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Office of Inspector General—Office of Audit

EMPLOYMENT AND TRAINING ADMINISTRATION

MANAGEMENT OF H-2B PROGRAM NEEDS TO BE STRENGTHENED TO ENSURE ADEQUATE PROTECTIONS FOR U.S. WORKERS

Date Issued: September 28, 2012
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U.S. Department of Labor
Office of Inspector General
Office of Audit

BRIEFLY…

Highlights of Report Number 06-12-001-03-321, issued to the Assistant Secretary for Employment and Training.

WHY READ THE REPORT

The Office of Inspector General (OIG) audited the Employment and Training Administration's (ETA) role in the H-2B visa program. This audit expanded the work we completed in our previous report issued September 30, 2011, which focused on four H-2B forestry employers in Oregon. In that report, we recommended that ETA develop and implement procedures to strengthen their application review and post-adjudication process because of weaknesses we noted with ETA's employer validation and prevailing wage submissions on their H-2B application.

The H-2B non-immigrant program permitted employers to hire foreign workers to enter the U.S. to perform temporary non-agricultural services or labor on a one-time, seasonal, peakload, or intermittent basis. Employers submitted H-2B applications to the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) within ETA. To obtain H-2B certification and comply with employment protections, employers self-attested that U.S workers capable of performing the job were not available and that the employment of foreign workers would not adversely affect the wages and working conditions of similarly employed U.S. workers.

WHY OIG CONDUCTED THE AUDIT

We conducted our audit to answer the question:

> Did ETA's management of the H-2B program ensure adequate protections for U.S. workers?

Our audit work was conducted at the ETA Headquarters' Office of Foreign Labor Certification, the Chicago National Processing Center, and onsite visits to 31 of 33 employers from Texas, Pennsylvania, Maryland, North Carolina, California, and South Dakota.

READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency response, go to: http://www.oig.dol.gov/public/reports/oa/2012/06-12-001-03-321.pdf.

September 2012

MANAGEMENT OF H-2B PROGRAM NEEDS TO BE STRENGTHENED TO ENSURE ADEQUATE PROTECTIONS FOR U.S. WORKERS

WHAT OIG FOUND

The OIG found ETA's management of the H-2B program needs to be strengthened to ensure adequate protections for U.S. workers. Our audit revealed that 27 of the 33 employers could not support attestations made on their applications. Our findings in employment attestations, immigration, and pre-filing recruitment indicated systemic weaknesses stemming from ETA's post-adjudication audit process and the H-2B regulations' self-attestation based model. These systemic weaknesses increased the risk of unsubstantiated employer attestations and jeopardized the protections afforded by the program to U.S. workers.

Specifically, ETA: (1) did not request necessary source documents when conducting its post-adjudication audits; (2) did not validate foreign worker employment eligibility; (3) performed most of its post-adjudication audits six months after the H-2B employment period ended; and (4) did not request supporting documentation to be submitted at the time of application. These issues allowed U.S. employers to not recruit and employ qualified U.S. workers, thus depriving domestic workers of employment opportunities.

WHAT OIG RECOMMENDED

The OIG recommended ETA: 1) develop an alternative methodology when conducting its post-adjudication audits; 2) collaborate with Department of Homeland Security (DHS) to explore ways for ETA to review U.S. Citizenship and Immigration Services documents during ETA post-adjudication audits; 3) begin post-adjudication audits no later than 120 days into the approved employment period of the selected application and complete within 70 days; and 4) continue pursuing regulatory action and explore other ways to ensure the integrity of the program including, but not limited to, legislative changes designed to expand ETA's pre-approval validation authority.

ETA generally agreed with three of the four recommendations. Based on ETA's response to our second and fourth recommendations, we modified them to emphasize that ETA should seek regulatory changes and take other actions to ensure the integrity of the H-2B program.

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U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210

September 28, 2012

Assistant Inspector General's Report

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This audit expanded the work we completed in our previous report issued September 30, 2011, which was focused on four H-2B forestry employers in Oregon. In the 2011 report, we found program design issues hampered the Employment and Training Administration's (ETA) ability to ensure that U.S. workers were provided the protections afforded by the H-2B program. In its initial H-2B application review, ETA did not validate that the petitioning employer was a bonafide business and did not independently validate that the employer submitted the proper prevailing wage on their H-2B application. Furthermore, during its post-adjudication audits, ETA did not independently verify the names listed on the employers' recruitment reports to determine if those individuals actually applied for employment. One of our recommendations was for ETA to develop and implement procedures to strengthen their application review and post-adjudication process.

