or human) to ensure that they refer only legitimate workers or that they are not organizationally set up to handle verification.

So, the Department reasons, consideration of cost and resources make sense in deciding to eliminate its responsibility for protecting US workers, but the same reasons are not important enough to consider when they increase the responsibilities of an agricultural employer.

It is also noteworthy that if the Department considers self-attestation of work eligibility reliable for an SWA job applicant, the elimination of the 2008 application process strongly implies that it distrusts self-attestation by a US employer.

MISCELLANEOUS COMMENTS

Following are comments regarding other proposed changes:

- Retention of earning records has been extended from three to five years. There is no justification or explanation of the need for such an extension.
- The reinstatement of productivity standard language dating back to 1977 completely ignores the changes in production techniques (planting on plastic, etc.), higher yields (better varieties, fertilizers and chemicals). Perhaps the Department should consult with the Department of Agriculture regarding modern production before reinstating this language. Just as a government clerk with a PC is expected to produce more work in the same amount of time as a 1977 clerk with a typewriter, the productivity expectation of an agricultural worker in 2009 rightfully exceeds that of 1977 workers.
- The Department should carefully consider privacy issues related to its demand for contracts between growers and contractors, growers and agents as well as posting employer information on the Internet. Nowhere in this proposed regulation is there a description of how the Department plans to protect this information and under what circumstances it will share it with third parties.

For the past 18 months, businesses and workers in this country have been negatively affected by a severe economic downturn. Farming was not exempted from the effects of this recession. The timing of proposed regulations which further increase operating costs is poor at best.

We respectfully urge that this action be delayed until the effects of the 2008 regulations can be studied in depth. Precipitous action on these issues will be devastating to the growers who have been assiduously trying to follow the ever-changing H2A rules in order to utilize a 100% legal workforce.

APPENDIX # 1

Following are recruitment statistics for a large grower in Georgia who requested 150 workers and as a result of the 50% rule, is still recruiting for work that Following are recruitment statistics for a large grower in Georgia who requested 150 began October 11, 2007. Domestic recruitment has been ongoing for more than six (6) months.

As of late February 101 domestic workers have been referred, of whom::

- *40 did not report for interview*
- *1 interview pending*
- *13 ineligible for referral because they had been terminated for cause by this employer or abandoned their jobs before previous contracts ended*
- *6 reported to interview, were hired but did not show up for first day of work*
- *4 refused job once it was explained to them*
- *9 quit after 1-2 days of work*
- *23 terminated for excessive absences (usually 3 consecutive days without contact—job abandonment)*
- *3 terminated for violation of work rules explained during orientation and after numerous verbal warnings*
- *2 still employed*

Following is an explanation of time and money spent by this employer on a fairly typical domestic worker referral who reported but quit after 2 days:

- *Application received from SWA in North Georgia. Contact information incorrect, called SWA to obtain correct information. (15 minutes)*
- *Called two numbers and left message. Worker returned call. Set up orientation time. Typed and mailed letter with time and directions. (15 minutes)*
- *Received call from worker's family member wanting information on housing, work hours, etc. He did not want worker to share living or cooking space with other workers. (15 minutes)*
- *Received call from another family member asking more questions about living arrangements. Invited the whole family down to see housing and working conditions. (15 minutes)*
- *On report day received call that he was lost. Continued with interviews for other workers who were waiting. When he arrived, set up special orientation. Completed paperwork, set up personnel folder, issued time badge and entered paperwork into system. (60 minutes)*
- *Worker preferred to start the following day (Friday) rather than Monday when the other new workers were to begin, so issued him the new worker housing package (new blanket, new pillow, new sheets, pot, pan, plates, utensils, cups, soap and toilet tissue—about \$25 value) (15 minutes)*

- *Worker began work on Friday morning and worked all day and part of Saturday morning (total 9.92 hours) Supervisors spent 4.5 hours one-on-one training time with him.*
- *The worker quit before noon on Saturday.*
- *Paid him \$85 plus \$43 bus and meal ticket.*
- *Drove him to nearest bus station (1.5 hours round-trip)*
- *Issued separation notices. Faxed appropriate agencies of termination and mailed copies to worker. Payroll department reconciled finances—outside of normal payroll period. (35 minutes)*

The total amount of office staff time spent on this one domestic worker (who had no farm work experience prior to his referral by the SWA) was about 2 hours and 10 minutes. At an estimated \$20 per hour, the cost to the employer was approximately \$45.

The 4.5 hours of one-on-one training by three different supervisors cost the employer about \$75. The 1.5 hours spent driving the worker to the bus station cost the employer about \$47 in driver time and mileage.

If you add the employer's time, the costs of supplies, bus ticket/meal and transport to the bus station, this referral cost this employer about \$320. The worker pruned 16 trees at a value of approximately 1.65 per tree which produced about \$26.40 for this for-profit business—a net loss of almost \$300.

