



NORTH CAROLINA GROWERS ASSOCIATION INC.

July 14, 2008

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
United States Department of Labor
Employment & Training Administration,
Chicago National Processing Center,
844 North Rush Street, 12th Floor
Chicago, Illinois 60611

Via Facsimile
(312) 886-1688

William L. Carlson, Ph.D.
Director of Foreign Labor Certification
Administrative Office of Foreign
Labor Certification
United States Department of Labor
200 Constitution Avenue, N.W., Room C-4312
Washington, D.C. 20210

Via Facsimile
(202) 693-2768

Mr. Bubba Grant
Employment Security Commission of North Carolina
700 Wade Avenue
Post Office Box 27625
Raleigh, North Carolina 27611

Via Facsimile
(919) 733-0189

Re: Modification to Job Orders by North Carolina Growers Association Inc.
("the Association" or "NCGA") and its joint employer member growers for
certification for workers in tobacco, vegetables, and other diversified
crops, Case No. C-08184-14118, and
Modification to Job Orders by North Carolina Growers Association Inc.
("the Association" or "NCGA") and its joint employer member growers for
certification for workers in vegetables and other diversified crops,
Case No. C-08184-14114

Dear Ms. Giles, Ms. Gonzalez and Ms. Wills, Dr. Carlson, and Mr. Grant:

This letter accompanies our packages of revised ETA-750 and ETA-790 forms, including the respective attachments and addenda for both of the cases, case numbers as referenced above, as to which letters rejecting the proposed applications were issued by ETA on July 9, 2008. If for any reason the explanations and further revisions made do not meet ETA's understanding of its requirements, we respectfully urge and ask for an opportunity to meet face-to-face with ETA decision-makers to understand better their concerns and to explain why

①

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 2

continuation of the joint employer application processes as they have been for so many years are so critical to continue. NCGA is a nonprofit joint employer grower association with its member growers in its twentieth (20th) year of providing joint employment opportunities to U.S. as well as to foreign workers that would not exist but for the flexibilities permitted under a joint employer association Order. Undoubtedly, ETA is well aware that, besides the specific job opportunities in issue under these two cases for U.S. and foreign workers as well as for local year-round workers, farmers and their families are dependent on the availability of workers to tend and harvest crops already in the ground and to manage crops yet to be planted and/or harvested this year. All of these combined efforts are critical to the maintenance of existing farming operations and thus jobs for all of the persons mentioned above as well as literally thousands of jobs created by the economic activity these individuals contribute. Changes to a well-established process that has been found in compliance with applicable regulations now for twenty (20) seasons of temporary need should not be upset because of the devastating and irreparable consequences to growers, workers, and others affected.

What is in issue now.

We understand, in accordance with the attached memorandum dated June 10, 2008, from ETA Counsel Vincent Costantino, Esquire, to our counsel Ann Margaret Pointer and Robert Willis, counsel for the Farm Labor Organizing Committee, AFL-CIO, ("FLOC"), the Union that represents both U.S. and H-2A workers employed under the joint employer program in issue here, that in both cases ETA has withdrawn objections referenced in Sections II and III of the ETA letters dated July 9.

In addition to revisions to the ETA-750 and ETA-790 forms, including the respective attachments, in which efforts have been made to provide further explanation of crops and crop activities likely to be worked on by workers hired under these particular submissions, we provide the following further explanation in response to ETA objections referenced in Sections I of both letters and Section IV of the letter in connection with Case No. C-08184-14118 that pertains to tobacco, vegetables, and other diversified crops.

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 3

Response to Section I Issues Raised in Both Cases as Misperceived "Inconsistent Job Descriptions," Contrary to Prior Approvals for Over Many Years, Including Previous Approvals This Year.

