NCGA NORTH CAROLINA GROWERS ASSOCIATION INC.

July 9, 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 Federal Express
and Facsimile
(312) 886-1688

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

Via Federal Express
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(202) 693-2768

Re case numbers C-08184-14118
C-08184-14114

Re: Two (2) H-2A Applications of joint employer North Carolina Growers Association Inc. ("the Association" or "NCGA") and member growers filed Wednesday, July 2, 2008

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

This is a summary of reasons North Carolina Growers Association Inc. ("NCGA" or "Association") and its joint employer member growers, the Farm Labor Organizing Committee, AFL-CIO, ("FLOC") and worker advocate Gregory S. Schell agree that the best way to protect the wages, working conditions, and job opportunities of U.S. workers "similarly employed" to proposed H-2A workers is for U.S. DOL-ETA to continue to accept two (2) Master Job Orders for the joint employer Association and its members as they are authorized to file under the applicable statutory law, 8 U.S.C. § 1188(d) and the applicable DOL-ETA regulations, as proposed and adopted under Administrative Act procedures and special statutory provisions requiring DOL consultation with the Secretary of Agriculture and approval by the Attorney General, and as DOL-ETA has approved for this Association and its members consistently since 1989, thus continuing to permit the filing of 1) a Master Job Order covering tobacco, vegetables and other diversified crops, and 2) a Master Job Order covering vegetables and other diversified crops, but not tobacco.

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- Two such Job Orders are presently pending before DOL-ETA.

- In June, DOL-ETA surprised NCGA, its members, FLOC and everyone associated with the farms and jobs by rejecting a Job Order for tobacco, vegetables, and other diversified crops.

- The proposed Job Order was withdrawn after the DOL-ETA Certifying Officer demanded that separate Job Orders be submitted on behalf of NCGA and member growers according to the specific crops the growers intended and would be permitted to plant, cultivate, and/or harvest, thereby limiting job opportunities and income for U.S. workers and jeopardizing the existence of the farms that depend on workers who are able and willing to handle multiple crops, as is the prevailing practice among farms in North Carolina in areas served by the Association. The Farm Labor Organizing Committee, AFL-CIO, the Union bargaining representative for U.S. workers and H-2A workers, joins NCGA and its joint employer growers in urging that the best way to protect the wages and working conditions of U.S. workers is to permit the filing, as NCGA and its members have done in the past, of multi-crop Job Orders without limiting the listed crops any member may plant, cultivate, and harvest other than by specifying whether or not tobacco will be grown.

- FLOC counsel and farmworker lawyer and advocate since graduation from law school in 1979, Robert J. Willis has submitted written confirmation to DOL-ETA counsel confirming the Union's position on behalf of U.S. and H-2A workers that the present system in effect for nearly 20 years should continue. Mr. Willis explained, "FLOC is aware of many workers that it represents that desire the job opportunities that only exist because of the access that NCGA members have to the Association's joint employer system which allows for the type of diversified crops economic system that sustains both the grower-members of the NCGA and the members of FLOC." Mr. Willis, for FLOC, has also pointed out that the position of DOL-ETA would have a "substantial negative effect . . . on the quantity of job opportunities available to FLOC's membership and farmworkers in

general in North Carolina. The Union . . . is aware of few if any U.S. workers who have an exclusive interest in work in only one of the non-tobacco crops cited in the type of 'farmworker diversified crops II' that NCGA has submitted . . . ."

- Notably, on behalf of FLOC, Mr. Willis concurs in points raised by NCGA to the effect that the flexibility for its farmers to make on-the-spot and as-the-season-develops decisions about which crops to plant, cultivate, and harvest increases both job opportunities for workers and financial stability and viability for the NCGA grower members. Job Orders must be filed with the DOL-ETA at least forty-five (45) days before the date of need. The jobs in issue contemplate worker arrival on or about August 16 and lasting through November 5. Many crops in North Carolina can be planted, cultivated, and harvested within the period workers are actually in North Carolina, not to mention between July 2, when the Job Orders had to be filed, and November 5, given that so many crops are planted with transplants.

