

- **What did the U.S. District Court for the Eastern District of Pennsylvania (the Court) decide in *Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Solis* related to the H-2B regulations and job contractors?**

On August 30, 2010, the Court in *CATA v. Solis*, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) issued a decision invalidating various provisions of the Department's 2008 H-2B Final Rule, 73 Fed. Reg. 78020 (Dec. 19, 2008). Among the provisions that the Court invalidated and vacated was 20 CFR 655.22(k), insofar as that provision permits the clients of job contractors to use the services of H-2B workers without each client submitting its own Application for *Temporary Employment Certification* to the Department. In particular, the Court found that the Department of Homeland Security's (DHS) regulatory provisions at 8 CFR 214.2(h)(2)(i)(C) and 8 CFR 214.2(h)(6)(iii)(A), when read together, "mandate that (1) every employer must file a petition with DHS, and (2) before doing so, the employer must also file a certification application with DOL. By allowing certain employers not to file certification applications, DOL's regulations unambiguously contradict this mandate." See *CATA v. Solis*, 2010 WL 3431761 *16 (E.D. Pa. Aug. 30, 2010) (emphasis added). Accordingly, the Court decided that these provisions prohibited the Department's existing practice of allowing only job contractors to file *Applications for Temporary Employment Certification*.

April 4, 2011

- **After receiving the Court's August 30, 2010 decision, what action did the Department take related to H-2B Applications for Temporary Employment Certification filed by job contractors?**

As a result of this order, the Department determined that it could no longer accept H-2B *Applications for Temporary Employment Certification* from applicants that meet the definition of job contractor at 20 CFR 655.4 if the job contractor's employer-client(s) also did not submit an application. Accordingly, in September, 2010, the Department began issuing Requests for Further Information (RFIs) to all employers who marked in Section C-17 of the ETA Form 9142 that they were job contractors or otherwise indicated in the application that they were job contractors. The RFI clearly provided notice of the Court's August 30, 2010 decision and the impact of the decision on applications filed by job contractors.

April 4, 2011

- **How can a job contractor file Applications for Temporary Employment Certification consistent with the Court's August 30, 2010 decision?**

The Court's decision unambiguously prohibits the Department from approving *Applications for Temporary Employment Certification* that are filed solely by the job

contractor. After thorough consideration, the Department does not believe that the H-2B regulations, as written, can accommodate a situation where both a job contractor and employer-client each file their own applications for a single job opportunity where there is no joint employment agreed to between the job contractor and the employer-client. The regulations at 20 CFR 655.20 only allow for one H-2B labor certification application to be filed for worksite(s) within one area of intended employment for each job opportunity with an employer. Additionally, if both the job contractor and employer-client were to file separate applications for the same job opportunity, it is unclear which entity would receive the certification.

Provided that a job contractor and any employer-client are joint employers, as defined in the 2008 H-2B Final Rule, a job contractor may submit an *Application for Temporary Employment Certification* on behalf of itself and that employer-client. The application must clearly identify the job contractor and its employer-client and their joint employment relationship. Also, the application must comply with all regulatory requirements related to submitting an application (e.g. prevailing wage determination obtained and pre-filing recruitment conducted). Additionally, both employers (the job contractor and the employer-client) must sign the Appendix B.1 to ETA Form 9142, attesting to the conditions of employment required of employers participating in the H-2B program.

April 4, 2011

• **When should a job contractor and its employer-client file as joint employers?**

In deciding whether to file as joint employers, the job contractor and its employer-client should understand that according to the H-2B regulations, employers are considered to jointly employ an employee when they each, individually, have sufficient definitional indicia of employment with respect to that employee. As described in the definition of employee in 20 CFR 655.4, some factors relevant to the determination of employment status include, but are not limited to, the following: the right to control the manner and means by which work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; discretion over when and how long to work; and whether the work is part of the regular business of the employer or employers. Whenever a job contractor and its employer client file applications, each employer is responsible for compliance with H-2B program assurances and obligations. In the event a violation is determined to have occurred, either or both employers can be found to be responsible for remedying the violation and attendant penalties

April 4, 2011

- **Can a job contractor file an Application for Temporary Employment Certification as joint employers with two or more of its employer-clients?**

A job contractor may have many separate contracts or agreements, each with a different employer-client. Each contract or agreement may support only one *Application for Temporary Employment Certification* for each employer-client job opportunity within a single area of intended employment. While a job contractor may have multiple employer-clients, these employer-clients do not have joint employment agreements among themselves. Therefore, in order to be considered joint employers, each employer-client and job contractor must file a separate application with the Department.

April 4, 2011

- **When a job contractor intends to file an Application for Temporary Employment Certification as a joint employer with its employer-client, is the job contractor or the employer-client responsible for obtaining the prevailing wage determination?**

Either the job contractor or its employer-client may submit an ETA Form 9141, Application for Prevailing Wage Determination, describing the job opportunity to the National Prevailing Wage Center (NPWC). Both of the joint employers are, however, responsible for ensuring that the wage offer listed on the Application for *Temporary Employment Certification*, ETA Form 9142, and related recruitment at least equals the prevailing wage rate determined by the NPWC and that all other wage obligations are met.

