

## Attachment No.: 3

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### Agricultural/Non-Agricultural Programs *Statement of Work and Work Plan*

As a condition for receiving funds in support of the Secretary's responsibilities under Sections 101(a)(15)(H)(i)(b) and 212(n), Sections 101(a)(15)(H)(ii)(a) and 218, and Section 212(a)(5)(A) of the Immigration and Nationality Act (Act), under the United States Citizenship and Immigration Services (USCIS) regulations at 8 CFR 214.2(h)(6) under Sections 101(a)(15)(H)(ii)(b) and 214(c) of the Act, under Section 221 of the Immigration Act of 1990, and under Department of Labor (DOL) regulations at 20 CFR parts 655 and 656, \_\_\_\_\_ (agency name) agrees to assist ETA to determine the availability of U.S. workers and the potential adverse effect on wages and working conditions that the admission of alien workers might have on similarly employed U.S. workers before employers can obtain a labor certification, and agrees to assist ETA by conducting the Occupational Employment Survey and appropriate agricultural surveys and providing wage determination information to employers wishing to file or update a labor attestation or labor condition application.

The sections of the Act and regulations cited above relate to DOL programs involving foreign workers as follows:

- Section 101(a)(15)(H)(i)(b) (8 U.S.C. 1101 (a)(15)(H)(i)(b)), called H-1B nonimmigrant classification, applies to professionals in specialty occupations and certain models; Section 212(n) (8 U.S.C. 1182(n)), specifies the requirements or labor condition applications which must be filed by employers seeking to employ such workers.
- Section 101(a)(15)(H)(ii)(a) (8 U.S.C. 1101 (a)(15)(H)(ii)(a)), called H-2A nonimmigrant classification, applies to agricultural workers; Section 218 (8 U.S.C. 1188), specifies the conditions for admission of temporary H-2A workers. DOL regulations at 20 CFR part 655 specify the labor certification requirements.
- Section 101(a)(15)(H)(ii)(b) (8 U.S.C. 1101(a)(15)(H)(ii)(b)), called H-2B nonimmigrant classification, applies to temporary non-agricultural workers. USCIS regulations at 8 CFR 214.2(h)(6) and section 214(c) of the Act require consultation with DOL before aliens are admitted to the United States. The regulations for the H-2B program are found in DOL regulations at 20 CFR part 655. Procedures pursuant to those regulations are documented in General Administration Letter (GAL) No. 1-95, GAL No. 1-95, Change 1 and Field Memorandum No. 25-98. The H-2B program is authorized only if two conditions are met:
  - The alien must be coming temporarily to the U.S., and
  - The services or labor which the alien will be performing must also be temporary in nature.
- Section 212(a)(5)(A) requires a labor certification from the Secretary of Labor for permanent employment of aliens in the United States. DOL regulations at 20 CFR part 656 specify the requirements for permanent labor certification.

## State Workforce Agency Requirements and Responsibilities

(Agency Name) shall:

- Provide labor certification services to protect job opportunities for U.S. workers and prevent adverse effect on U.S. workers' wages and working conditions which may be caused by the employment of aliens;
- Provide labor certification application forms and conduct certain labor market services necessary for the Secretary of Labor to make determinations on applications for permanent and temporary alien labor certification; and
- Conduct certain labor market services necessary for the Secretary of Labor to accept for filing attestations and labor condition applications with respect to the employment of certain nonimmigrant aliens.

### **1. SWA Responsibilities under Labor Certification Programs.**

Employers requesting permanent labor certification, H-2A temporary agricultural certification, or H-2B temporary non-agricultural certification for alien workers are required to do the following:

- Demonstrate that they have attempted to recruit U.S. workers through advertising, the State Workforce System, and/or by other specified means.
- Offer prevailing wages and working conditions that will not adversely affect similarly employed U.S. workers.
- Fulfill the duties listed in regulation 20 CFR 656.21 listed below:
  - Performing initial processing of non-agricultural applications
  - Conducting special recruitment (outside of regular workforce agency recruitment and referral activities) for U.S. workers
  - Conducting prevailing wage surveys for agricultural occupations
  - Determining prevailing wage rates using the Occupational Employment Statistics system and review of employer supplied surveys
  - Preparing Form ETA 232 reports
  - Obtaining data needed for making prevailing practice determinations
  - Submitting required reports
  - Gathering other information which forms the basis for Division of Foreign Labor Certification determinations to grant or deny labor certifications

