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U.S. Department Labor Employment and Training Administration
Chicago Processing Center
844 N. Rush Street
12th Floor
Chicago, IL 60611

July 09, 2008

NCGA, INC.
230 CAMERON AVE

VASS, NC 28394

No. of Job Openings: 226
Job Title: FARMWORKER,
DIVERSIFIED CROP II
Period of Employment: 08/16/2008 - 11/05/2008
Case Number: C-08184-14118
Date of Receipt by DOL: 07/02/2008
Due Date for Modifications: 07/14/2008

Dear Sir/Madam,

Your temporary alien agricultural labor certification application, which was received by this office on July 02, 2008, has been reviewed, and it has been determined that it does not meet the requirements of 20 CFR 655.10 1 - 655.103. Consequently, pursuant to the provisions of 20 CFR 655.104, your application is not being accepted for consideration on the grounds that the availability of U.S. workers cannot be tested because the benefits, wage rates, and/or working conditions do not meet the criteria of the regulations.

The specific reasons why your application cannot be accepted for consideration, with citations to the relevant regulatory standards, appear on the enclosed attachment. As an additional matter, we would take this opportunity to reiterate our position concerning a matter that was discussed with NCGA several weeks ago. It is our position that the association filing applications as joint employers with their growers members are permitted to transfer workers **ONLY** between the employers listed on the particular application. Any transfer of workers between employers on different applications will be treated as a violation of the terms of the certification.

You may submit a modified application. The modifications that are required for consideration of your application also appear on the attachment. If you choose to file a modified application, it must be received in this office no later than the above captioned date. **Include your case number on any correspondence sent to the National Processing Center. Failure to do so may result in a delay in processing your application.**

At the time you file a modified application with this office, you must submit a duplicate modified application to the State Workforce Agency office where you submitted the duplicate of your initial application.

If the modifications in that application are the ones specified in this notice, and the modified application is received by the date requested, it will be accepted for consideration, and a

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certification determination will be made on your application not later than thirty (30) days prior to your date of need.

If you file a modified application, and it does not address all the modifications listed in this notice, we will not be able to accept it for consideration.

If you file a modified application, and it does address all the modifications listed in this notice, but it is not received in the office by the date indicated, the certification determination will be postponed one day for each day's delay in receiving the modified application.

As provided by the regulations at 20 CFR 655.104(c), you have the opportunity to request an expedited administrative judicial review or a de novo hearing before a Department of Labor (DOL) Administrative Law Judge on the non-acceptance of the application. To obtain this review or de novo hearing, you must file within seven (7) calendar days of the date of this notice by facsimile (fax), telegram or other means normally assuring next day delivery, a written request for such a review or hearing to the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street NW, Suite 400, Washington, DC 20001-8002, with a copy to this office. The request for a review or hearing should contain any legal arguments that you believe will rebut the basis for the non-acceptance of the application.

If you do not request an expedited administrative judicial review or a de novo hearing before an Administrative Law Judge within seven (7) calendar days of the date of this notice of non-acceptance, or if you do not choose to resubmit a modified application within five (5) calendar days, no further consideration of the application will be made by any Department of Labor official.

Sincerely,

Marie Gonzalez
Certifying Officer

Enclosure

CC: SUPERVISOR, AGRICULTURE EMPLOYMENT SERVICES
NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION

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ATTACHMENT FOR UNACCEPTABLE APPLICATIONS

I. Inconsistent Job Descriptions

20 CFR 655.101 (a)(3) and 20 CFR 655.102

The North Carolina Growers Association (NCGA) has submitted a joint employer association master application involving 27 employer members. A uniform description of the job duties to be performed involving different crop activities was provided in item 13 of the ETA 750 including attachment and items 10 & 10a of the ETA 790. Addendum A12 provides the address, number of workers requested and specific crop information for each of the employer-members included in this joint employer application.

In Item 13, Job Description, of NCGA's ETA Form 750, Part A application, as well as its addendums, NCGA indicates that its employer members will grow the following crops: Flue Cured Tobacco; Burley Tobacco; Pickle; Cucumbers; Hay and Straw; Sweet Potatoes; Red and White Potatoes; Asparagus; Cabbage; Collards; Squash; String Beans; Butter Beans; Sweet Corn; Long Green Cucumbers; Bell Peppers; Eggplant; Long Hot Peppers; Turnips; Jalapeno Peppers; Field Peas; Strawberries; Cherry Peppers; Banana Peppers; Cuban-L Peppers; Blueberries; Watermelon; Cantaloupes; Soy Beans; Wheat; Cotton; Onions; Radishes; Spinach; Tomatillo; Kale; Mustard Greens, Okra, Pumpkins and Gourds. Because NCGA filed a master order, pursuant to the regulation at 20 CFR 655.101(a)(3) requires an application filed by an association to "identify by name and address each member which will be an employer of H-2A workers." NCGA complied with this obligation by submitting an addendum it entitled "Addendum A12", which listed the name, address, telephone number and crop activity, total number of workers requested, and dates of need, housing location county, housing capacity and total number of H-2A workers requested for each respective employer member. The table listed below details each member employer's specific information:

FARMER	NUMBER OF WORKERS REQUESTED	CROP(S)	PAY RATE	ADDITIONAL REQUIREMENTS
ANDREW TYSON	23	Tobacco, Sweet Potatoes, Cantaloupe, and Cucumbers	Tobacco and Cantaloupe (\$8.85 AEW/R), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85), and Cucumbers (\$8.85 AEW/R, and a piece rate of \$.75 per 3/8 bu./Bucket)	Tobacco and Cantaloupe (no productivity standards), Sweet potatoes (no productivity standards), and Cucumbers (5 bu/hr.)
BARRY DINKINS	4	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEW/R of \$8.85	Tobacco, Hay, and Straw have no productivity standards
BILLY H. WHITE	2	Tobacco, Hay, Straw	Tobacco, Hay, and Straw will pay an AEW/R of \$8.85	Tobacco, Hay, and Straw have no productivity standards
BOBBY R. BEASLEY, JR.	0	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an	Tobacco, Hay, and Straw have no productivity

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			AEWR of \$8.85	standards
CHAD BADGETT	4	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEWR of \$8.85	Tobacco, Hay, and Straw have no productivity standards
DARRYL DUNAGAN	6	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEWR of \$8.85	Tobacco, Hay, and Straw have no productivity standards
DAVID T. MCGEE	0	Tobacco, Hay, Burley Tobacco, and Sweet Potatoes	Tobacco and Cantaloupe (\$8.85 AEWR), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85)	Tobacco, Hay, and Sweet Potatoes have no productivity standards
EDWARD A. NEWTON	4	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEWR of \$8.85	Tobacco, Hay, and Straw have no productivity standards
GLENN RIGGIN	8	Tobacco, Wheat, Corn and Small Grains	Tobacco, Wheat, Corn and small grains will pay an AEWR of \$8.85	Tobacco, Wheat, Corn and Small Grains have no productivity standards
GRBG S. WRIGHT	4	Tobacco, Hay, Straw and Wheat	Tobacco, Hay, Straw and Wheat will pay an AEWR of \$8.85	Tobacco, Hay, Straw, and Wheat have no productivity standards
HENRY GREY FIELDS, JR.	4	Tobacco, Hay, and Cucumbers	Tobacco and Hay, pay an AEWR of \$8.85 Cucumbers (\$8.85 AEWR, and a piece rate of \$0.75 per 5/8 bu./Bucket)	Tobacco and Hay (no productivity standards), and Cucumbers (5 bu/hr.)
JAMES HILL JR.	55	Tobacco, Sweet Potatoes, Cotton, Peppers, and Cabbage	Tobacco, Cotton and Cabbage (\$8.85 AEWR), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85), 5 types of peppers stated as offering different piece rates.	Tobacco, Sweet Potatoes, Cotton, Peppers, and Cabbage have no production standards
JESSIE DENNY	4	Tobacco, Hay, Wheat	Tobacco, Hay, and Wheat will pay an AEWR of \$8.85	Tobacco, Hay, and Wheat have no productivity standards
KENT W. PAGE	0	Tobacco, Wheat and Soybeans	Tobacco, Wheat and Soybeans will pay an AEWR of \$8.85	Tobacco, Wheat and Soybeans have no productivity standards
LOIS HOPE	0	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEWR of \$8.85	Tobacco, Hay, and Straw have no productivity standards
MATTHEW C. PEARSON	4	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEWR of \$8.85	Tobacco, Hay, and Straw have no productivity standards
MICHAEL GODWIN FARMS, INC.	12	Tobacco, Sweet potatoes, and Cucumbers	Tobacco (\$8.85 AEWR), Sweet potatoes (Hand	Tobacco (no productivity standards), Sweet potatoes (no productivity standards).

