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The United Farm Workers strongly opposes the Bush Administration's proposed changes to the regulations of the H-2A agricultural guestworker program. The proposed changes are arbitrary, capricious and contrary to law. The extensive, detailed revisions, which in many cases are not explained or are barely described, should have been proposed with a lengthy public comment period and far more explanation to enable a meaningful public process. The proposal should be withdrawn in its entirety. Almost all of the specific proposals should be rejected as unlawful or irrational policy.

The existing regulatory H-2A regulatory framework protects US farm workers from being displaced by foreign guestworkers. The proposed regulations significantly undermine these protections, opening the door to widespread displacement of and discrimination against US farm workers and unfair treatment of temporary foreign workers.

We submit these comments on behalf of the hundreds of thousands of farm workers around the US. Our members in particular are deeply concerned about the negative impact these proposed regulations, if implemented, will have on their lives. The United Farm Workers has proudly represented agricultural workers from around the world during its more than 40 year history. During that time, we have steadfastly fought to ensure all agricultural workers are treated with respect, earn a fair wage with benefits to support their families. For these reasons, we oppose the proposed regulations in their entirety.

Recruitment:

USDOL proposes to allow US agricultural employers to use an attestation process rather than certification process to establish a shortage of US farmworkers. Establishing a shortage of US workers is the critical step which ultimately determines the need for foreign guest workers. To date, USDOL has failed to enforce and comply with the current certification process. US workers are routinely and systematically denied access to jobs at H-2A employers. In December, 2007, the United Farm Workers and Farmworker Justice sued the agency for failing to disclose the terms and conditions of proposed H-2A jobs to advocates in a timely fashion, thus denying US workers access to these jobs. Instead of addressing these shortcomings, DOL is proposing to authorize them.

The attestation process further removes and diminishes DOL's role in assuring all reasonable efforts have been exhausted before foreign guestworkers are certified for hire. US employers will now only have to sign a sworn statement indicating they were unable

to identify US farmworkers. USDOL will no longer exercise direct oversight to this process.

USDOL proposes to increase the required time frame of the recruitment of US farmworkers to no more than 120 days and no less than 75 days from the date of need. They suggest such efforts will better identify US farmworkers for hire. But this proposal reflects a woeful lack of understanding of agricultural labor. Many farmworkers do not make decisions about where they will be working two to four months ahead of time. Those employed as seasonal workers carefully evaluate weather, crop conditions and pay before deciding where they will work. USDOL's proposed extension of recruitment period of domestic farmworkers is symbolic at best and will fail to result in the increased employment of US farmworkers.

US DOL proposes to waive the 50 percent rule, which requires US employers to hire US farmworkers who are eligible and available for employment up to the 50 percent mark of an approved H-2A job order. This change would mean that if a US farmworker applies for a position once foreign guestworkers are in place, the US farmworker can be legally denied employment. Word of mouth is how information is most frequently transmitted in the farmworker community. US farmworkers, upon learning of higher paying H-2A jobs, should have the right to apply for them and to be hired. The removal of the 50 percent rule will deny many US farmworkers their legitimate right to work. DOL already studied this issue in the past and recognized the value of this rule to US workers.

DOL fails to require employers to notify farmworker unions, organizations, community groups, and others who have daily contact with workers of proposed H2A jobs. By requiring employers to notify organizations and union who work regularly with farmworkers, DOL can help ensure that literally, the word gets out about the availability of these jobs. Few, if any, farmworkers read the want ads in search of employment.

DOL also will no longer require agricultural employers in one geographic area to recruit farmworkers in another area if the latter area has agricultural employers seeking workers. An employer claiming a labor shortage should compete for workers by improving wages and working conditions and should seek job applicants by effective recruiting. Farmworkers should be offered the opportunity to select the best job opportunity based on their needs regarding wages, working conditions, timing of the job, location, reputation of the employer, opportunities for advancement and other factors.

USDOL proposes to increase fines and penalties for failing to comply with H-2A rules, and to institute an audit procedure to ensure compliance with recruitment requirements. While we welcome an increase in penalties and fines, we have historically witnessed little interest from USDOL to enforce existing law. The H-2A program has been characterized for decades by the widespread, egregious violations of worker rights, including, but not limited to debt peonage, enslavement, refusal to hire US workers, failure to pay wages, substandard housing conditions; the list goes on and on. We have no faith that the proposed measures will result in anything more than a symbolic and empty gesture. DOL should prohibit guestworkers and U.S. workers from being charged fees to pay for access

to H-2A jobs, but DOL's proposal would not do so; in effect it would create a shield against liability for H-2A employers by allowing them to merely assert that asked their labor contractors not to charge fees. DOL should assert its enforcement authority to intervene in the recruitment process, wherever it occurs, to prevent H-2A employers, via third parties, from charging fees and from engaging in other improper or illegal activity, including discrimination on the basis of age, race, and gender. DOL also should require employers to comply with the Fair Labor Standards Act in accordance with the decisions in *Arriaga v. Florida Pacific Farms* and other cases to assure that workers' right to the minimum wage is not violated by forcing them to absorb transportation, visa, recruitment and other costs that should be borne by employers.