- Likewise, Gregory S. Schell, farmworker advocate and lawyer, based in Florida, the State in which most non-North Carolina domestic farmworkers working on North Carolina farms are based or which they call home, concurs that in his experience of nearly 30 years of close work with farmworkers, aside from those who would not choose to work in tobacco, which is presented in a separate Master Job Order, workers with whom he is familiar would not make job decisions based on which vegetables and other diversified crops are available. Tobacco farms cannot be operated, however, without other crops being grown on them.

- The prevailing practice among farmers in North Carolina, both those in NCGA and outside, is to plant diversified crops and to experiment with opportunities that may arise during the season to diversify from strictly tobacco even if that remains their main crop.

- The O*NET OnLine job description code 45-2092.02 for "farmworkers and laborers crop" covers workers working in multiple crops. This is the current official DOL job title into which the jobs for which NCGA and its members seek workers fall. Under the formerly

used DOL Dictionary of Occupational Titles job descriptions, the NCGA multi-crop as needed job fit squarely into the category "farmworker, diversified crops II." There is no justification for forcing farmers to create a limited scope of crop operations that does not match what they or other farmers actually do.

- As an independent reason DOL should not be permitted to insist on the employers separately stating in separate Job Orders the specific same crops covered growers will and may undertake, the result would be to force the farmers to fit within a specific type of farming operation, not to define the job in accordance with the employers' needs and actual operations as the law contemplates. Action by DOL-ETA to require a specified listing of a defined number of crops in separate joint employer Job Orders would exceed DOL-ETA's legal authority on a number of grounds, including the DOL's own job descriptions.

- Statutory law under the Immigration Reform and Control Act of 1986 ("IRCA") incorporated what had been available to joint employer agricultural associations pursuant to DOL regulations and expressly permits filing of Master Job Orders by agricultural associations, such as NCGA. Moreover, in the case of "joint employers" with their members, as NCGA is, the law expressly says:

> If an association is a joint or sole employer of temporary agricultural workers, the certifications granted under this section to the association may be used for the certified job opportunities of any 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).

- Regulations published by the DOL are unlawful and exceed DOL authority unless the Attorney General of the United States, "in consultation with the Secretary of Labor and

the Secretary of Agriculture . . . , shall approve all regulations to be issued implementing [this section]." Section 301(e) of Pub. L. 99-603, as amended, Pub. L. 100-525, Section 2(l)(4) October 24, 1988, 202 Stat. 2612.

- The regulations as proposed by DOL track IRCA's statutory authorizing language quoted above with respect to joint employer associations. 52 Fed. Reg. 16790 (May 5, 1987). See proposed 20 C.F.R. § 655.106(c)(2). See also 52 Fed. Reg. 16772-73 and 16783 (proposal for applications filed by associations as joint employers and commentary explaining pre-IRCA regulations applicable to joint employer associations still published at 20 C.F.R. § 655.206(b)). It was these regulations, as proposed, that DOL submitted to the Attorney General and the Secretary of Agriculture and that DOL says met the approval of these officials who have statutory duties and prerogatives with respect to this H-2A program. See 52 Fed. Reg. 20506 (June 1, 1987). Only in commentary published with the interim final regulations that retained the proposed text of 655.106(c)(2) did DOL first raise any issue that applications filed by joint employer associations must be "virtually identical for all members of the association." See 52 Fed. Reg. 20498 under Commentary on Section 655.101. This commentary may not violate or supersede 1) statutory rights or 2) regulatory rights established through the Administrative Procedure Act or 3) the rights of the parties to expect DOL to submit any substantive requirements, especially changes from established practice and interpretation, to the Attorney General and the Secretary of Agriculture for their concurrence and/or approval.

