## Appendix D

## OFLC Response to Draft Report

**U.S. Department of Labor**

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General

FROM: JANE OATES
Assistant Secretary

SUBJECT: Response to the Office of the Inspector General's Audit of the Office of Foreign Labor Certification and Wage and Hour Division Suspension and Debarment Authority, Draft Audit Report 05-10-002-03-021

Date: September 24, 2010

The Employment and Training Administration (ETA) appreciates the opportunity to provide a response to the Office of the Inspector General's (OIG) draft audit report on the Office of Foreign Labor Certification's (OFLC) and the Wage and Hour Division's (WHD) use of suspension and debarment authority in its labor certification programs. We appreciate the time and effort OIG staff spent examining labor certification applications and labor condition applications and the professional and collaborative manner in which the audit was conducted with the OFLC staff. Our comments are only applicable to the ETA findings.

**Recommendation 1:** Implement procedures and controls to assure that OFLC and WHD use suspension when appropriate and assess and document the appropriateness of debarring each individual convicted of an FLC violation resulting from an OIG investigation.

**ETA Response:** While in principle and practice we fully agree with the recommendation, we have concerns about the incorrect assumptions made by the audit that every individual convicted of an immigration violation (FLC violation) is debarrable in OFLC's programs. Specifically, the report assumes that "[v]iolations of the [Immigration and Nationality Act], including convictions of fraud related to applications for the four types of employment visas, serve as the basis for debarments by the Program Office…." Unfortunately, this is not factually accurate with respect to any debarment authority, whether it comes from the INA or the Department's implementing regulations. Our understanding is that violations of the Immigration and Nationality Act (INA) by an OFLC certified entity, attorney, agent or employee does not always necessarily correlate to an actionable offense which permits debarment under OFLC regulations. The current regulations contain differing standards for debarrable offenses; however one generalization that can be made is that, at a minimum, the offense must relate to the labor certification programs (in fact, the program in which the

debarment is sought) and involve fraud, misrepresentation, or a flagrant disregard for the obligations of the program. Our internal review produced an understanding that In fact, very few of the individuals referred were debarrable under OFLC regulations, because their convictions or other violations were not directly related to OFLC programs. To further the analysis, when the violations did directly relate to OFLC programs, they may not be the type of violation that leads to debarment under the relevant regulation, or are violations too old to permit debarment as OFLC did not have debarment authority under older regulations. Of the 178 names cited, our review found many are convictions for visa marriage fraud, harboring and other human trafficking offenses, and other visa fraud on which OFLC, based upon our understanding, has no legal authority to debar.

In addition, even when the conviction is for an offense for which OFLC may debar, it may not be actionable given the types and dates of violations. For example, Robert J. Mahood, was sentenced to 18 months' imprisonment and 36 years probation for his involvement in an immigration fraud scheme involving the submission of over 1,400 fraudulent labor certifications. The labor certifications in question were filed prior to his indictment in 2004, at a time when OFLC had no debarment authority in the permanent labor certification program. Accordingly, we could not legally debar him from the program.

We note a factual inaccuracy: That an individual debarred from filing H-1B visa applications would not be prohibited from filing applications in the Permanent Labor Certification Program (PERM) or other visa programs. The INA at 8 U.S.C. 212(n)(5)(e)(ii) and OFLC regulations at 20 CFR 655.855(c) and (d) specifically prohibit individuals and entities debarred by WHD from participating in any visa program (immigrant or nonimmigrant) for the debarred period. In addition, it is WHD, not OFLC, which has the authority to debar in this program. Therefore, the paragraph on page 4 of the report that states that an individual debarred in H-1B is not prohibited from filing applications in other visa programs is not accurate based upon our understanding of the applicable law and regulation.

**Recommendation 2:** Implement procedures and controls to assure that OFLC and WHD report FLC suspensions and debarments to designated Department personnel for inclusion on the government–wide exclusion system.

**ETA Response:** We respectfully disagree with this recommendation for the following reason. Historically, our understanding has been that OFLC cannot refer to the government-wide exclusion system created by Executive Order 12549 (February 12, 1986), as amended by Executive Order 12689 (August 16, 1989). This non-referral is based upon the understanding that the transactions covered by those orders, and the implementing Department regulations, do not include OFLC granted labor certifications. This was mentioned during the audit process and discussed at the informal briefing. We believe there are differing

legal opinions on the utilization of the exclusion system and that difference must be formally resolved in order to definitively answer this question prior to a finding of this nature.

**Recommendation 3:** Strengthen FLC application processing controls to ensure the detection and resolution of applications with invalid EINs.

**ETA Response**: OFLC staffs continually examine the need for improvements to program review controls, and appreciates the OIG bringing this to our attention even though it was not included in the audit. Invalid EINs are the primary reason for the denial of an LCA. LCA or H-1B invalid EINs is an example of an obvious error and OFLC believes it has sound statutory authority for issuing denials. While it is less clear that we have the authority to do so in other FLC programs, in those programs where we identify an invalid EIN, internal procedures are employed to verify the validity of the EIN.

We note that OIG reviewed a sample of published EINs on the web site of the Internal Revenue Service (IRS) and found a total of "potentially" 99 invalid EINs out of a sample of more than 306,000 applications. We strongly note the fact that this error rate is extremely low but will continue to use internal systems to improve.

Last, OFLC has implemented additional EIN controls in the LCA program in the iCERT system, with further implementation across programs to follow.

Thank you for the opportunity to comment on this report.