FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

www.laborlawyers.com

Atlanta
1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326-1125

(404) 231-1400 Tel
(404) 240-4249 Fax

Direct-Dial (404) 240-4223
E-Mail apointer@laborlawyers.com

July 16, 2008

Vincent C. Costantino, Esquire
Assistant Counsel for Litigation and
Senior Trial Attorney
U.S. Department of Labor
Employment and Training Legal Services
Office of the Solicitor
200 Constitution Avenue
Washington, D.C. 20210

Via E-Mail
Costantino.Vincent@dol.gov

Harry J. Sheinfeld, Esquire
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

Via E-Mail
Sheinfeld.Harry@dol.gov

Re: 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

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

Gentlemen:

I write this letter to both of you as I am not sure which of you is in the office today, and I know that you work consultatively on matters of serious concern to your client, the Employment Training Administration (ETA). Your close attention to this urgent matter under the H-2A program is requested and appreciated.

We are dealing essentially with two (2) provisions of the Immigration Reform and Control Act, 8 U.S.C. § 1188(d)(2) and § 1188(e), that grant certain rights to this nonprofit grower

Association and its joint employer members with respect to "temporary agricultural workers" as to whom:

> certifications [are] granted under this [Section 1188 so that members of this nonprofit Association may use the workers for] 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). We are not certain that there are any large joint employer grower associations remaining outside of the ETA Region served by the ETA Atlanta processing office up until June 1, 2008.

Perhaps through failure of new ETA staff to understand that this nonprofit Association and its members have special rights, we are potentially in the situation of losing or foregoing rights provided under statute and, of course, applicable regulation, if we do not lodge an appeal for a *de novo* hearing today. As you know, the statute provides an expedited *de novo* consideration of what is decided at the administrative level. Specifically, the law says:

> . . . and regulations shall provide for . . . at the applicant's request, for a *de novo* administrative hearing respecting the denial or revocation [of a certification].

8 U.S.C. 1188(e). Within the Supreme Court guidance of *Firestone & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), we find specific rejection of an arbitrary and capricious standard of review of a fiduciary ERISA administrator's fact determinations. Where decisions were not clearly left to the administrator's discretion, all decisions by the administrator were subject to a *de novo* judicial review.

That means starting over on all fact and law decisions. Here, of course, the IRCA statute itself provides for a *de novo* hearing as of right.

Notably, in cases since *Firestone* where the *de novo* standard has been applied, courts have looked at the course of dealings of the parties and how specific contractual language was interpreted and applied in the past.

Thus, substantial weight should be given to the fact determinations made by ETA in earlier applications by NCGA this year that were approved routinely as applications containing the same provisions were routinely approved for so many years. See, e.g., *Schultz v. Metropolitan Life Insurance Co.*, 872 F.2d 676, 678-79 (5th Cir. 1989) (under *Bruch de novo* standard of review to determine that health insurance plan administrator/insurance company properly denied benefits already paid by tortfeasor's insurer, court looked to past conduct of the parties to help construe the coordination-of-benefits provision).

Moreover, in a *de novo* review, there is not a deference to the agency preliminary determination of legal rights under the Act, and indeed, even upon court review:

> Where, as here, the court must review an agency's construction of the statute which it administers, the court must first consider whether Congress has directly addressed the issue. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

Grace Korean United Methodist Church v. Chertoff, CA No. 04-1849-PK (Nov. 3, 2005). (Copy attached.)

Furthermore, to the extent that an agency might make a decision based on what it thinks are rights granted or controlled through a statutory provision for which it is not responsible, the agency would not be granted any deference on such decisions; indeed, it should refrain from venturing an opinion outside its assigned province. As discussed in *Grace Korean United Methodist*, the Citizenship and Immigration Services did not have authority or expertise, in the words of the decision, to decide what a particular phrase meant in terms of a job description. Here the Judge cited case support for his conclusion that action by an agency based on an understanding outside its

authority or expertise should not be recognized, *Tavar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993) (finding that the U.S. Postal Service had no expertise or special competence in immigration matters); and *Omar v. INS*, 298 F.3d 1710, 1714 (8th Cir. 2002), *overruled in part on other grounds, Leacal v. Ashcroft*, 543 U.S. 1, __ (2004) (finding that an INS interpretation of a criminal statute was not entitled to any deference).