### **2. SWA Responsibilities under Labor Attestation and Labor Condition Application Programs.**

Employers filing labor attestations and labor condition applications for H-1B nonimmigrant workers must file such attestations directly with the H-1B processing center. Employers filing labor condition applications for H-1B nonimmigrant workers have the option of requesting prevailing wage data from the SWA or using other legitimate sources such as appropriate published wage surveys.

If requested to do so, the SWA must provide to employers or their representatives requesting such information the prevailing wage data for the occupation in the area of intended employment. This wage determination must be made from the Occupational Employment Statistics data unless the SWA is requested by an employer or employer's representative to review a survey provided for prevailing wage purposes to determine if the survey meets standards published by DOL. If so requested, the SWA must inform the employer or the employer's representative if the survey may be used as the prevailing wage in that instance.

### **3. Special Assurances.**

- Services provided for activities shall be in conformity with regulations at 20 CFR parts 655 and 656, handbooks, field issuances, and other instructions issued by DOL, e.g., Technical Assistance Guide No. 656 Labor Certifications, ETA Handbook No. 398 (H-2A Program Handbook), ETA Handbook No. 385 (Employment Service Forms Preparation Handbook), General Administration Letter (GAL) No. 1-95, "Procedures for H-2B Temporary Labor Certifications in Non-Agricultural Occupations" (November 10, 1994), GAL No. 1-95, Change 1, "Procedures for H-2B Temporary Labor Certifications in Non-Agricultural Occupations" December 1997), Field Memorandum No. 25-98, "H-2B Temporary Non-Agricultural Labor Certification Program Requirements" (April 1998), Training and Employment Guidance Letter No. 12-03, "Policy Clarification for Processing H-2B Temporary Labor Certification for Occupations in the Landscaping Industry, 2004-2005", Training and Employment Guidance Letter No. 4-03, "Procedures for Temporary Labor Certification in the Entertainment Industry", and GAL 1-97, Change 1, "Measures for Increasing Efficiency in the Permanent Labor Certification Process" (May 1999).
- Services provided for temporary agricultural and logging alien certification activity shall be in conformity with regulations at 20 CFR part 655, handbooks, field issuances, and other instructions issued by the DOL, e.g., ETA Handbook No. 398, issued March 4, 1988;
- Summary data relating to prevailing wage surveys conducted by the SWA shall be released to those who request it. However, information identifying, or which might contain, information leading to the identification of a specific employer surveyed shall not be released by the SWA since such action could result in possible competitive damage to the employer and could inhibit the employer from cooperating in future surveys;
- The state shall assure that job orders placed into the regular SWA recruitment system pursuant to regulations at 20 CFR 656.21(f) do not contain symbols or words which identify the job order as an alien certification order, and that SWA staff are instructed to refrain from discouraging U.S. workers who seek referral to employers on such job orders;
- Contracting out any aspects of the ALC programs will not be allowed without a pre-approval in writing from the national office. If such requests are included in the work plan and are clearly detailed in a cover memorandum, the national office can provide pre-approval. Otherwise, states must provide a written justification and cost estimate; and
- Advertisements, though they must include many specific elements of information, should be written in a style consistent with non-ALC advertisements, organized, titled, and placed in a logical section of the publication so as to reach the maximum number of U.S. workers.

### **4. Allowable Costs.**

- Costs may be attributed to activities directly in support of the regulations at 20 CFR part 656; 20 CFR part 655, subparts A, B, C, H, and L, including costs for all activities related to the preparation of and submittal of ETA 232 and ETA 9037 reports, and for indirect support as a fair share of overhead.
- Regular workforce agency activities under Wagner-Peyser, such as referring workers to job bank orders, migrant and seasonal farmworker recruitment, and the processing of complaints under the SWA complaint system, are not allowable costs unless the activity can be directly attributed to extraordinary functions in the processing of a specific labor certification application/attestation.