In both cases, ETA asked that the grower Association and its joint employer grower members make revisions to what were misperceived as "inconsistent job descriptions." We believe that discussions among your counsel Mr. Costantino and Harry Sheinfeld, Esquire, ETA officials Messrs. Brian Pasternack and Ben Orona, and Ms. Isabel Jean-Pierre, our counsel Ann Margaret Pointer, and counsel for the Farm Labor Organizing Committee, AFL-CIO, ("FLOC"), Robert J. Willis, may have satisfied ETA's concerns. In order to enhance the description of the specific task work available in the period covered by these Job Orders through NCGA and its joint employer grower members, we have added language specifying the usual approximate time frame within which crops are harvested and within which crop activities such as planting and cultivating of particular crops are handled. All of these dates are subject to change based on many factors. Even though we have amended the job descriptions to reference, for example, that harvesting is most likely completed for blueberries, strawberries, and asparagus, workers may be asked to provide services associated with planting and cultivating these crops as part of the job of a "Farmworker, Diversified Crops," DOT Code 407.687-010, referenced in the O*NET OnLine DOL job code listing as "farmworkers and laborers, crop," code number 45-2092.02.

While workers may be initially assigned to specific individual growers (unless they are shared workers, as discussed below, as to those growers who do not specify a specific number of workers because they share workers with other NCGA members) listed on a particular Job Order, as ETA has been aware throughout the many years of this nonprofit grower association's work on behalf of its joint employer members, workers may be assigned to any certified grower member of NCGA to work in any of the "certified job opportunities of its producer members and such workers may be transferred among its producer members to perform agricultural services of a temporary or seasonal nature for which the certifications were granted." 8 U.S.C. 1188(d)(2). See also 20 C.F.R. § 655.106(c)(2) which provides that unless an employer

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 4

member of an association is ineligible to receive workers, and none of this Association's members is ineligible:

such workers may be transferred among its [i.e., the joint employer association's] producer members to perform work for which the temporary alien agricultural labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary alien agricultural labor certifications to associations may be used for the certified job opportunities of any of its members.

Listings of the related Atlanta --ETA Processing Center certifications covering the "certified job opportunities" already applicable to NCGA grower members for the current season are provided in Exhibit B, and details concerning each of those members have already been provided to ETA. The name and address of each grower member of the Association who already is or will be jointly employing H-2A workers is attached as Exhibit D. We reference as Exhibit C, pages 1-524, (but do not separately include) a letter dated July 8, 2008, with sample approved Job Order packages approved by ETA in the years 2000-2004 (two (2) packages for each of the five (5) years) already provided to ETA recipients of this letter by FLOC counsel Mr. Willis. These samples demonstrate that the job descriptions provided in the applicable papers, particularly as modified, meet established ETA criteria and interpretations of applicable law and regulations.

Handling the Master Applications in the Manner That ETA Has Approved and That NCGA and Its Grower Members Have Used for So Many Years Benefits U.S. Workers as Well as the Growers.

For U.S. workers, the process described above allows more days, and days later in the year, within which U.S. workers may apply for and obtain jobs with NCGA and its grower members. If workers earlier in the season have citrus or other work opportunities elsewhere

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 5

that they want to complete, under the 50% U.S. hiring preference rules, U.S. workers may apply and be hired for jobs with NCGA and its joint employer members under the later filed applications. This system also permits greater periods of advertising the availability of these jobs to U.S. workers.

Moreover, allowing workers to continue to transfer among the growers to perform all and any of the "certified work opportunities" available among all of the grower members certified to receive workers benefits workers in many ways besides more work and higher earnings potentials. Some of these ways include:

- It allows workers to transfer to be closer to medical clinics where they may need care.
- It allows workers to transfer to work with family members or to take into account personal friendships and preferences to the extent these desires can be accommodated.
- It allows workers who are allergic to cucumbers or to tobacco or some other crop to have opportunities to work in other crops for which they may be better suited.
- It allows workers who have or who develop personality conflicts with other members of their crew to obtain fresh starts with other co-workers on other farms.

