

March 29, 2005

MEMORANDUM FOR: EMILY STOVER DeROCCO
Assistant Secretary for
Employment and Training



FROM: ELLIOT P. LEWIS
Assistant Inspector General
for Audit

SUBJECT: The San Francisco Regional Office May Be Certifying
Inaccurate, Deficient, or Possibly Fraudulent Applications for
Foreign Labor Certification
Management Letter Report No. 06-05-001-03-321

SUMMARY

The Employment and Training Administration's (ETA) San Francisco Regional Office (SFRO) may be certifying inaccurate, deficient, or possibly fraudulent Foreign Labor Certification (FLC) applications despite warnings from the State of California (CA), Employment Development Department's (EDD) Investigation Division. The State provided these warnings via "green sheet" reports that accompany the employer's application package when submitted to the SFRO.

We reviewed a sample of 35 applications that were submitted from CA EDD to SFRO with "green sheets." We found:

- No "green sheets" at SFRO;
- All 35 application files were purged, leaving limited documentation;
- SFRO's FLC database indicated;
 - All 35 were certified; yet
 - 18 had no record of any questions being raised;
 - 13 were remanded back to the State for further review; with
 - 8 subsequently issued a Notice of Finding (NOF);
 - 5 had no other action; and
 - 4 had NOFs prepared.

BACKGROUND

Each State Workforce Agency (SWA) in the U.S. has an FLC unit that currently reviews all FLC applications before the application packages are forwarded to the ETA regional offices for processing. If the State FLC unit has concerns regarding an application, the

State makes those concerns known when the application package is forwarded to the ETA regional office.

The CA EDD has an Investigation Division, outside the FLC department, that reviews and investigates suspect applications beyond what is typically done by the State's FLC staff. When issues regarding the application's authenticity are found, the Investigation Division flags the application with a "green sheet," which represents the result of an independent, thorough investigation of the application's information including: verifying the validity of the job offer, the existence of the employer, the employer's ability to pay the prevailing wage offered, and the alien's qualifications for the job offered. The Investigation Division forwards the "green sheet" to the EDD FLC department, which then forwards the application package, with "green sheet" attached, to the SFRO.

During the Office of Inspector General's (OIG) recent audit¹ of applications submitted under the provisions of Section 245(i) of the Immigration and Nationality Act, we were informed that the SFRO did not consider warnings, notification of potential fraud, or other application deficiencies pointed out via the "green sheets." Further, we were informed the priority was to certify or process as many applications as possible to reduce the backlog and meet regional goals or quotas, with little or no regard to warnings of abuse, potential fraud, or application deficiencies.

OBJECTIVE, SCOPE, AND METHODOLOGY

Our objectives were to determine:

- 1) if the SFRO certified applications with known discrepancies, identified by "green sheet" reports, and
- 2) if the appropriate guidelines are being followed in the review and certification of applications for permanent foreign labor certification.

We requested the CA EDD Investigation Division to identify FLC applications where "green sheet" reports had been prepared from January 1, 2000, to December 31, 2003. The division identified 105 "green sheet" reports prepared from September 3, 1999, through April 4, 2003. There were no distinguishing factors between the applications, and an insufficient number to warrant scientific sampling, so we accepted the universe and judgmentally selected 35 applications for review by selecting every third application.

We conducted tests to determine the "green sheets" existence, content, dissemination, and impact on the final decision to certify or deny applications.

¹ Audit Report No. 06-04-004-03-321, "Restoring Section 245(i) of the Immigration and Nationality Act Created a Flood of Poor Quality Foreign Labor Certification Applications Predominantly for Aliens Without Legal Work Status," dated September 30, 2004.

Our audit work also involved:

- gaining an understanding of the EDD Investigation Division’s process and overall contribution to the permanent FLC program;
- determining the working relationship between the EDD Investigation Division and the EDD FLC department; and
- determining what type of information the EDD Investigation Division develops and provides to the SFRO so an informed decision can be rendered.

We did not evaluate or test management controls over FLC application processing at either the CA EDD FLC department or the SFRO. This report is not intended to provide any assurance over those controls.

We conducted our audit in accordance with Government Auditing Standards for performance audits.