The H-2B non-immigrant program permitted employers to hire foreign workers to enter the U.S. to perform temporary non-agricultural services or labor on a one-time, seasonal, peakload, or intermittent basis. Employers submitted H-2B applications to the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) within ETA. To obtain H-2B certification and comply with employment protections, employers self-attested that U.S. workers capable of performing the job were not available and that the employment of foreign workers would not adversely affect the wages and working conditions of similarly employed U.S. workers.

ETA said it reviewed applications for any errors that would prevent certification and for compliance with the certification criteria. If the application appeared to be error free, ETA did not request supporting documentation and certified or partially certified[1] the application. If ETA determined the application failed to comply with one or more of the criteria for certification, the agency issued a written Request for Further Information (RFI) to the employer within seven calendar days of receipt of the application. Based on the response to the RFI, ETA certified, partially certified, issued a second RFI, or denied

[1] Partially certified applications were certified applications for which ETA had made modifications. For example, ETA reduced the number of requested workers because the employer had reported hiring U.S. workers.

the application.

Effective October 2009, ETA began conducting post-adjudication audits within its sole discretion and authority under 20 CFR 655.24 to verify the accuracy of the applications and ensure integrity within the H-2B program. Typically, these audits began 6 months after the end of the approved H-2B employment period and ETA worked to complete these audits within 120 days.

Because self-attestation carries the inherent risk that reported information is not accurate or supported, we assessed whether the employers could document adherence to their self-attestations made on their applications so that we could answer the following question:

> Did ETA's management of the H-2B program provide adequate protections for U.S. workers?

In order to test ETA's management of the H-2B program, we randomly selected 33 certified or partially certified H-2B employer applications between October 1, 2010, and September 30, 2011, from 6 states.[2] We interviewed ETA personnel and reviewed H-2B application and post-adjudication audit procedures conducted by ETA's Chicago National Processing Center (CNPC). We reviewed the 33 H-2B applications with supporting documentation, and conducted our testing in the field, to determine if the employers could support the attestations made on their respective applications and if ETA adhered to current program regulations.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

RESULTS IN BRIEF

ETA's management of the H-2B program needs to be strengthened to ensure adequate protections for U.S. workers. Our audit revealed that 27 of the 33 employers could not support attestations made on their applications. Our findings in employment attestations, immigration, and pre-filing recruitment indicated systemic weaknesses stemming from ETA's post-adjudication audit process and the H-2B regulations' self-attestation based model. These systemic weaknesses increased the risk of unsubstantiated employer attestations and jeopardized the protections afforded by the program to U.S. workers.

[2] During our selection of the 33 employers, we substituted 7 additional randomly selected employers because our Office of Labor Racketeering and Fraud Investigations had open investigations on these employers or their relevant attorneys/agents.

ETA monitored the validity of employers' self-attestations through post-adjudication audits conducted from the CNPC. Those audits primarily focused on the areas of pre-filing recruitment, payroll, and employer temporary need. During our audit, we conducted onsite employer visits, interviewed employers, and reviewed source documentation for pre-filing recruitment, immigration, and employment areas. In contrast to ETA's post-adjudication audit process, our audit approach enabled us to identify certain employment, immigration, and pre-filing recruitment discrepancies that ETA would be unable to identify given their current process. For example, ETA did not request U.S. Citizenship and Immigration Services (USCIS) documentation from employers relevant to their H-2B workers. Specifically, ETA did not verify the employment eligibility of foreign workers brought into the country under the H-2B program. The issues identified in our audit, employers not abiding by attestations on their H-2B applications, abusing foreign workers, allowing foreign labor with unknown legal status into the country, and the self-attestation model, provided incentives for U.S. employers to not recruit and employ qualified U.S. workers, thus depriving domestic workers of employment opportunities.