- To the extent DOL's demand that all Master Applications filed by joint employer associations on behalf of themselves and their members contain "virtually identical job opportunities," the concept of what is a "virtually identical job opportunity" must be considered in the context of recognized DOL job categories, which includes the diversified-type crop arrangements included in the O*NET OnLine job description and the prior DOT job description for diversified crop workers. It also must be evaluated in the context of DOL-ETA's own explanation of what constitute separate occupations in the H-2A context where DOL in ETA Handbook 398 describes "harvest workers" as a

distinct and separate occupation from "cooks and cook helpers," obviously very different and not virtually "identical jobs" in contrast to jobs called "farmworkers and laborers crop," the O*NET Online Job Code 45-209202. These jobs must be considered "virtually identical" by the way DOL itself defines the job. *Id.* at 1-7.

- To the extent DOL-ETA now contends that pepper farmworkers are different from squash farmworkers or sweet potato farmworkers, at the least DOL-ETA may not spring that change on NCGA, its members, and the farmworkers—U.S. and H-2A—who are dependent on these jobs in an ad hoc administrative determination that is made after nearly 20 years of consistent application—during all of the post-IRCA era during all of which these diverse crops have been held the same diverse farmworker job without an Administrative Procedure Act notice and comment rulemaking in which advice and concurrence is sought by DOL from the United States Attorney General and the Secretary of Agriculture as are statutorily required.

- Moreover, adoption by DOL of such a position appears to be outside DOL's legal authority under the statutory provisions enacted in IRCA that permit joint employer associations to file Master Orders with their grower members in exactly the way in which NCGA and its members have always filed their Job Orders.

- Why flexibility is required for farmers to be able to maintain jobs available for workers, the growers' families, and their other hired farm employees. A partial list of factors affecting which crops any given grower may plant, cultivate, and harvest includes:

    - the timing, availability, and price of decent plants for transplanting, or alternatively, plants for another commodity, such as better pepper plants than squash plants;

    - availability of land, including unexpected opportunities to lease or obtain land on other short-term bases;

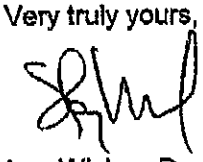
- the prices of land and transplants and the cost of planting and cultivating and harvesting specific crops as opposed to others;
- whether the farmer himself, family member, or key personnel are ill, have other commitments, or conclude that it is better to defer planting for a week or to plant X crop instead of another crop for any of many reasons;
- the availability of brokers, farmers' markets, roadside sales outlets, U-Pick outlets, and other markets for smaller or larger quantities of a given commodity;
- the weather and other conditions affecting farmers of similar or other commodities in other parts of the country that may affect the marketability of North Carolina-grown commodities;
- the weather in North Carolina, including availability of water for irrigation, storm damage to other crops;
- the willingness or desire of existing workers to undertake specific crops to have more income opportunity; and
- the amount of capital the grower has to invest in plants, fertilizer, irrigation, labor, and other costs associated with planting, cultivating, harvesting, and marketing a crop.

- Growers can and do make hundreds of decisions regarding which plants to plant and when to do it based on the above and many other factors. The workers benefit by having more work opportunity and therefore more income opportunity and more stable employment because the growers can spread their overhead over more crops. Even large growers within NCGA would be unable to manage the cost of obtaining and using legal workers, that is, U.S. workers and foreign workers authorized to work in the United States, without the ability to plant multiple crops and deploy their resources as they best see fit on a short-term, immediate decision-making basis.

- To discontinue on an immediate basis the ability of growers to plant multiple crops they may not even know about until the opportunity to do so arises and the ability of workers to have access to these jobs should not be denied based on an unsubstantiated hypothesis that U.S. workers want to know exactly which crops farms will grow—a hypothesis that is disputed by the Union that represents the farmworkers, by workers' advocates, by growers, and by workers.

- The consequences of the denial of these job opportunities could spell the death knell for many growers as well as for the Association that today provides joint employment over an extended period of work opportunity and coordination of work opportunities for workers and thus the permanent losses of U.S. work opportunities for U.S. workers and U.S.-grown diverse food crops.

Very truly yours,



Lee Wicker, Deputy Director
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