### **5. Performance Standards.**

- The state's performance shall be reviewed according to labor certification TAG No. 656; GAL No. 1-95, "Procedures for H-2B Temporary Labor Certifications in Non-Agricultural

Occupations"(November 10, 1994), Field Memorandum No. 25-98, "H-2B Temporary Non-Agricultural Labor Certification Program Requirements" (April 1998), General Administration Letter No. 2-98, "Prevailing Wage Policy for Non-Agricultural Immigration Programs" (October 31, 1997) and Field Memorandum No. 1-00, "Availability and Use of Occupational Statistics Survey Data for Alien Labor Certification Prevailing Wage Purposes" (May 16, 2000); ETA Handbooks Nos. 398 and 385; and any subsequent ETA advisories concerning alien certification activities. Fund utilization will be reviewed against the Funding Plan and actual workload levels, and when expenditures are significantly below plan, ETA may de-obligate funds for redistribution.

- The state shall continue to staff prevailing wage activities for labor certification/attestation programs with individuals who have relevant skills. Current programs; however, require enhanced knowledge, skills, and expertise in evaluating prevailing wage surveys and in making prevailing wage determinations. To increase the state's capacity to perform this work, and to assure credibility, validity, and reliability of wage surveys and determinations, state allocations include funding to support a prevailing wage expert function. In states with a small labor certification workload, it is appropriate for that function to be filled on a part-time basis. Each state shall:
  1. Staff this function with an individual who has at least a bachelor's degree in statistics or economics, or a degree in another field with a minimum of six (6) hours in statistics, and at least two years of experience in data collection, statistical analysis, sampling techniques, labor market analysis, or conducting wage surveys and classifying jobs;
  2. Make the incumbent responsible for implementing national prevailing wage policies, evaluating prevailing wage surveys for labor certification/attestation programs, training other staff, responding to prevailing wage issues and challenges, and giving expert testimony in litigation cases.
- When requested by the national office, states shall ensure that appropriate labor certification staff travel within or outside the state to attend meetings, training sessions, speaking engagements, or other activities deemed necessary by the national office to carry out effective program operations. Travel for such activities is accounted for within program funding levels.
- The state shall continue to maintain an automated Alien Certification Processing System(s) for receiving and tracking applications, writing letters, and maintaining a prevailing wage database.
- Due to continued growth of the H-2B non-agricultural temporary labor program, states are expected to initially screen each H-2B application to ensure that the employer's need for the duties to be performed is truly temporary. That need may be neither ongoing nor continuous. The employer has the burden of establishing the facts necessary to support such a finding in the application. States should immediately consult with their respective national processing center when there is doubt. Because of the need to make a determination on applications within 60 days of receipt by states, the state is responsible for informing its Certifying Officer regarding the status of the H-2B case workload on a monthly basis to ensure timely completion. ***H-2B applications should be processed in an expedited manner and processed applications should be transmitted to the Certifying Officer within 30 days from the date the application was received by the state.***

## 6. Reporting Requirements.

- Basic reporting requirements for Labor Certification include financial and program reporting requirements as specified by ETA. The required program reports, including the ETA 9037 and the ETA 232 reports, will be submitted in accordance with ETA TAG No. 656, ETA Handbook No. 385, and ETA Handbook No. 398.
- Financial reports relating to staff time and other charges to the alien certification reimbursable grant shall be available to national office staff. Inappropriate charges shall be questioned and may be disallowed.

- Informally, states will report to the field office increases in H-2A and H-2B activity. In addition, states should report all new occupations or crop activity for these programs.