As you know, Mr. Baldemar Velasquez, President of the Farm Labor Organizing Committee, AFL-CIO, ("FLOC"), wrote to the ETA recipients of this letter by letter dated July 8, 2008. In that letter, Mr. Velasquez urged ETA not to take positions in connection with the pending applications that would have a substantial negative effect on the quantity of job opportunities available through joint employer NCGA to FLOC's membership or generally to farmworkers, both U.S. farmworkers and H-2A workers.

(E) V

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 6

At the time of Mr. Velasquez's letter of July 8, no one was aware of the particular concern expressed in Section I of DOL's July 9 letters. Nonetheless, Mr. Velasquez's comments are pertinent to that issue. Of critical importance to Mr. Velasquez, on behalf of all affected farmworkers is to avoid "curtailing job opportunities by disrupting the transfers from one joint employer to another in successive back-to-back harvest." See Mr. Velasquez's letter at page 3 (additional copy not included but can be supplied).

As discussed during the July 10 telephone meeting referenced in Mr. Costantino's e-memo, attached as Exhibit A, the ability of all of the joint employer members of NCGA to share workers is critically important to the economic sustainability of their farms. In that July 10 telephone meeting, only a few examples could be discussed. There are many more. One example we did discuss is that only within the past two (2) weeks a tornado created substantial damage to a tobacco farmer's crop that would have to have been plowed under and could not have ripened and been harvested if it could not have been immediately uprighted, a task that had to be handled by hand. This tobacco is harvested by machine, and so even more than in other tobacco fields, it is critical that the tobacco be upright at the time of harvest. Furthermore, tobacco that is blown over will not develop good or ripened leaves, and other good cultivation practices are impossible or are ruined. In short, the immediate availability (as in next day, not days later) of other workers in certified job opportunities on other joint employer members' farms besides that farmer's usual crew was critical to the avoidance of an economic catastrophe for the affected farmer. That crisis for the grower was also an opportunity for the workers involved to have additional work opportunities, a benefit urged by Mr. Velasquez should not be lost to farmworkers through a new and sudden DOL-ETA action.

There are many more examples of circumstances in which such continued ability to transfer workers is critical to the growers and to their ability to provide work opportunities for U.S. workers in job opportunities certified under Job Orders as well as to their other U.S. workers in other jobs of a full-time nature. Another example of a circumstance in which extra workers are sometimes needed on an urgent, next day type basis is when the weather forecast

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 7

is that there will be an early frost when a grower still has crops in the field that would be destroyed if not quickly harvested. If workers are immediately available among the joint employer group to assist a particular farmer in bringing in his remaining crop of squash or some other commodity among the joint certified job opportunities before the frost, the farmer's crisis is averted and the workers who are engaged in the certified job opportunities have more work and pay opportunities.

In other instances, farmers who have small acreage and who can handle planting through cultivation of crops up until harvest time can become certified within the certified job opportunities shared among the joint employers so they can then share workers for harvest with growers who can provide more work opportunity. All, growers and workers, benefit from allowing the growers to share some of the expenses of the program and providing work opportunities for workers among fellow Association members.

Moreover, individual growers may adjust their own crop plans after the filing of a job order for any of a number of reasons that are described in the respective Job Orders as part of the ETA-750 Item 13 attachment and the ETA-790 Item 11 attachment:

Many growers may grow one or more of these other crops [listed in these documents besides those specifically listed on Addendum A12] depending on many variables including favorable available markets, favorable plant stock and unexpected land availability, favorable weather conditions, poor crop and weather conditions in other growing areas, and other factors that cannot be determined at the time this application is made.

See ETA-750 attachment and ETA-790 attachment as described above. The aim of the growers and their nonprofit joint employer association and of the workers and their representatives is for the farmers to provide as much work opportunity as possible that will

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 8

result in sufficient profitability to NCGA's approximately 750 joint employer farmer members for them to continue farming.

