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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 AVT

VASS, NC 28394

No. of Job Openings: 63
Job Title: FARMWORKER
DIVERSIFIED CROP II
Period of Employment: 08/16/2008 - 11/05/2008
Case Number: C-08184-14114
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 655.101 - 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: CHESTER PILSON
GARRETT JOHNSON
GEORGE WOOTEN
KENNETH RAY WATKINS
TIMOTHY C. TUTTLE
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 5 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 VG4A 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 addendum, NCGA indicates that its employer members will grow the following crops: pickle cucumbers, hay and straw, sweet potatoes, red and white potatoes, asparagus, cabbage, collards, squash, string beans, butter beans, sweet corn, long grain cucumbers, bell peppers, eggplant, long hot peppers, turnips, tomatoes, jalapeno peppers, field peas, strawberries, cherry peppers, banana peppers, Cuban-L peppers, blueberries, watermelon, cantaloupes, soy beans, wheat, cotton, peaches, onions, radishes, spinach, tomatillo, kale, mustard greens, okra, pumpkins and gourds. Because NCGA filed a master order, 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 VG4A", 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
GARRETT JOHNSON	1	Peaches, Melons and Tomatoes	All crops are paid at the \$8.85/hour AEW
CHESTER PILSON	8	Collards, Hay, Sweet Potatoes, and Wheat	Collards, Hay and What are paid at the \$8.85/hour AEW. Sweet Potatoes are paid at the higher of the AEW or a piece rate payment of \$0.40 per 5/8 th bushel.
TIMOTHY C. TUTTLE	1	Cantaloupe, Hay, Watermelons, and Wheat	All crops are paid at the \$8.85/hour AEW.
KENNETH RAY WATKINS	3	Collards, Hay, and Straw	All crops are paid at the \$8.85/hour

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			AEWR
GEORGE WOOTEN	50	Sweet Potatoes, Cotton, and Corn	Cotton and Corn are paid at the \$8.85/hour AEWR. Sweet Potatoes are paid at the higher of the AEWR or a piece rate payment of \$0.40 per 5/8 th bushel.

The uniform job description contains duties involving several crop activities that based on a review of Addendum VG4A, 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. A review of the employer's listed crop activity in Items 13 of the ETA Form 750, Part A, and Addendum VG4A reveal that NCGA has listed crop activities that none of their employer members intended to grow and harvest. Specifically, the employer indicated that work would be involved in the following crop activities: pickle cucumbers, hay and straw, sweet potatoes, red and white potatoes, asparagus, cabbage, squash, string beans, butter beans, long grain cucumbers, bell peppers, eggplant, long hot peppers, turnips, jalapeno peppers, field peas, strawberries, cherry peppers, banana peppers, Cuban-L peppers, blueberries, soy beans, onions, radishes, spinach, tomatillo, kale, mustard greens, okra, pumpkins and gourds; however, a review of NCGA's Addendum VG4A indicates that none of its employer members are growing these crops. Therefore, the job description used to recruit U.S. workers is more extensive and does not truly represent the agricultural services or labor 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.

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:

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Crop Activity	Piece Rate of Pay	Per	Unit
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	\$2.50	Per	5/8 th bushel
Long Hot Pepper 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 Harvest	\$1.50	Per	5/8 th bushel
Red/White Potatoes Harvest	\$0.30	Per	5/8 th bushel
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 VG4A 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 Garrett Johnson with the job opportunity for the employer George Wooten. 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:

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

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