Furthermore, ETA's post-adjudication audit approach did not allow for corrective action to be made by the employer during the employment period since audits typically began six months after the employment period ended. This practice allowed the potential for an employer to file and receive a new certification for a subsequent application before ETA rendered a decision of compliance/non-compliance for the audited application.

Under current regulations, the H-2B application process is an employer attestation-based model that did not permit meaningful validation before the application is approved. As such, no source documentation regarding the employer's recruitment efforts, such as the State Workforce Agency (SWA) job order or newspaper advertisements, are required at the time of application. ETA only requested pre-filing recruitment information through an RFI or during their post-adjudication audits. ETA issued a Final Rule, which replaced the self-attestation model with a compliance-based format. This change emphasized the review of documentation provided to ETA in advance of the certification determination. However, this Final Rule is being challenged in federal court. Although ETA is limited by the H-2B regulations, the agency must do more to ensure the integrity of the program.

We recommend ETA develop an alternative methodology when conducting its post-adjudication audits, including: requesting payroll source documentation; collaborating with Department of Homeland Security (DHS) to explore ways for ETA to review USCIS documents during their post-adjudication audits; beginning post-adjudication audits no later than 120 days into the approved employment period of the selected application and completing them within 70 days, not only to deter potential fraud within the program, but also to allow the employer to take corrective action for any deficiencies identified; and continue to pursue regulatory action and explore other ways to ensure the integrity of the program including, but not limited to, legislative changes designed to expand ETA's pre-approval validation authority and discourage the submission of inaccurate and potentially fraudulent information.

ETA'S RESPONSE and OIG CONCLUSION

ETA stated our overall finding was a result of the 2008 Final Rule design flaws and not a result of ETA's inadequate management of the H-2B program. Throughout the report, we described ETA's current procedures and efforts in administering their role in the H-2B program and stated more needs to be performed to ensure adequate protections. We acknowledged the limited abilities of ETA under the current 2008 Final Rule, specifically that current regulations do not permit meaningful validation of pre-filing recruitment documentation at the time of application. However, three of the four weaknesses identified in the report are related to ETA's post-adjudication process and not subject to regulatory restrictions. As such, ETA can initiate modifications to their own post-adjudication process given our current recommendations with no regulatory changes needed, and we feel our recommendations can be implemented without need for additional resources.

ETA stated that OFLC seeks to strike a balance between not overburdening employers by requiring voluminous documentation and requesting documentation to verify an employer's compliance with regulations. Furthermore, ETA stated they revised their NOAE in May 2012 and are requesting payroll source documentation covering three discrete months during the certified period. ETA believed this change in procedure provides the OFLC with adequate source documentation necessary to make an initial determination as to whether employers are meeting their employment and payroll obligations under their certified H-2B application. However, ETA did not disclose nor identify the types of payroll source documentation being requested. ETA needs to request payroll documentation similar to what we reviewed during our audit to ensure employers are properly paying their H-2B workers. If ETA were to follow our audit approach, this would provide the agency a more focused and selective request of payroll documentation minimizing the amount of paperwork requested from the employer and requiring less time and staffing resources for their post-adjudication audits. Furthermore, we agree with ETA that the Wage and Hour Division has the authority to enforce the payroll obligations, therefore, we maintain ETA should refer any payroll non-compliance to Wage and Hour for corrective action.

Finally, ETA agreed in general to collaborate with DHS on information sharing and, in collaboration with the Department's Office of the Solicitor, ETA has initiated discussions with DHS to identify the types of nonimmigrant visa petition data that the OFLC could access to enhance its administration of the H-2B program.

ETA generally agreed with three of the four recommendations and has taken actions to implement them. Based on ETA's response, we have adjusted language in recommendations number two and four. ETA's response is included in its entirety in Appendix D.

RESULTS AND FINDINGS

Objective — Did ETA's management of the H-2B program provide adequate protections for U.S. workers?

ETA's management of the H-2B program needs to be strengthened to ensure adequate protections for U.S. workers.