## ENCLOSURE I

### Work Plan (Attached to Statement of Work)

(Agency Name) shall prepare a narrative plan which explains how it will deliver labor certification/attestation services in FY 2005. This narrative should include, at a minimum, the following:

- A. The projected number of permanent applications to be processed until the effective date of the PERM program.
- B. The projected number of job orders related to temporary agricultural alien certification applications to be processed.
- C. The projected number of temporary non-agricultural alien certification applications to be processed.
- D. The projected number of prevailing wage surveys to be conducted in agricultural activities including projected wage surveys in anticipation of H-2A requests (this includes logging).
- E. The projected number of housing inspections to be conducted in anticipation of H-2A orders (this includes logging).
- F. The projected number of prevailing wage determinations to be provided to employers for non-agricultural occupations by the following categories: Permanent program; H-1B nonimmigrant program; and H-2B program.
- G. Any plans for changes in existing operations including the prevailing wage program that will substantially affect negotiated goals.

## ENCLOSURE II

### Work Plan (Attached to Statement of Work)

#### **Statement of Work for Housing Inspections**

***Note: Due to the special nature of housing inspections, a separate Statement of Work is included.***

\_\_\_\_ (Agency Name) shall prepare a narrative plan which explains how it will deliver this activity in FY 2005. This narrative should include, at a minimum, the following:

1. Statement of the negotiated goals to be achieved. Number of pre-occupancy housing inspections to be conducted;
2. Plans for changes in the existing operations, if any, which may substantially affect negotiated goals.

In addition, as a condition for receiving funds in support of the Secretary's responsibility, \_\_\_\_ (Agency Name) agrees to do the following:

- Conduct pre-occupancy inspections of housing to be furnished to migrant and seasonal farmworkers or other U.S. workers, or to nonimmigrant aliens admitted to the United States under temporary labor certification programs for temporary employment in agriculture or logging.
- Assist employers in recruiting agricultural and logging workers. These employers are required to provide housing at no cost, or public housing, for workers who are not reasonably able to return to their place of residence the same day. In the case of employers seeking H-2A agricultural or logging labor, free housing must be provided. The housing must meet ETA standards described in 20 CFR part 654, subpart E or OSHA standards at 29 CFR 1910.142 and be sufficient to house the number of workers required.
- Determine, through a pre-occupancy inspection, that such housing is, in fact, available and meets appropriate standards. The employer seeking labor certification may also provide rental or other public accommodation-type housing. Such housing must meet applicable local or state standards, and does not have to be inspected by state agency staff when such standards exist. However, in the absence of applicable local or state standards, such housing must meet Federal standards at 29 CFR 1910.142 (OSHA) and must be inspected by the state agency or other appropriate public agency prior to occupancy.

#### **1. Special Assurances.**

- The state shall adhere to regulations at: 20 CFR, part 655, subparts B and C, Labor Certification Process for Temporary Agricultural and Logging Employment; part 654, subpart E, Housing for Agricultural Workers; and, part 653 subpart F, Agricultural Clearance Order Activity. Actual housing inspections may be conducted under certain conditions in accordance with OSHA standards at 29 CFR 1910.142, Temporary Labor Camps.
- SWAs should encourage employers who expect to obtain their certification 30 days before the date of need to have housing ready for inspection at the time of filing their H-2A application or earlier.
- SWAs should be prepared to conduct housing inspections prior to the filing of applications.
- SWAs should plan to schedule housing inspections prior to the filing of H-2A applications for those employers who regularly use the H-2A program.

- SWAs should be encouraged to evaluate alternative methods of conducting pre-occupancy housing inspections. (i.e., State Health Department, Agricultural Department, etc.)

**2. Allowable Costs.**

- Costs may be attributed to activities in support of tasks described in 20 CFR part 654 subpart E, Housing for Agricultural Workers and/or 29 CFR 1910.142, Temporary Labor Camps, and for indirect support as a fair share of overhead.

**3. Performance Standards.**

- The state's performance will be reviewed according to the applicable Housing Inspection Checklist in ETA Handbook No. 398, the applicable Federal housing standards.