NCGA's members and their employees under the H-2A program provide employment for approximately three (3) times as many workers in other jobs as the total number of H-2A and corresponding U.S. workers employed through this program. These so-called "upstream" jobs would be lost to these workers and their families and their communities without the program here in issue. We estimate that the total economic impact of the jobs in issue in the North Carolina economy is in the range of \$62,500,000 each year.

Their work in all of the "certified job opportunities" by employees hired under Job Orders of the type in issue here has permitted an increasing diversification of food and other vital crops to be produced in North Carolina. In the era of increased food production and distribution costs caused by increased transportation, fertilizer and other costs related to petroleum prices, this is not the time to prevent farmers and workers expecting to work for them in a range of certified job opportunities from doing so.

The workers affected by the decisions of ETA have worked under this system through the history of the nonprofit NCGA since 1989. While there have been differences and adjustments over time, what is consistent today is that both the workers and their advocates and the nonprofit Association and its joint employer members are in favor of continuing the interpretation of the applicable statute and regulations that permits maximizing job opportunities for all workers. ETA just published proposed regulations with the stated aim of streamlining application processes. Rejecting this long-established program and its practices on which affected farmers depend would be catastrophic; it would create a crisis; it would be a drastic step backwards from which a sizeable number of farmers would be unable to recover.

We trust this letter and the revisions contained in the attached 750s and 790s and their attachments and addenda for these cases address the concerns of ETA. In this connection, we note finally a portion of an e-mail placed in the official record of Case No. C-08158-09546 in

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 9

connection with an application that was withdrawn. Attached as Exhibit E is document 60-B from the record of the referenced earlier case. It is a communication to Ms. Wills from Mr. Grant relating to the Master Order process that has been used successfully for so long. The North Carolina Employment Security Commission has worked out systems using the Master Orders so that workers have access to details of the job, which, as Mr. Grant said:

. . . works pretty well for us. It also allows me to keep track of everything and ensure the entire process is done right.

We've made over 500 referrals this year and we are only in June.
fyi. . . . I'm attaching my h-2a log.

Any other way (like only growers in the same area on an application), and you are talking about breaking down this order and all the others into hundreds and hundreds of applications.

A work load that would be near impossible to handle.

Id. Not only would the work load be "near impossible to handle" for the State of North Carolina, we submit that such an increased work load would benefit no one. Workers would have a more difficult time sorting through available jobs even if all could be loaded into the system. If ETA were to consider requiring Job Orders as apparently suggested to Mr. Grant or the further changes it asks for in Section I of the July 9 letters, it should conduct appropriate economic impact analyses on the affected parties, both growers and workers, on the State, and even on its own operational apparatus. It should obtain the consent of the United States Attorney General and consult with the Secretary of Agriculture.

The bottom line is that the systemic ability to refer workers among the joint employers to available employment, to keep them employed productively, and to allow them to earn as much income as possible, consistent with the employers' needs to have workers engaged, are what makes the whole system beneficial to everyone involved. The impact of discontinuing this process would result in substantial job losses, not only to the affected U.S. and H-2A workers

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Willis
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 10

but to the farmers, their regular year-round employees, employees in other jobs besides those directly covered under the Job Orders, and their communities as well.

The Association remains eager to sit and meet in person with representatives of the current ETA decision-makers involved in these matters so that miscommunication or uncertainty about how the systems have always worked will not lead to catastrophic results that cannot be remedied. Job opportunities and farm income affected by these orders will not be lost just for this year but many will be lost permanently.

Request for modification in Section IV in connection with Case No. C-08184-14118, the tobacco, vegetables, and other diversified crops Order.

As discussed in the July 10 telephone meeting, the four (4) farmers who did not list a specific number of workers they personally intend to employ are farmers who pay the certification fees and meet all H-2A employer requirements. They are farmers who share workers, as is permitted, with other certified grower members of NCGA. The practice of listing these individuals without the names of specific other joint employers began in approximately 1993 at the request of the then ETA official in Atlanta, Stephen Becker, for the very reason that because all certified Association members could share workers among all of the other Association members, Mr. Becker believed it was more informative simply to list those farmers' names and addresses without specifying the most likely other Association member(s) with whom farmers such as Messrs. Bobby R. Beasley, Jr., David T. McGee, and Kent W. Page and Ms. Lois Hope will likely be sharing workers. If, for example, one of these farmers intended to share a group of eight (8) workers with one (1) other grower, it would have been an overstatement of their combined need to say that they needed sixteen (16) workers. See the Job Orders provided by Mr. Willis that have been approved since 2000.