Our audit revealed that 27 of the 33 employers could not support attestations made on their applications (see Exhibit 1). Our findings in employment attestations, immigration, and pre-filing recruitment indicated systemic weaknesses stemming from ETA's post-adjudication audit process and the H-2B regulations' self-attestation based model. Specifically, ETA: (1) did not request necessary source documents when conducting their post-adjudication audits; (2) lacked a crucial review step in their post-adjudication process (i.e., did not validate foreign worker employment eligibility); (3) performed most of its post-adjudication audits six months after the H-2B employment period ended (in some cases, employers had subsequent applications approved before the post-adjudication process was completed); and (4) did not request support documentation to be submitted at the time of application. These systemic weaknesses increased the risk of unsubstantiated employer attestations and jeopardized the protections afforded by the program to U.S. workers.

ETA's Post-Adjudication Audit Process

ETA monitored the validity of employers' self-attestations through post-adjudication audits conducted by the CNPC within its sole discretion and authority under 20 CFR, Part 655.24. The regulations are silent on the specific documentation ETA can or cannot request. Given ETA's limited resources and efforts to ensure timely audits, ETA chose to primarily focus on the areas of pre-filing recruitment, payroll, and employer temporary need. We conducted onsite employer visits, interviewed employers, and requested source documentation for immigration, employment and pre-filing recruitment areas. Our audit approach enabled us to identify certain employment, immigration, and pre-filing recruitment discrepancies that ETA would be unable to identify given their current process based on the program's regulatory framework. Furthermore, ETA's post-adjudication audit approach did not allow for corrective action to be made by the employer during the employment period since audits typically began six months after the H-2B employment period ended, with a goal to complete within 120 days.

In May 2011, ETA created an Audit Integrity Team to focus on conducting post-adjudication audits. The team audited statistically random or targeted certified and partially certified H-2B applications and focused on substantiation of temporary need, recruitment efforts, and payroll.

For those H-2B applications selected for audit, ETA would send the employer a NOAE letter. This letter provided the requirement for responding to the notice and all requested documentation the employer had to submit to ETA within 21 days of the letter. If the

employer did not comply with the audit request, ETA required the employer to conduct supervised recruitment in future filings of H-2B applications or debarment. After ETA received the documents, it began its audit. If the employer did not provide all requested documentation or if ETA required further documents, ETA sent the employer a Request for Supplemental Information.

ETA advised us on August 28, 2012, after completing its audit, that it may issue a letter of compliance, a warning letter, a notice of supervised recruitment, or propose to debar the employer. ETA may impose a warning or supervised recruitment where an employer was found to have: (1) violated H-2B requirements, (2) made a material misrepresentation to DOL, (3) failed to adequately conduct recruitment activities, or (4) failed to comply with any H-2B requirements enumerated in 20 CFR 655, Subpart A. ETA told us it may debar an employer from the H-2B program if it is determined that the employer substantially violated a material term or condition of its temporary labor certification (i.e., employers paying workers an amount that was substantially lower than the prevailing wage, employers moving workers outside the certified area of intended employment, or not responding to the NOAE). Similarly, the agency may debar an agent or attorney if it is determined that the agent or attorney participated in, had knowledge of, or had reason to know of, the employer's substantial violation.

As of August 2, 2012, ETA had completed 378 of 661 post-adjudication audits and proposed to debar six employers from participation in the program. ETA's reason for proposing debarment for these six employers is that none of the six responded to the notification of audit. ETA did not identify any instances of noncompliance with attestations made on the employers' applications, but instead proposed to debar the employer for nonresponse.

- **Issues Identified in Employment Attestations**

We reviewed 33 H-2B applications and supporting documentation to determine if the employers could support the attestations made on their respective applications. We interviewed employers and reviewed supporting H-2B source documentation, including immigration and payroll documents. We identified 23 employers that did not abide by the employment attestations made on their H-2B applications.[3] Among the discrepancies impacting U.S. workers were: employers not properly paying their foreign workers (20 instances), employers not notifying ETA of foreign workers' early departure prior to the end of the employment period (11), employers working foreign workers outside of the approved work area (4), and employers advertising drug testing as a requirement but did not subject foreign workers to the test (3). See Exhibits 2 and 3 for the summary listings of employment attestation deficiencies identified for each of the employers.

ETA requested summary payroll documentation from employers to support they abided by the attestations made on their respective H-2B applications. Specifically, ETA stated they accepted summary monthly payroll records to support prevailing

[3] Some employers demonstrated more than one employment attestation deficiency.

wages were paid. As such, ETA's audits did not review source documentation to ensure hours worked were paid correctly or wages purported as paid were actually paid.