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			Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85, and Cucumbers (\$8.85 AEW, and a piece rate of \$0.75 per 5/8 bu./Bucket)	and Cucumbers (5 bu/hr.)
NEWELL JOHNSON	2	Tobacco, Hay, Corn, Wheat, Soybeans, Cucumbers, and Sweet Potatoes	Tobacco, Hay, Corn, Wheat and Soybeans (\$8.85 AEW), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85), and Cucumbers (\$8.85 AEW, and a piece rate of \$0.75 per 5/8 bu./Bucket)	Tobacco Hay, Corn, Wheat, Sweet Potatoes and Soybeans (no productivity standards), Cucumbers (5 bu/hr.)
PHILLIP JOHNSON	4	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEW of \$8.85	Tobacco, Hay, and Straw have no productivity standards
RANDAL S. BENSON	5	Tobacco, Hay, and Sweet Potatoes	Tobacco and Hay (\$8.85 AEW), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85)	Tobacco, Hay, and Sweet Potatoes have no productivity standards
ROBIN ROGERS	5	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEW of \$8.85	Tobacco, Hay, and Straw have no productivity standards
ROGER LANE	23	Tobacco, Sweet Potatoes, Squash, Peppers, Melons, Cucumbers	Tobacco, Melons, and Squash (\$8.85 AEW), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85), and Cucumbers (\$8.85 AEW, and a piece rate of \$0.75 per 5/8 bu./Bucket) 5 types of peppers stated as offering different piece rates.	Tobacco, Sweet Potatoes, squash, Peppers, Melons (no productivity standards), Cucumbers (5 bu/hr.)
STANLEY WILLIAMS	5	Tobacco, Hay, Straw and Corn	Tobacco, Hay, Straw and Corn will pay an AEW of \$8.85	Tobacco, Hay, Straw and Corn have no productivity standard
SUE LEGGETTE	25	Tobacco, Hay, Soybean, Sweet Potatoes and Cucumbers	Tobacco, Hay and Soybean (\$8.85 AEW), Sweet potatoes (Hand	Tobacco, Hay, Soybean, and Sweet Potatoes (no productivity standards), Cucumbers (5 bu/hr.)

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			Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85), and Cucumbers (\$8.85 AEW, and a piece rate of \$0.75 per 5/8 bu./Bucket)	
TIM KNIGHT	4	Tobacco, Hay, and Straw	Tobacco, Hay, and Straw will pay an AEW of \$8.85	Tobacco, Hay, and Straw have no productivity standards
TONY W. JOHNSON	18	Tobacco, Hay, and Sweet Potatoes	Tobacco, Hay and Soybean (\$8.85 AEW), Sweet potatoes (Hand Harvesting is a piece rate of \$.40 per 5/8 bush. Mechanical harvesting paid hourly at \$8.85)	Tobacco, Hay, and Sweet Potatoes have no productivity standards
WILBUR M MARION	1	Tobacco, Wheat, and Soybeans	Tobacco, Wheat, and Soybeans will pay an AEW of \$8.85	Tobacco, Wheat, and Soybeans have no productivity standards

The uniform job description contains duties involving several crop activities that based on a review of Addendum A12, none of the employer-members duly named on this application grow. This is in violation of 20 CFR 655.102 which provides that the job order must contain the terms and conditions of the job offered. For example, work activities involving peaches and asparagus is described in detail, but none of the employer members are identified as growing these crops. The work involving Asparagus is described as follows:

"Move along assigned row, stooping, bending, and reaching to break asparagus spears at ground level. May operate self-propelled harvesting aid on which workers ride while stooping to break spears at ground level. Spears which are under inch in diameter (measured at butt) are discarded. Spears over inch in diameter which exceed 7 inches in length will be rebroken at the butt end. Any spear head which has begun to open will be discarded. Spears meeting harvest specifications will be placed in a straight fashion in field buckets and carried to trucks or trailers for dumping. Workers may assist in planting activities. Workers will be required to stay on their assigned row. All asparagus work is hourly."

The inclusion of these job duties when none of the employer-members duly named on this application grow asparagus is a violation of 20 CFR 655.102 and hinders the effective recruitment of U.S. workers for the job opportunity.

The ETA 750 and 790 also define piece rates for strawberry and blueberry harvest and for pulling turnips when none of the employer members are identified as having these crops. Strawberries have a piece rate for harvest at \$1.00 per 1 gallon. An applicant may be interested in the job opportunity specifically for the piece rate offerings and once arriving for the first day of work would then find out that none of the employer members have strawberries to harvest. Therefore, the job description used to recruit U.S. workers is more extensive and does not truly

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represent the agricultural services or labor to be performed needed to be performed at the employer-member field locations.

Modification Required:

North Carolina Growers Association must only specify job duties and wage rates that apply to the Employer Members specifically identified in each particular master application. The modified application must only include information relating to crop activities that are actually available under the specific job order.