This example is yet another example of how long this process of Master Job Orders allowing growers to share with all other certified growers who have been approved for the season has been in effect. It has been successful for workers and growers alike.

Ms. Charlene Giles
Ms. Maria Christine Gonzales
Ms. Lynette Wills
William L. Carlson, Ph.D.
Mr. Bubba Grant
July 14, 2008
Page 11

Conclusion.

We trust these materials respond to all questions and concerns and that the pending application will be approved. If there are other questions or concerns, please let us know as soon as possible.

Very truly yours,



Lee Wicker, Deputy Director
North Carolina Growers Association

cc: Vincent Costantino, Esquire (Via E-Mail – Costantino.Vinc@dol.gov)
Harry Sheinfeld, Esquire (Via E-Mail – Sheinfeld.Harry@dol.gov)
Baldemar Velasquez, President of the Farm Labor Organizing Committee, AFL-CIO,
("FLOC")
Ann Margaret Pointer, Esquire (Via E-Mail – APointer@laborlawyers.com)
Robert J. Willis, Esquire (Via E-Mail – RWillis@rjwillis-law.com)
Shanon R. Stevenson, Esquire (Via E-Mail – SStevenson@laborlawyers.com)

North Carolina Growers Association Inc.

Index of Exhibits

E-mail dated July 10, 2008, from Vincent Costantino to Ann Margaret Pointer and Robert Willis regarding "NCGA applications: Case Nos. C-08184-14118 and C-08184-14114"	Exhibit A
NCGA Tobacco, Vegetables, and Other Diversified Crops, 2008.....	Exhibit B Page 1 of 2
NCGA Vegetables and Other Diversified Crops, 2008.....	Exhibit B Page 2 of 2
Letter dated July 8, 2008, from Robert Willis to DOL	Exhibit C* 000001- 000005
DOL-ETA Acceptance Letter dated May 2, 2000, Case No. 10400484.....	Exhibit C* 000006- 000073
DOL-ETA Acceptance Letter dated June 8, 2000, Case No. 10400591	Exhibit C* 000074- 000121
DOL-ETA Acceptance Letter dated April 26, 2001, Case No. 20401259.....	Exhibit C* 000122- 000158
DOL-ETA Acceptance Letter dated May 21, 2001, Case No. 20401360	Exhibit C* 000159- 000249
DOL-ETA Acceptance Letter dated April 2, 2002, Case No. 30401942.....	Exhibit C* 000250- 000291
DOL-ETA Acceptance Letter dated May 20, 2002, Case No. 30402091	Exhibit C* 000292- 000351
DOL-ETA Acceptance Letter dated March 19, 2003, Case No. 30402640.....	Exhibit C* 000352- 000391
DOL-ETA Acceptance Letter dated April 23, 2003, Case No. 30402762.....	Exhibit C* 000392- 000456

*Incorporated by reference but not attached.

North Carolina Growers Association Inc.

**Index of Exhibits
(cont'd)**

DOL-ETA Acceptance Letter dated February 18, 2004, Case No. R3-04049-00631	Exhibit C* 000457- 000488
DOL-ETA Acceptance Letter dated March 22, 2004, Case No. R3-04082-00937	Exhibit C* 000489- 000524
Name and address of each grower member of the Association who already is or will be jointly employing H-2A workers	Exhibit D
E-mail dated June 11, 2008, from William ("Bubba") Grant to Lynette Wills regarding "H2A logsheet.xls"	Exhibit E

*Incorporated by reference but not attached.