This is not an unusual case nor is it limited to GA. Even if a worker is referred but does not show up, there is a cost to the employer for staff time spent contacting the worker, SWA and preparing reports.

APPENDIX #2

H-2A 50% Rule Questionnaire

1) What type of employer are you?

- a) Farmer
- b) Farm Labor Contractor
- c) Grower Association
- d) Agent
- e) Other – please specify

2) In the last 3 years, how many times have you applied for workers under the H-2A program?

12 times

3) How many foreign H-2A workers did you hire in 2007? 2006? 2005?

2007__477

2006__477

2005__377

4) How many domestic seasonal workers in total did you hire in 2007? 2006? 2005?

2007__166

2006__165

2005__220

5) How did these domestic seasonal workers find out about employment opportunities at your farm/organization?

a) Referral from a state agency or other organization?

- *Referrals from SWA and occasionally, local shelters.*

b) Marketing efforts by your organization?

Newspaper advertisements

c) Other?

- *Word of mouth, community awareness of job opportunities during peak agricultural seasons.*

6a) Have any of these domestic workers been hired under the so called “50% rule”? Yes

6b) If yes, how many did you hire in 2007? 2006? 2005?

2007__140

2006__145

2005__200

7a) In 2007 were there any domestic workers who applied for employment under the 50% rule that you did not hire? No

7b) If yes, how many? NA

7c) How many in 2006? NA 2005? NA

7d) What are the main reasons for not hiring these applicants?

NA

8a) How long, on average, did the domestic workers hired under the 50% rule stay on the job?

Two weeks at most

8b) Does the retention of domestic workers follow a consistent pattern year after year?

Yes, most in-state workers accept the job referral based on the advertised wage alone or because an agency's policies require that they accept available work in order to qualify for benefits. This occurs year after year. The nature of farm work does not change from year to year so workers' reasons for leaving it remain the same.

9a) For those domestic workers who left early, what were the main reasons they gave for leaving?

a) Working conditions?

Most are unfamiliar with the physical demands of farm work. Summers in South GA are hot and humid. Work begins very early to avoid the hottest time of the day—mid-late afternoon.

b) Other job opportunities?

Most local domestic job applicants are looking for full-time permanent jobs. When they find less physical year-round work, regardless of the wage, they leave farm work to accept it.

c) Wages?

H2A hourly wages (AEWR) have generally averaged more than \$1.00 an hour above our local prevailing wages for entry level, physical labor since I have participated in the program. Coupled with piece rate incentives, a moderately productive worker can make an additional \$2-3 per hour. Wages are not the issue.

d) Other? Please specify

10a) In your experience, what impact has the requirement to hire domestic workers during the first 50% of the contract period had on your cost?

My costs were increased significantly.

10b) If there has been an impact on your costs, please identify the area of your operation impacted?

a) Labor?

Yes....productivity decreases as new workers are added to experienced crews. And, I paid high wages to workers for a few days or weeks of producing little or nothing.

b) Housing?

Yes...paid for extra housing for workers I did not need and who did not stay to complete the season just so I could keep H2A workers instead of replacing them with less dependable hires..

c) Labor?

Yes, I must provide at least three days of training before a worker can be either terminated or placed with a crew. This represents three days that a supervisor is diverted from his regular duties.

d) Administrative?

Office staff must interview, orient, complete paperwork, assign housing, advance wages, and prepare termination paperwork as well as out-of-payperiod checks for every worker who appears but does not stay. This is in addition to the contact with SWAs and workers during the referral process. We were denied our request to at least let us do all interviewing and

hiring in a group setting once a week to minimize constant disruptions and costs. The reason given by DOL was that the grower had to be available 8 hours a day, 5 days a week if anyone wanted to apply for an H2A job.

e) Other? Please specify

11) Did you encounter other non-cost related problems in hiring the domestic workers under the 50%?

Every time a new worker appears during the season, a supervisor must be sidelined to provide training and close supervision for about three days. Only then can the new person be assigned to a crew. If that worker cannot keep up with the production level and speed of his/her crew, overall productivity decreases. Other workers whose earnings are enhanced by piece work incentives often complain when slowdowns occur simply to accommodate a new worker(s).

12) Generally, what happens to H-2A foreign workers when you hire domestic workers under the 50% rule?

I continue to employ them. I cannot afford to send workers back to their countries of origin and then pay to process and bring them back again because the domestic hires fail to complete the work for which they are hired. I have to absorb the additional costs.

13) What changes, if any would you suggest be made to improve the 50% rule.

No other US industry, whether it uses foreign labor or not, is forced by the government to constantly hire and train new workers at the worker's convenience during peak productivity periods. If workers are not available when the work begins, then domestic workers are not available to that employer. Growers should not be punished by increased costs, demands on staff time and reduced productivity because there are no domestic workers ready to begin work when perishable crops are ready.