- Employer Payroll Issues

  - Fourteen of the 33 employers did not pay their H-2B workers the prevailing wage. The employers attested on their applications they would pay the prevailing wage. By not paying the prevailing wage, the employers did not comply with employment protections and ensure that the employment of foreign workers did not adversely affect the wages of similarly employed U.S workers. Examples included:

    One employer presented summary payroll documentation to us as proof it had paid prevailing wages. However, when asked for time sheets documenting hours worked to those found on the payroll summaries and copies of bank statements or cleared checks to verify wages actually paid, the employer then explained that the original documentation provided to us was inaccurate and had only shown what should have been paid. We then reviewed the source documentation and identified the employer had actually paid little more than half of the prevailing wages to its four foreign workers. This matter has been referred to the OIG Office of Labor Racketeering and Fraud Investigations (OLRFI) for possible criminal investigation.

    One employer attested to paying its foreign workers $10.79 per hour. However, when we reviewed the source payroll documentation, we determined the employer paid 6 of its 27 workers $10 instead of $10.79 per hour. The remaining 21 workers were paid the correct wage or more than the prevailing wage.

    One employer attested to paying its seven foreign workers $9.84 per hour. However, we found the employer did not pay the prevailing wage to two workers: one worker was paid $9.50 per hour, and the other was paid $9.00 per hour.

  - Two employers did not properly pay their foreign workers, including overtime pay in certain pay periods.

    One employer did not pay 7 foreign workers overtime, as the employer capped their hours at 40 hours per week. We reviewed the foreign workers' timesheets and compared them back to the payroll register. We identified the foreign workers worked over 40 hours; however, the payroll register showed they were only paid for 40 hours. In one case, a foreign worker worked 63 hours, but was still only paid for 40 hours. Employers attest they will abide by H-2B regulations in ensuring workers are paid for

all hours, including the appropriate premium overtime for hours greater than 40 hours in a week.

The other employer did not pay two of its four foreign workers the correct amounts. The payroll register showed the correct payroll totals; however, we reviewed the checks paid to the workers and the employer underpaid the workers by as much as $128. Additionally, one of the employees was not paid eight hours of overtime.

- One employer made unauthorized deductions from 22 of 28 foreign workers' pay. The employer deducted attorney fees and required the foreign workers to reimburse the employer for the newspaper advertisements related to their H-2B application, even though the employer attested on its application it would not seek or receive payment of any kind from employees for any activity related to obtaining labor certification.

- One employer advertised the correct prevailing wage; however, the payroll documentation showed the employer paid the foreign workers differently. The employer paid a base hourly wage, which was below the prevailing wage, but the employer paid bonuses to the foreign workers if they completed the job early. The base hourly wage plus the bonus payments increased the total wages significantly, sometimes doubling the advertised wage. However, the employer did not advertise the correct wage and bonus incentive. If potential U.S. applicants had known they would be paid twice the prevailing wage, some additional U.S. applicants might have applied for this job.

- One employer did not pay 4 of 15 foreign workers it brought into the country as the payroll documentation for these 4 workers did not contain any payroll amounts. Furthermore, the employer did not employ these workers for the month of March. We asked the employer why there was no March payroll, and the employer told us the foreign workers worked for another employer. This employer conveyed to us that it routinely shared its workers with other employers, and vice versa. Allowing foreign workers to work for another employer adversely affected the working conditions of similarly employed U.S. workers and potentially took job opportunities away from U.S. applicants.

- Employers Did Not Notify ETA of Foreign Workers' Early Departure

Employers attested on their applications that if an H-2B foreign worker leaves work prior to the end date of employment, the employers would notify ETA in writing no later than 48 hours after the employer discovers the separation. However, we found 11 employers had H-2B foreign workers who left early, but did not notify ETA. Because the employer did not notify ETA of the foreign

workers' departure, there was a possibility these foreign workers could have worked for another employer and taken away job opportunities from potential U.S. applicants.

- Foreign Workers Worked Outside of Approved Area

  Employers attested on their applications they would not place any H-2B workers outside the approved area of employment listed on the application. However, we found four employers had their H-2B foreign workers working outside their approved area. As such, it is possible these workers were underpaid because prevailing wages on the applications were only for the approved area of work and U.S. workers would not have been aware of the employment opportunities.