April 4, 2011

- **When a job contractor intends to file an Application for Temporary Employment Certification as a joint employer with its employer-client, is the job contractor or the employer-client responsible for conducting the required pre-filing recruitment activities?**

Either the job contractor or its employer-client may place the required job order and newspaper advertisements, as described in 20 CFR 655.15. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the National Processing Center (NPC) with the *Application for Temporary Employment Certification*, ETA Form 9142.

April 4, 2011

- **When a job contractor intends to file an Application for Temporary Employment Certification as a joint employer with its employer-client, what content is required**

in the job order and newspaper advertisements?

The job order and newspaper advertisements placed by joint employers must satisfy the advertising content requirements required for all H-2B-related advertisements, as identified in 20 CFR 655.17. Additionally, in order to fully apprise applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the worksite location(s) where workers will perform labor or services.

Any employer who files a job order or advertisement after the publication date of this FAQ will be expected to comply with the requirements set forth in the previous paragraph, and the Department will consider the publication date of this FAQ when evaluating recruitment conducted by joint employers. The Department considers the name of both employers and the worksite location as essential content for joint employment recruitment to appropriately test the U.S. labor market.

April 4, 2011

- **When a job contractor intends to file an Application for Temporary Employment Certification as a joint employer with its employer-client, does the job contractor need to send a written inquiry to its employer-client regarding U.S. worker displacement as described in 20 CFR 655.22(k)?**

No. As joint employers, both the job contractor and its employer-client independently attest to the conditions of employment required of employers participating in the H-2B program, including non-displacement of U.S. workers as specified in 20 CFR 655.22(i). Accordingly, the employer-client already must attest that it has not laid off and will not lay off any similarly employed U.S. worker in the occupation for which certification is sought within the area of intended employment within the period beginning 120 calendar days before the date of need through 120 calendar days after the date of need, except where the employer-client also attests that it offered the job opportunity to those laid off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons. Therefore, an additional written inquiry from the job contractor to its employer-client regarding U.S. worker displacements would be redundant.

Employers make the required attestation regarding non-displacement of U.S. workers when signing ETA Form 9142 at Appendix B.1, through Item B.8. As described in the paragraph above, the employer-client's Item B.8 attestation renders the Item B.14(i) attestation, describing a job contractor's written inquiry to its employer-client regarding displacement, redundant. Also, the job contractor and employer-client both attest through the Item B.14(ii) that all worksites are listed on the ETA Form 9142.

April 4, 2011

• When a job contractor intends to file an Application for Temporary Employment Certification as a joint employer with its employer-client, what must the job contractor submit to the NPC in order to file a complete application?

A job contractor that is filing as a joint employer with its employer-client must submit the following to the NPC:

- A completed *Application for Temporary Employment Certification*, ETA Form 9142, that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the actual worksite), in the attachment (see below);
 - Section B (Temporary Need Information), Item 9 (Statement of Temporary Need), must contain information reflecting each joint employer's individual temporary need, described separately, and identifying the joint employment relationship;
 - Section C (Employer Information) and Section D (Employer Point of Contact Information) should contain only job contractor information;
 - In the field within Section C for "Type of employer application", "H-2A Labor Contractor or Job Contractor" should be selected; and
 - In Section F (Job Offer Information), subsection c (Place of Employment), the actual worksite or multiple worksites within an area of intended employment where the labor or services will be performed and the name of the employer who owns or controls each worksite should be identified.
- An attachment containing the employer-client's name, mailing address, and total worker positions needed and a description of the employment relationship between the joint employers;
- One Appendix B.1, bearing the original signature of the job contractor;
- One Appendix B.1, bearing the original signature of the employer-client;
- A recruitment report bearing both joint employers' signatures; and
- The contract or agreement establishing the employers' relationship related to the workers sought.

The information and documentation described above is necessary for the Department to appropriately evaluate an Application for Temporary Employment Certification for joint employment. A job contractor who submits an application without this basic information or documentation will receive a Request for Further Information (RFI) requesting this basic information for review. Failure to provide this basic information will result in denial of the application. Also, submitting an application identifying more than one employer-client will result in denial of the application.

By signing Appendix B.1, each employer independently attests to the conditions of

employment required of employers participating in the H-2B program and assumes full responsibility for the accuracy of the representations made in the application. Also, each employer is individually responsible for complying with the document retention provisions contained in the 2008 H-2B Final Rule and providing such documentation in the event of an RFI, an audit examination, or investigation.

April 4, 2011

• When a job contractor files an Application for Temporary Employment Certification as a joint employer with its employer-client, will the job contractor or the employer-client receive the certification if the application is approved?

If an application for joint employers is approved, the NPC will issue one certification and send it to the job contractor named in Section C of the ETA Form 9142. In order to ensure notice to both employers, a courtesy copy of the certification cover letter will be sent to the employer-client using the mailing address information provided in the attachment to the ETA Form 9142.

When submitting a certified Application for Employment Certification to U.S. Citizenship and Immigration Services, the job contractor should submit the complete ETA Form 9142 and both originally signed Appendix B.1 forms.

April 4, 2011