**4. Reporting.**

- Required reporting of activity is specified on the ETA 9037, semi-annual report. Financial reporting will be as specified by the Employment and Training Administration.
- States should plan to track the costs associated with conducting pre-occupancy housing inspections to assist the national office in the allocation of future resources. The costs include, but are not limited to, staff resources, travel expenditures, and administrative costs (see Attachment 6).
- **States should submit an estimate of their annual cost for conducting pre-occupancy housing inspections by April 29, 2005 (see Attachment 7).**



## ENCLOSURE III

### Work Plan (Attached to Statement of Work)

#### **Statement of Work for Agricultural Wage Surveys**

***Note: Due to the special nature and importance of agricultural prevailing wage surveys, a separate Statement of Work is included.***

\_\_\_\_\_(Agency Name)\_\_\_\_\_ shall prepare a narrative plan which explains how it will deliver this activity in FY 2005. This narrative should include the number of prevailing wage surveys to be conducted and for which crop activity.

As a condition for receiving funds in support of the Secretary's responsibility, \_\_\_\_\_(Agency Name) agrees to conduct prevailing wage surveys of agricultural and logging activities in accordance with ETA Handbook No. 385. The SWA assists employers in recruiting agricultural and logging workers. Since those workers do not have knowledge of wages in distant locations, the SWA provides a level of wage protection by requiring that intra- and inter-state clearance orders offer a prevailing wage (20 CFR 653.501(d)(4)), if it is higher than the state or Federal minimum. For H-2A orders involving alien workers, the prevailing wage must be offered if it is higher than the state or Federal minimum and the Adverse Effect Wage Rate (AEWR) (20 CFR 655.102(b)(9)).

In order to establish the required prevailing wages, surveys must be done in accordance with ETA Handbook No. 385 for each agricultural reporting area in which a crop activity meets the threshold specified in Section I, C. 1. a. of the Handbook. When the data are collected and compiled in accordance with the Handbook, a signed Form ETA 232 must be submitted to the national office for review and confirmation before publication.

#### **1. Special Assurances.**

- **The state shall submit to the national office a plan for the surveys it is scheduling for the coming year.** This plan must include all the surveys which will be conducted by the state in the upcoming season. Accordingly, the state's survey targets should be based on estimated job order activity to be produced by H-2A applications. Prevailing wage surveys must be completed in the following instances: 1) When there were more than 100 workers in one crop last season or you expect more than 100 workers in the current season; 2) When there were H-2A workers last season or you expect H-2A workers in the current season; 3) When it is a very complex method of payment (i.e., piece rates); and 4) all mandatory national interest surveys such as Custom Combine, Sheep and Goat herding, Nurseries, and East Coast apples. **Wage surveys should not be conducted if they do not fit into the above categories.** The plans should be mailed to Mr. Ben Orona, Division of Foreign Labor Certification, 200 Constitution Avenue, NW, Room C-4312, Washington, D.C 20210 or fax to (202) 693-2768.
- The state shall submit the results of its prevailing wage surveys (ETA 232) promptly to the national office as well as to the respective national processing center (Atlanta or Chicago), so the correct wage is established for the next cycle of crop activity. Timely submission is critical to ensure release of wage determinations by the national office well ahead of the crop activity start date. The ETA 232 forms should be mailed to Mr. Ben Orona, Division of Foreign Labor Certification, 200 Constitution Avenue, NW, Room C-4312, Washington, D.C. 20210 or fax to (202) 693-2768.

#### **2. Allowable Costs.**

- Costs may be attributed to tasks described in ETA Handbook No. 385 for crop activities which meet the criteria specified above and for indirect support as a fair share of overhead.

### 3. Performance Standards.

- The state's performance will be reviewed according to its adherence to the procedures for wage surveys in ETA Handbook No. 385. Irrespective of the Adverse Effect Rate (AEWR) published for a given state each year, the procedures contained in the ETA Handbook No.385 require that prevailing wage surveys be conducted for any crop activity that is anticipated in the upcoming season.

### 4. Reporting.

- Completed surveys will be submitted on the ETA-232. Financial reporting will be as specified by ETA. The ETA-9037 will continue to be used to report activity on a semi-annual basis.
- States should plan to track the costs associated with conducting prevailing wages in order to assist the national office in the allocation of future resources. The costs include, but are not limited to, staff resources, travel expenditures, and administrative costs (see Attachment 6).
- **States should submit an estimate of their annual cost for conducting H-2A prevailing wage surveys by April 29, 2005 (see Attachment 7).**