- Foreign Workers Not Subjected to Advertised Drug Testing

  Employers attested that the offered terms and conditions were not less favorable than those offered to foreign workers. We found three employers advertised drug testing as a requirement for employment by U.S. applicants. However, none of the three employers performed drug testing on their foreign workers. This requirement may have caused potential U.S. applicants not to apply for these jobs.

Utilizing ETA's current audit approach, these scenarios may not have been identified and the conditions would likely have continued as summary documentation is inherently incomplete and can be easily manipulated. Abuse of foreign workers in these manners undermines comparable U.S. workers' pay and, if not identified, provides a tangible incentive for H-2B employers to not recruit and employ U.S. workers. Furthermore, based on ETA's debarment criteria, we identified 16 separate employers from the 33 we reviewed who should be considered for debarment from future participation in the H-2B program. The names of these 16 employers will be referred to ETA.

- **Foreign Workers' Employment Eligibility Review Step Missing During ETA's Post-Adjudication Audits**

Once an employer's application had been selected for post-adjudication audit, ETA primarily focused its efforts on requesting and reviewing documentation supporting the employer's temporary need, payroll, and pre-filing recruitment efforts. However, ETA did not attempt to verify the employment eligibility of foreign workers brought into the country under the H-2B program, as the agency did not request immigration documentation of these workers and only requested the foreign workers' names and start and end dates for payroll purposes. ETA told us that issues related to employment eligibility verification and other non-immigrant forms and documentation were outside their jurisdiction and should be brought to the attention of DHS.

We requested USCIS documentation from employers relevant to their H-2B workers such as I-9s, I-129s, I-797s, [4] and copies of H-2B visas in an attempt to verify employment eligibility. We identified 15 employers who had issues with their immigration documentation, such as missing or incomplete forms. See Exhibit 4 for a summary of immigration deficiencies. Examples of immigration issues follow.

- Employers were required to complete an I-9 form for all newly hired employees to verify their identity and authorization to work in the United States. Six employers could not produce I-9 forms for their workers to help validate employment eligibility (no determination could be made showing the foreign workers had the legal status to work in the United States). For example, one employer did not have any I-9 forms for its 15 H-2B employees.

- Four employers brought their foreign workers into the country prior to their approved employment dates. Three of these employers had foreign workers who signed their I-9 forms prior to their H-2B visa issuance dates. Another employer had its foreign workers earn wages over a month prior to the approved employment period.

- One employer brought in two foreign workers who were not named on its I-129 petition to USCIS; thus, these workers were not approved to work in the U.S. for this employer under the H-2B program.

ETA requested a listing of all foreign workers, but did not request documentation to verify those workers existed and were in the country legally to work. The employers attested on their applications they would follow all Federal, State, and local laws. Employers were required to complete an I-9 for all newly hired employees to verify their identity and authorization to work in the United States; however, we talked to a USCIS employee and generally DHS did not verify employment eligibility of H-2B workers after they entered the country.

Allowing foreign workers into the U.S. during unapproved periods and permitting unapproved workers into the country may negatively impact comparable U.S. workers by reducing valid employment opportunities. These practices dis-incentivize H-2B employers from genuinely recruiting U.S. workers when they know foreign labor can be obtained during unapproved periods and legal work status is not verified.

- **Post-Adjudication Audits Were Not Timely**

ETA's post-adjudication audit approach did not allow for corrective action to be made by the employer during the H-2B employment period because ETA typically began its audits six months after the employment period ended and took up to 120 days to complete. At that point, the approved employment period had concluded and the foreign workers had returned home. This practice allowed the potential for an

[4] I-9 - Employment Eligibility Verification form; I-129 - Petition for a Nonimmigrant Worker; I-797 - Notice of Action

employer to file and receive a new certification for a subsequent application before ETA rendered a decision of compliance/non-compliance for the audited application. In some cases, these same foreign workers had already returned to the U.S. under a subsequent application for the same employer. Conducting post-adjudication audits in this manner provided no actual protections for U.S. workers as discrepancies in employing foreign workers may have already taken place and corresponding protections for U.S. workers had been nullified.