ISSUE: There is no evidence that SFRO considered the CA EDD Investigation Division’s “green sheet” information in its decision to approve FLC applications.

We reviewed a sample of 35 applications for which CA EDD had copies of “green sheets” prepared; however, we did not find any “green sheets” with these applications at the SFRO. The SFRO’s FLC database identified the following actions:

35	100%	All were certified.
18	(51%)	Certified without any record of a NOF or remand issued, or any questions raised prior to certification.
13	(37%)	Remanded back to the State; <ul style="list-style-type: none">• 8 subsequently issued a NOF, and• 5 had no other action.
4	(11%)	NOFs prepared.

The absence of “green sheets” in the application files at the SFRO may be due to the purging of the files after final action at SFRO, as discussed in item two of the following issue. While their absence in the files at SFRO does not prove that they were ignored, an indicator that “green sheet” information was probably ignored is that 13 applications were certified the same day they were assigned to one analyst, and 3 were certified the day following assignment to analyst. It would appear impracticable that “green sheet” issues could be resolved in 1 or 2 days, because analysts would have to investigate the issues with the employers, other agencies, and document the results.

Issues identified on the "green sheets" included:

- employers were inactive, or out of business;
- employers were not *bona fide* employers;
- aliens did not meet job requirements;
- alien's address and business address were the same;
- jobs were part time;
- employer does not pay prevailing wage; and
- alien was laid off and drawing unemployment insurance.

The issues identified on the "green sheets" were serious enough to warrant issuance of a remand or NOFs, yet, only half had any such action. Also, without copies of the remands or NOFs, it is unclear whether the NOF's or remands identified in the database addressed the issues identified on the "green sheets."

ISSUE: There is insufficient evidence to make a definitive determination that the SFRO followed appropriate guidelines in reviewing and certifying FLC applications.

According to 20 CFR Part 656.24, Certifying Officers (COs) must make their determination to grant or deny requests for labor certification based on the employer's compliance with regulations, and ensuring that there are no detrimental effects on U.S. workers. While performing our review we discovered:

- 1) The SFRO CO did not review his analysts' work to ensure that only *bona fide* applications were certified.
- 2) Application files were purged of critical documents that should have been considered in the analysts' decisions to certify or deny the application.
- 3) The SFRO's emphasis is on reducing the FLC application backlog, opposed to certifying only *bona fide* applications.

1) The SFRO CO does not review his analysts' work to ensure that only *bona fide* applications are certified.

Although the EDD Investigation Division has been submitting "green sheets" for several years, the SFRO CO indicated he neither had knowledge of, nor had he ever seen, a "green sheet." He has been in the CO position since November 2000. The CO informed us that he does not review permanent FLC applications, and is not involved on a daily basis. He stated, "I walk behind analysts and look at a small number of cases by performing cursory review."

The SFRO FLC analysts make all decisions on the applications. They can remand back to the State, issue a NOF, certify, or deny an application without any CO intervention or review. Their decision is final.

When questioned why the 35 applications reviewed were certified when they contained obvious irregularities, the CO stated, "Each application was processed as usual and there was no evidence for denial. If the State did not identify issues on the transmittal form the application was appropriate for certification."

Regardless of whether application issues were identified on the transmittal form, issues identified on the "green sheets" should have been considered. When the State issues "green sheets," they are an integral part of the application package. Analysts had to have noticed the green forms identifying the State's issues with the application.

According to CA EDD Investigation Division staff, the SFRO CO has maintained that he could not, or perhaps would not, stop processing applications that are suspect of fraud, allowing his staff to ignore indications of fraud, unless he had direction to do so from an authorized person, such as a U.S. Attorney or judge. The SFRO CO also stated this position to OIG staff, even though the regulation at 20 CFR,656.31² allows exception to the stance taken by the CO as follows:

(a) If **possible fraud or willful misrepresentation** involving a labor certification is discovered **prior** to a final labor certification determination, the Certifying Officer **shall** refer the matter to the INS [now Bureau of Citizenship and Immigration Services (BCIS)] for investigation, shall notify the employer in writing, and shall send a copy of the notification to the alien, and to the Department of Labor's Office of Inspector General. If 90 days pass without the filing of a criminal indictment or information, the Certifying Officer shall continue to process the application. [Emphasis added.]