DOL should commit to a plan of vigorous enforcement of existing requirements, rather than weakening the requirements and increasing penalties it refuses to use.

DOL proposed to place additional obstacles in the way of domestic farmworkers by requiring the local State Workforce Agencies (SWAs) to verify their legal status prior to being referred to a proposed H-2A job. The proposed verification system is notoriously inaccurate. Given the fact that most of the domestic applicants will be foreign born workers, applicants stand to face additional problems due to possible misspellings and typographical errors. The net result will be that otherwise eligible domestic workers may very well lose the opportunity for employment due to flaws in the verification system. For this reason, DOL should withdraw its proposed requirement for SWAs to verify the legal status of domestic H-2A applicants.

Housing:

USDOL proposes substantial changes to current housing requirements, which will negatively impact farm workers. Under current regulations, US employers must provide, at no cost to workers, housing that has been inspected and certified prior to workers taking occupancy and the grower's application being approved. USDOL proposes to relax these requirements in several ways. First, DOL offers no meaningful explanation for eliminating the longstanding requirement that H-2A employers provide housing at no cost to workers. These low-wage workers need housing but do not earn enough to create an adequate private market in seasonal housing. DOL should continue the current requirement and collaborate with government agencies and private entities to encourage the development of more farmworker housing. Second, the proposal would allow employers to attest through a sworn document that the housing they will provide meets local standards. No pre-occupancy inspection will be required as a condition of approval of the H-2A application. As such, foreign guestworkers may well arrive to their housing only to find substandard conditions. USDOL states they will take enforcement action against any employer who engages in such activity, but our concerns outlined above remain regarding the lack of such activity and, no mention is made of what will happen to the workers. If their housing is found to be deficient, where will they go? Who will find, secure and pay for their new housing? The proposed regulations are silent on this point.

Furthermore, USDOL proposes allowing growers to circumvent basic housing standards by issuing foreign guestworkers "vouchers" and allowing them to secure their own

housing. These vouchers will only be prohibited in those cases where the Governor has certified that a local shortage of farmworker housing exists, something to our knowledge, no Governor has done to date, despite widespread housing shortages.

Foreign workers, most of whom do not speak or read English, have driver's licenses, cars or insurance will be issued housing vouchers and sent out on their own to find housing. For many of these workers, it will be their first time in the US. It is absurd to think they will be successful in finding appropriate housing, and may well result in many guestworkers living in substandard conditions due to a lack of knowledge and/or availability of local housing. But by issuing vouchers, USDOL and the US employer can avoid liability and responsibility for foreign guest workers and US migrant workers living in deplorable conditions.

Wages:

The wage rates required by the H-2A program are not too high; if anything, they are too low and are not adequately enforced even at the required level. Wages for the large majority of farmworkers in this wealthy country continue to be a fraction of the average wages of other workers in the United States despite the grueling, dangerous nature of much agricultural work and the claim of employers that they have difficulty finding workers. For one hundred years, official commissions and other objective observers have said that agribusiness must stop relying on new flows of foreign labor and must stabilize the workforce by offering decent wages and working conditions. The H-2A program should help fulfill this longstanding recommendation.

The law requires DOL to set wage rates under the H-2A program that protect U.S. workers from adverse effect in the form of displacement or depressed wage levels. The DOL should continue, as it proposes, to require employers to pay the highest of the following wage rates: the state minimum wage, the federal minimum wage, the "prevailing wage" (which has a special definition under H-2A that should be improved), and the adverse effect wage rate. The DOL should continue to rely on the USDA Farm Labor Survey's results for the adverse effect wage rate (AEWR) and should not switch to the Bureau of Labor Statistics Occupational Employment Survey or the Foreign Labor Certification Data Center wage system for the H-2A AEWR. The AEWR should continue to be based on the USDA FLS findings for annual regional average hourly wage rates for field and livestock workers combined. The agency should require H-2A users to pay wages at such a level as to ensure that employers who claim a labor shortage are competing with those agricultural employers who are effectively recruiting and retaining workers.

USDOL proposes to abandon this methodology and turn to wage information collected by the Bureau of Labor Statistics in its Occupational Employment Survey. Any wage-setting based on market rates in agriculture should be based on accurate information regarding wages paid in agriculture. The BLS OES is not accurate. It does not survey farms and ranches. It relies on a small subset of the agricultural industry: farm labor contractors and other intermediaries that hire farmworkers. The large majority of

farmworkers in the US are not studied in this survey. Moreover, the survey of this particular subset results in even lower average wage rates than in the current methodology.