Urgent action to accept Job Orders requested.

Therefore, I am hopeful that you will be able to counsel and meet with your client to urge the immediate acceptance of the modified Job Orders, which NCGA was glad to do in order to provide more information regarding the likely availability of jobs within and among the Association's producer members.

Request for meeting to iron out details and resolve this matter whether or not we must file for an immediate *de novo* hearing.

Even if we conclude that to protect the rights of this nonprofit Association and its producer joint employer members we must file for an immediate appeal with a *de novo* evidentiary hearing and so forth, we respectfully urge that Messrs. Stan Eury and Lee Wicker, the principals of the Association who are most knowledgeable about what their growers require and how operations really work on the ground as well as Mr. Baldemar Velasquez, President of the Union that represents all workers, U.S. and H-2A, Robert Willis, Esquire, counsel for the Union, and potentially I should meet directly with decision-makers of ETA who now, and only since June 1, 2008, are in charge of reviewing applications submitted on behalf of this Association and its members.

Through a back-channel manner, I heard that the view of ETA is that now that lawyers are involved on behalf of the Association, all of the decision-making and negotiations should be or must be handled through counsel, and it appears that there is a preference that "everything" be conducted "in writing." Maybe this is not true. I hope it is not so.

Nothing could be further from the truth in terms of my own view of how misunderstandings are avoided and accurate presentations of information are best made. I ask for such a meeting.

I also invite you to copy Lee Wicker and Stan Eury on every communication and to have them involved in very telephone discussion and face-to-face meeting. Knowledgeable as Bob Willis is through his representation of the Union and as hard as I am trying, many important details and reasons for actions and historic alternatives considered and rejected or possibly implemented and then found not to work so well are known best to Lee and Stan. A written communication is a great way to lock in specific positions, but it is often a terrible way to explore options, clarify nuanced misunderstandings, and in general to find out the real concerns of others at the table and to try to respond to them. Meeting face-to-face is at the heart of the obligation under the National Labor Relations Act to meet and confer that management and Union representatives have. If all they had to do is exchange written contract proposals, neither side would be complying with its obligation under that law.

Let's go back to February 26.

In short, we would like to go back to February 26, 2008, when Lee Wicker asked to meet with the senior management of ETA in Chicago and Washington who would soon be responsible for reviewing the H-2A application for the jobs in issue. In fact, the ETA website urges that such meetings and consultations should be had. (See attached correspondence, pp. 1-11.)

We again ask for a meeting to clear the air, potentially to restore wounded personal feelings, and to see if there is not a way that NCGA and its principals can satisfy information needs of ETA.

We also ask for acceptance of the modified applications now.

We also respectfully submit that the middle of the season is no time to consider a new way of doing things, especially when the way that the Association and its members have been doing things has been accepted and relied on earlier this current year as well as for so long in the past. The Association does not want in any way to be or to appear to be unreceptive to new ideas for the future. As all of ETA must recognize, from the coalition of support through the FLOC as well as through the AFL-CIO at its most senior levels and from nearly 30-year worker advocate and counsel Gregory S. Schell, this Association and its members are open to new and better ideas of recruiting and retaining U.S. workers.

Conclusion.

I ask for your urgent discussion of the points raised in this letter with your client and look forward to hearing from you at your very earliest convenience. Needless to say, I am at the office today and should be reachable at my direct line, but if for any reason I am away from my desk or on my telephone, please have me paged.

Very truly yours,

Ann Margaret Pointer
For FISHER & PHILLIPS LLP on behalf of the
North Carolina Growers Association Inc. ("NCGA")
and Its Joint Employer Members

AMP:sjw
Enclosures

cc: Mr. C. Stan Eury, Executive Director, North Carolina Growers Association Inc. ("NCGA")
Mr. Lee Wicker, Deputy Director, North Carolina Growers Association Inc. ("NCGA")
Mr. Baldemar Velasquez, President, Farm Labor Organizing Committee, AFL-CIO, ("FLOC")
Robert J. Willis, Esquire (Via E-Mail – RWillis@rjwillis-law.com)
Shanon R. Stevenson, Esquire (Via E-Mail – SStevenson@laborlawyers.com)