2) Application files were purged of critical documents that should have been considered in the analysts' decision to certify or deny the application.

Once the application has been certified, the file is purged of critical documents. According to the CO,³ a purged file should contain the 750 application parts A & B, amendments and/or attachments, notice/posting, advertisement, contract and documentation, summary of employer's recruitment results (less resumes), ETA 4748, final determination, schedule B waiver, and the G-28.

We determined that the EDD FLC department receives "green sheets" from the EDD Investigation Division and forwards them along with the application files to the SFRO. We reviewed the application files at the SFRO to determine if the final certification/denial decision was adequately documented and supported.

² Title 20, Chapter V – Employment and Training Administration, Department of Labor, Part 656 – Labor Certification Process For Permanent Employment of Aliens in the United States, subsection 31 "Labor certification applications involving fraud or willful misrepresentation."

³ The CO stated he has instructed his staff to follow U.S. Department of Labor, ETA Field Memorandum No. 21-93, dated January 6, 1993, regarding purging and retention of documents.

We did not find any “green sheets” in the purged application files. Also, missing from most of the files were records of remands, NOFs, related responses or rebuttals to NOFs. It is understood that the SFRO was operating according to the guidance it was provided.

Our audit included a review of SFRO’s FLC database. This database is intended to record each action taken on applications. For the 35 applications reviewed we found:

- 18 applications were certified without any record of a NOF or remand issued, or any questions raised prior to certification;
- 13 applications were remanded back to the state for further review;
 - 8 subsequently issued a NOF;
 - 5 had no other action; and
- 4 applications had NOF’s prepared.

Without the record of the remands, NOFs, and rebuttals to the NOFs, it is impossible to tell what issues the SFRO had with the applications, what the employer responded (if he/she responded), and on what information the certification decision was based. Without the documents related to the actions noted above, there is no way to determine if questions that were raised were properly resolved.

3) The SFRO’s emphasis is on reducing the FLC application backlog as opposed to certifying only *bona fide* applications.

Under the provisions of Section 245(i) in 2001, ETA was inundated with permanent foreign labor applications. At the end of FY 2001, the system was backlogged with about 325,000 applications nationwide. The last estimate of the backlog was approximately 315,000 as of May 2004. At the end of FY 2002, when many of the sampled applications were certified, SFRO’s backlog was over 70,000 applications.

According to the SFRO CO, “[a] quota system has been in effect since 2000. The premise is to get rid of the backlog.” Further, the CO stated, “The quota system is written into each analyst’s performance standards annually.” We concluded that the quota system may be a factor in analysts disregarding warnings of potential abuse and/or fraud in order to meet “quotas.” Due to emphasis to reduce the regional application backlog, analysts are penalized for taking “actions,” which could include NOFs.

The Division of Foreign Labor Certification has assured OIG that it neither established nor condoned any quota system. They do recognize that the Regional Administrators established “production goals.” With major reorganization of the Division of FLC imminent, the regional FLC offices will disappear and the backlog processing will be consolidated into two centers, whose directors will report directly to the FLC Chief.

CONCLUSION

The SFRO may be certifying inaccurate, deficient, or possibly fraudulent applications. There is insufficient evidence to make a definitive determination. There is no evidence that the SFRO analysts are heeding warnings of potential abuse and/or fraud. Additionally, the SFRO FLC unit appears to be working under a quota system, driving them to ignore questionable applications in order to achieve numerical results, with little or no management oversight.

RESULT OF OIG AND FLC DIVISION CHIEF BRIEFING

After we briefed the FLC Chief of the issues in this report, the SFRO CO instructed his staff to forward him all applications containing “green sheets.”

RECOMMENDATIONS

We recommend the Assistant Secretary for Employment and Training:

1. Implement oversight at the SFRO to ensure FLC applications are processed in accordance with established rules and regulations.⁴ This oversight should include referrals of potential fraud cases to the BCIS and the OIG.
2. Revise guidance directing what documentation must be retained in the application file to support final determinations.⁵ This should include remands, NOFs, responses, rebuttals, “green sheets,” and other documents related to questions or irregularities regarding applications.
3. Direct the immediate discontinuance of any quota or production goal system that may result in questionable applications being approved in order to meet such quota or goals.