DOL does not propose to require employers to pay the average BLS OES wage rates. Instead, DOL proposes to use the Foreign Labor Certification Data Center system, which was set up for non-agricultural wages. The 530 geographic areas and four or five occupational categories, with four levels of wages for each, would result in at least 8,000 and perhaps 10,000 different wage rates. Such complexity is unjustified for many reasons, not the least of which is that it divides the labor market in ways that are wholly artificial. DOL does not even explain how the four wage levels would work, much less offer any assurances they will require employers to choose the appropriate wage rate, so we must assume that companies will be permitted the freedom to choose level 1, or the lowest possible wage rate. No employer that claims difficulty recruiting workers should be offering such low wage rates, which only undocumented workers or guestworkers from poor countries would be willing to accept. Many of the wages at level one are below the state minimum wage (e.g., $8.00 in California) and therefore the minimum wage would apply, even though average wage according to the USDA, and the current H-2A wage rate, is far higher ($9.72 in California). Such a result would be utterly wrong.

DOL should continue to use the USDA FLS's annual results for regional hourly average wage rates for field and livestock workers combined as the basis for its adverse effect wage rate under the H-2A program. DOL should adjust its current methodology, however, by compensating for the depression in wage rates caused by the employers' hiring of hundreds of thousands of undocumented workers (who the National Agricultural Workers Survey data from 2001-02 suggests are 53% of crop workers). The FLS (like the OES) includes the wages of undocumented workers even though a proper methodology would only include U.S. workers' wages and would compensate for the depressing effect from the hiring of unauthorized workers. If improvements are needed in wage surveys, the FLS is the best source to begin improvements. It should also continue to require payment of the highest wage rate, including the federal or state minimum wage. DOL also should require employers to offer wage rates paid by businesses that are succeeding at hiring and retaining U.S. workers. We suggest that H-2A employers should pay at least the highest of the 66 2/3d percentile or the average wage in the FLS survey of field and livestock workers combined.

Transportation and Subsistence

For decades, DOL has understood the importance of requiring employers under agricultural guestworker programs to reimburse workers for the cost of their inbound transportation costs and for their outbound transportation costs after completing the season. DOL invites comments on the costs and benefits to employers and workers of continuing to require employers to pay these costs. DOL should not waive this requirement. By definition, H-2A workers are farmers in their country of origin. They aspire to work in the US because they can not make a living where they live. In other words, they do not have the money to pay for transportation and related expenses. We are already witnessing a booming global industry charging H-2A applicants recruitment fess

(which DOL proposes to do nothing about). Any transfer of the cost of transportation from the employer to workers will place H-2A applicants in a de fact state of debt peonage. This, on top, of often thousands of dollars of debt they've incurred in recruitment fees, often raised from local loan sharks and banks.

We call on DOL to start enforcing the Fair Labor Standards Act, which prohibits employers from effectively reducing workers' wages below the federal minimum wage by shifting the costs of items, such as long-distance transportation, visa costs and recruitment fees, which are primarily for the benefit of employers, onto the backs of workers. Moreover, in many H-2A employers' locations there are ample supplies of U.S. workers; the employers simply do not wish to pay what it would take to attract these workers. The employer should bear the cost of obtaining the benefit of finding distant workers who will accept the low wages offered by reimbursing their transportation costs.

In the absence of such payment, as experience under the Bracero program and in recent years has shown, many workers will be forced to seek low-cost transportation that is often unregulated and deadly, including in stripped-down vans. Because H-2A workers are specifically excluded from the Migrant and Seasonal Agricultural Worker Protection Act, which contains important transportation safety protections, they are especially at risk. The employer's obligation to reimburse travel costs also helps discourage employers from inviting a glut of workers who are compelled to accept lower wages and encourages employers to fully employ the workers in whom they have invested. The transportation cost payment at the end of the season is important to help guarantee that workers are able to afford to return home. It also is a helpful benefit, one of few offered to farmworkers, that encourages employee retention and return, reducing employee turnover. DOL needs to prevent employers from cheating workers by refusing to pay their transportation costs when the season ends or by paying less than the cost of workers' travel home. In addition, DOL should continue to require employers to provide and pay for safe transportation within the area of the job site and between employers, as frequently there is no transportation source, or no safe source, available. Subsistence costs during long-distance travel are by nature vital.

Conclusion:

These proposed regulations, if implemented, will further decrease farm worker wages and working conditions, and subject US farm workers to discrimination and displacement. Given the highly exploitative and precarious nature of a guestworker, where their ability to remain legally in the US is entirely dependent on the goodwill of their employer, we fully expect to see a widespread deterioration of working and living conditions for farmworkers across the US if these changes go into effect. Foreign guestworkers will be fearful of articulating any complaints about the terms and conditions of their employment as they understand that by doing so, they are subject to immediate discharge, eviction and deportation with little to no practical recourse. US farmworkers will be subjected to similar conditions, and if they complain, will, under the terms of these regulations, now be much more easily replaced by foreign guestworkers.

The clear intent of these changes is to lower the cost of employing guestworkers and the requirements that protect them. This is clearly unacceptable. We are not interested in DOL making some minor corrections in some of these proposals; they need to be withdrawn in their entirety.