As an example, ETA completed a post-adjudication audit for an employer's FY 2010 application and issued a warning letter to the employer for hiring only 35 foreign workers when they were approved for 50 foreign workers. This same employer[5] once again requested and was approved for 50 workers for FY 2011, but only brought in 13 foreign workers, all of whom worked on the previous H-2B application. We identified the 2011 application was certified one day after ETA began its post-adjudication audit of the 2010 application. The warning letter had no effect on the employer's new H-2B submission and the employer still requested 50 workers, even though it did not have the temporary need for all 50 foreign workers.

ETA should begin its audits no later than 120 days into the approved employment period of the selected application. Beginning the audits in this manner allows the employer to bring in all foreign workers and sufficient documentation to support payroll disbursements would be available to perform a payroll review by ETA. This practice would allow ETA to not only deter potential fraud within the program, but also allow the employer to initiate corrective actions for deficiencies identified. Waiting to perform post-adjudication audits at the end of or even after the employment period provides no benefit. For example, during our employer reviews, we did not identify any instance where the employer began paying the prevailing wage and then decided to reduce the workers' pay later in the period. Instead, we found 14 employers not paying prevailing wages either during the initial payroll periods or not at all throughout the entire employment period. Conducting audits early in the approved employment period would allow ETA an opportunity to identify problems, if they existed, at a time when corrective actions can not only be made, but protections of both foreign and domestic workers can be asserted.

Current Regulations Do Not Permit Meaningful Validation of Pre-filing Recruitment Documentation at the Time of H-2B Application Submission

Under current regulations, Title 20, Code of Federal Regulations (20 CFR), Part 655, the H-2B application process is an employer attestation-based model that does not permit meaningful validation before the application is approved. As such, no source documentation regarding the employer's recruitment efforts, such as the State Workforce Agency (SWA) job order or newspaper advertisements, are required at the time of application. ETA only requests pre-filing recruitment information through an RFI or during their post-adjudication audits. During its proposed rulemaking to change the 2008 H-2B regulations, the Department stated that deferring many determinations of

[5] Selected as part of our sample.

program compliance until after an application has been adjudicated does not provide an adequate level of protection for U.S. workers.

According to 20 CFR, 655.15(b), employers were only required to attest on the H-2B application to having performed all required steps of the recruitment process as specified in this part, including the required SWA job order and the signed recruitment report. The recruitment report identified each recruitment source by name; the name and contact information of each U.S. worker who applied or was referred to the employer; the disposition of each worker; and if applicable, the lawful job-related reason for not hiring any U.S. worker who applied or was referred to the position.

After completing the pre-filing requirement, the employer submitted an ETA Form 9142, Application for Temporary Employment Certification, Appendix B.1, and the signed recruitment report. ETA reviewed the application, appendix, and recruitment report for any errors that would have prevented certification and for compliance with the certification criteria. If the application appeared to be error free, ETA did not request supporting documentation and certified or partially certified the application. If ETA determined that the application failed to comply with one or more of the criteria for certification, the agency would issue a written RFI to the employer within seven calendar days of receipt of the application. Based on the response to the RFI, ETA would certify, partially certify, issue a second RFI, or deny the application.

These regulations left the H-2B program open to noncompliance as employers were not required to validate they had recruited U.S. applicants per regulatory requirements at the time of application. Instead, validation of pre-filing recruitment requirements could not be made unless the employer was issued an RFI requesting this specific documentation or the application had been selected for a post-adjudication audit by ETA. However, not all employers would be subjected to this additional level of justification as not all applications received an RFI nor were all applications selected for a post-adjudication audit.

We found 18 of the 33 employers sampled did not comply with program pre-filing recruitment requirements. Sixteen employers' job orders did not advertise that the employment positions were to be in connection with a future H-2B application, minimum education or training requirements, or note that on-the-job training would be provided to new hires. Lacking this critical required information could have potentially discouraged U.S. workers from applying for these H-2B jobs. See Exhibit 5 for a summary of Pre-Filing Recruitment deficiencies.

20 CFR, Part 655.15(e), *Job Order* states:

> The employer must place an active job order with the SWA serving the area of intended employment… identifying it as a job order to be placed in connection with a future application for H-2B workers… The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in 655.17.

20 CFR 655.17 (e) *Advertising requirements* states:

> … The job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available.