For instance, the National Processing Center would have accepted an application (assuming there were no other modifiable issues) with the following employers: Barry Denkins, Billy H. White, Bobby R. Beasley, Jr. (if he had a need of H-2A workers), Chad Badgett, Darryl Dunagen, Edward A. Newton, Greg S. Wright, Jessie Denny, Lois Hope (if she had a need of H-2A workers), Mathew C. Pearson, Phillip Johnson, Robin Rogers, and Tim Knight. These employers have virtually identical crop activities (tobacco, hay, straw and wheat), rates and methods of payment (an hourly AEW of \$8.85) and have no additional requirements such as productivity standards.

II. Applications Filed by Associations 20 CFR 655.101(a)(3)

Joint employer associations may submit master applications covering virtually identical job opportunities available with a number of employers. 20 CFR 655.101(a)(3); H-2A Program Handbook (ETA Handbook No. 398) at I-9. Identical job components would normally include such items as description of work to be performed, hours or work, pay, and benefits. Job components which normally differ would include such items as employers name, address and phone number, number of workers needed, and description of housing. Each job component which differs for each employer must be clearly identified as such in the master application package.

In Item 12a, Rate of Pay, of its ETA Form 750, Part A, the employer indicated that the rate of pay would be \$8.85/hour. However, in its addendum to the ETA Form 750, the employer further expands on the rate of pay and indicates that the crops are paid based on the higher of a specified piece rate basis, or a guaranteed hourly wage rate of \$8.85. Further, NCGA indicates that each crop has varying piece rate payments, which are listed below:

Crop Activity	Piece Rate of Pay	Per	Unit
Cucumber Harvest	\$0.75	Per	5/8 th bushel
Long Green Cucumbers	\$0.50	Per	5/8 th bushel
Bell Pepper Harvest	\$0.35	Per	5/8 th bushel
String Beans Harvest	\$2.00	Per	5/8 th bushel
Butter Beans Harvest	\$1.00	Per	5/8 th bushel
Jalapenos Harvest	\$1.50	per	5/8 th bushel
Strawberries Harvest	\$1.00	Per	1 gallon
Sweet Potato Harvest	\$0.40	Per	5/8 th bushel
Banana Peppers Harvest	\$0.45	Per	5/8 th bushel
Hot Cherry Peppers	\$1.50	Per	5/8 th bushel
Red/White Potatoes Harvest	\$0.30	Per	5/8 th bushel

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Cuban-L Peppers Harvest	\$0.35	Per	5/8 th bushel
Blueberries Harvest	\$0.42	Per	Pint
Pulling Turnips	\$0.80	Per	5/8 th bushel

A review of Addendum A12 reveals that some employer members involved in the master application have different crops than others and therefore have different work to be performed. While we are not insisting that the exact same job opportunity must be available at every grower under a master application, the major components of the opportunity must be virtually identical. At minimum, the three major components that need to be virtually identical are the job description, wage rates and production standards of the jobs available. Failure to do this would dissuade domestic workers from applying for positions under this application and adversely affect domestic workers. The requirements for master orders, as described in both the regulation and the Handbook, are designed to ensure that workers have an appropriate opportunity to choose the work they want to perform. A worker who would not otherwise accept a referral to a particular employer because of the nature of that employer's job opportunity should not be forced to work for the employer because that employer's application is part of a master application which includes employers with different job duties. For example, compare the job opportunity for the employer Chad Badgett with the job opportunity for the employer Michael Godwin.

Chad Badgett grows tobacco, hay and straw and will pay workers \$8.85/hour whereas; employer member Michael Godwin grows tobacco, sweet potatoes, and cucumbers. Mr. Godwin would pay its tobacco workers \$8.85/hour whereas he would pay his sweet potato and cucumber workers the higher of \$8.85/hour or the applicable piece rate payment listed above.

Chad Badgett grows Tobacco, Hay, and Straw:

Tobacco is paid hourly at the AEW rate of \$8.85 per hour and no production standards are identified.

Hay and Straw is paid hourly at the AEW rate of \$8.85 per hour and no production standards are identified. The job description identified is as follows; Move along rows of previously baled hay and straw, bending, stooping and lifting 30 to 60 lb. bales. Load and stack bales onto a truck or trailer, move tractor or truck in field incidental to loading. Worker may unload and restack for storage.

Michael Godwin grows Tobacco, Sweet potatoes, and Cucumbers:

Tobacco is paid hourly at the AEW rate of \$8.85 per hour and no production standards are identified.