ETA’s Response:

Recommendation 1: ETA indicated that it has reengineered the national foreign labor certification programs, and now the San Francisco Regional Certifying Officer directly reports to the Program Manager of the Chicago National Processing Center, ensuring a closer connection between national office policy guidance and direct implementation on the part of field staff. The San Francisco Regional Certifying Officer has been directed to ensure all foreign labor certification staff is familiar with fraud referral protocols and require strict compliance.

ETA will take recommendation 2 under consideration.

Recommendation 3: The ETA contends that the national office has not established any quota system for processing foreign labor certification. However, it maintains that it is

⁴ Title 20 CFR Part 656

⁵ Guidance currently contained in ETA FM 21-93

possible to establish a production environment without loosening review standards. Also, ETA reconfirmed its internal procedures with the San Francisco Regional Office that any “green sheets” or similar information received from a State Workforce Agency would be fully and completely acted upon.

Auditor’s Conclusions:

ETA’s reengineering the national foreign labor certification programs is a major step in improving the connection between field staff and national office policy guidance. This recommendation is closed.

We still recommend that retaining documentation pertinent to the certification decision is vital, especially in light of the new random audit process under the PERM system that will be approving applications electronically. We will leave this recommendation unresolved pending ETA’s “consideration” of this recommendation.

While the ETA national office may not have had an official quota system, regional staff was adamant that they were pressured under a quota system. This situation should be resolved with the Regional Certifying Officers now reporting directly to the Program Managers of the National Processing Centers, who in turn report directly to the FLC Chief. This recommendation is closed.


ETA' s RESPONSE TO DRAFT REPORT



MAR 21 2005

MAR 16 2005

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General
for Audit

FROM: EMILY STOVER DeROCCO 

SUBJECT: Response to Draft Management Letter
Report No. 06-05-001-03-321

Thank you for the recent draft report of the Office of Inspector General (OIG) titled, "The San Francisco Regional Office May Be Certifying Inaccurate, Deficient, or Possibly Fraudulent Applications for Foreign Labor Certification." The Employment and Training Administration (ETA) appreciates the opportunity to comment on the draft report and, with respect to your three recommendations, we offer the following information.

First, you recommend we implement oversight at the San Francisco Regional Office to ensure foreign labor certification applications are processed in accordance with established rules and regulations, including the referral of potential fraud cases.

ETA has always required, and will continue to require, that foreign labor certification applications be processed in compliance with all applicable statutes, regulations, and policies. As part of ETA's national re-engineering of the foreign labor certification programs, the San Francisco Regional Certifying Officer now reports directly to the Program Manager of the Chicago National Processing Center. This is a change from the previous reporting to the ETA Regional Administrator. This direct program linkage will ensure a closer connection between national office policy guidance and direct implementation on the part of field staff. The San Francisco Regional Certifying Officer has been directed to ensure all foreign labor certification staff are familiar with fraud referral protocols and to require strict compliance.

Second, you recommend that we revise guidance as to what documentation must be retained in archived files. ETA's guidance on this matter was reviewed and cleared by the Solicitor's Office and meets statutory and regulatory guidelines. We will take under consideration your recommendation to revisit this requirement to include additional materials.

Third, you recommend we direct the immediate discontinuance of any quota or production goal system that may result in questionable applications being approved in order to meet such requirements.

The Chief of the Division of Foreign Labor Certification fully discussed with your staff that there are no such quotas in place or required by the national program office. Further, ETA does not agree that establishing a production environment equates to a loosening of review standards such that questionable applications may be approved. Rather, we believe this is a training and staff compliance issue which rests outside of a processing environment. The San Francisco Regional Certifying Officer has been formally apprised of this situation (at the time it was brought to the attention of the Chief of the Division of Foreign Labor Certification) and internal procedures re-confirmed that any "green sheets" or similar information received from a State Workforce Agency would be fully and completely acted upon.

We look forward to continuing our productive relationship. If you have any questions regarding our response, please do not hesitate to contact me at 693-2700.