Cucumbers work is guaranteed the AEW rate of \$8.85, but also offers a piece rate of \$0.75 per 5/8 bu. Bucket. Works with cucumbers also have a production standard of picking five (5) buckets per hour. It is not identified as to what type of cucumbers (pickle or long green) and the both have different job descriptions. In addition, workers can be terminated by the employer if he/she does not meet the productivity standard.

Sweet Potato harvest workers will walk along row that has been previously plowed. Workers will stoop, bend and kneel to pick up sweet potatoes using hands and fingers to dig out

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unexposed potatoes. Workers may grade in the field separating #1s and #2s into separate 5/8 field hampers. Canners, when harvesting will be placed into a separate bin. Damaged or diseased potatoes will not be harvested. Full hampers weighing up to 35 lbs. will be carried to truck row to be loaded onto truck or trailer. Workers will be required to stay in their assigned row and may be required to ride a mechanical harvester. Hand harvesting sweet potatoes will be paid on a piece rate of \$.40 per 5/8 bushel. Mechanical harvesting will be paid hourly at \$8.85.

The job opportunity at Chad Badgett is only paid hourly at the AEW of \$8.85, does not require a production standard and the job description is basic in regards to hay and straw. The job opportunity at Michael Godwins is paid hourly at the AEW of \$8.85 and can also be paid by a piece rate for cucumbers. It provides for a production standard for cucumbers which could be cause for termination of an employe who fails to meet the standard. In addition, the job description is detailed and differs from the one at the other grower, depending on the type of cucumber or method of harvesting of sweet potatoes.

These two job opportunities differ in job description, rate of pay, and production standards. The inclusion of both of these job opportunities in one master applications does not allow a U.S. applicant to decide if they are best fit to do work at Chad Badgett's or Michael Godwin's farm. The applicant has to be prepared or capable of performing both job opportunities. This adversely affects similarly employed U.S. workers because this application does not give applicants a choice since workers may be transferred between growers under the master application. Therefore, the conditions involved like production standards and piece rates for Michael Godwin's job opportunity are combined with the work conditions of the job opportunity at Chad Badgett's farm. Because the job opportunities differ, the job opportunities should be advertised separately presenting the uniqueness of each. An applicant can then decide if they would rather perform a job opportunity with piece rate offerings or fixed hourly rates. Failure to do so may have an adverse effect on the recruitment, hiring and retention of domestic workers.

Modification Required:

North Carolina Growers Association must only include Employer Members that have virtually identical work to be performed within a Master Application. North Carolina Growers Association should provide a detailed explanation supporting the notion that all of the job opportunities offered by the employers included in the application members are virtually identical. Alternatively, the North Carolina Growers Association may modify this application to only include employers growing the same crops with identical job components.

III. Disclosure of Prospective Employers' Wage Responsibilities ETA Handbook NO. 398

Deficiency:

DOL operating guidelines found in the ETA Handbook NO. 398 (page, I-35) stipulates that in "situations in which the adverse effect wage rate might change during the contract period (usually March or April), the job offer should contain a statement that the employer will pay at least the AEW in effect at the time work is performed." In its attachment to its ETA Form 750, Part A, NCGA stated that "NCGA and its employer members reserve the legal right to pay a new or different wage rate (wage standard) authorized by the USDOL or signed into law by the President of the United States of America as soon as it becomes effective." NCGA's assertion that it would be entitled to pay a new wage standard is beyond the scope of what is permissible

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in the ETA Handbook NO. 398. The ETA Handbook NO. 398 is specific to situations in which the AEWWR will change during the employer's period of need, and enables the employer to pay the new AEWWR rate once it is published. However, the ETA Handbook NO. 398, and its regulations, are silent on situations where the AEWWR is abolished and a new wage standard become effective.

Modification Required:

Since no policy change or specific program guidelines have been provided relative to proposed changes to the current H-2A program, this language must be removed from the application.

IV. Failure to Establish a Need:

20 CFR 655.100(a)(1)

Deficiency:

The regulations at 20 CFR 655.100(a)(1) provides that an employer may apply for temporary alien agricultural labor certification for the employment of H-2A workers to perform agricultural employment of a temporary or seasonal nature. NCGA, in its master application, included the following four (4) farmers who did not list a need to employ H-2A workers: Bobby R. Beasley, Jr., David T. McGee, Kent W. Page, and Lois Hope.

Modification Required:

Addendum A12 of NCGA's application must be amended to either 1) identify the number of workers requested which must be greater than zero (0) in all application materials or 2) remove the four employers listed above from NCGA's master application.

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