On February 21, 2012, the Department published a Final Rule amending the H–2B regulations at 20 CFR part 655, Subpart A. Under the new Final Rule, ETA would require employers to provide a copy of the draft the employer provides to the SWA for the creation of the SWA job order. A review conducted at this stage by ETA prior to actual recruitment of U.S. workers should ensure that job orders meet all regulatory requirements and eliminate the deficiencies identified in this audit. However, on April 16, 2012, several plaintiffs filed a challenge to the 2012 H-2B Final Rule in the U.S. District Court for the Northern District of Florida. On April 26, 2012, the U.S. District Court for the Northern District of Florida issued an order temporarily enjoining the Department from implementing or enforcing the 2012 H-2B Final Rule pending ''the court's adjudication of the plaintiffs' claims.''

Therefore, employers must continue to file H-2B labor certification applications under the 2008 H-2B Rule, and ETA will still only request pre-filing recruitment information through an RFI or during its post-adjudication audits. Although ETA is limited by the 2008 H-2B regulations, the agency must do more to ensure the integrity of the program, until a decision has been made regarding the Final Rule.

RECOMMENDATIONS

We recommend the Assistant Secretary for Employment and Training:

1. Develop an alternative audit methodology regarding payroll areas when conducting post-adjudication audits. For example, ETA should request and review payroll source documentation to ensure purported wages are actual wages paid. ETA should refer all identified payroll non-compliance to DOL's Wage and Hour Division for enforcement;

2. Collaborate with DHS to explore ways for ETA to review USCIS documents during their post-adjudication audits. ETA's immigration review methodology should include referrals to DHS if they determine any errors with the immigration documentation;

3. Begin post-adjudication audits no later than 120 days into the approved employment period of the selected application and complete within 70 days, not only to deter potential fraud within the program, but also to allow the employer to take corrective action for any deficiencies identified; and

4. Continue pursuing regulatory action and explore other ways to ensure the integrity of the program including, but not limited to, legislative

changes designed to expand ETA's pre-approval validation authority and discourage the submission of inaccurate and potentially fraudulent information.

We appreciate the cooperation and courtesies that ETA personnel extended to the OIG during this audit. OIG personnel who made major contributions to this report are listed in Appendix E.

Elliot P. Lewis
Assistant Inspector General
for Audit

Exhibits

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Exhibit 1

Summary of 33 H-2B Employer Applications

		Problem Areas		
Employer ID	Attestations not Supported	Pre-filing Recruitment	Immigration	Employment
TX1				
TX2	X	X		X
TX3				
TX4	X		X	X
TX5	X	X		
TX6	X		X	X
TX7	X	X	X	X
TX8	X	X		X
TX9	X			X
TX10	X	X	X	X
TX11	X	X	X	X
TX12	X	X	X	X
PA1				
PA2	X	X	X	X
PA3	X	X		X
PA4				
PA5	X			X
PA6	X	X		X
PA7	X	X		
PA8	X		X	X
MD1	X		X	X
MD2	X			X
MD3				
MD4	X			X
NC1	X			X
NC2				
NC3	X	X	X	X
NC4	X	X	X	X
CA1	X	X	X	X
CA2	X	X	X	X
CA3	X	X	X	X
SD1	X	X	X	
SD2	X	X		
	27	**18**	**15**	**23**

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Exhibit 2

Employment

	Employment								
	Foreign Workers								
Employer ID	**Early departure but no Notification**	**Hours not tracked**	**Did not work minimum 30 hours**	**Did not receive wages for at least one pay period**	**Treated as contractors**	**Worked outside of approved area**	**Remained in country beyond approved timeframe**	**Did not receive all promised benefits**	**Advertised drug testing as requirement for job but did not perform testing on H-2B workers**
TX2	X								
TX4		X		X					
TX6	X	X			X				
TX7			X				X		
TX8				X					
TX9		X							
TX10	X					X			
TX11	X								
TX12	X		X	X		X			X
PA2	X		X						
PA3	X		X					X	
PA5			X	X					X
PA6		X							
PA8	X								
MD1									X
MD2									
MD4	X		X			X			
NC1			X			X			
NC3	X								
NC4			X						
CA1									
CA2		X							
CA3	X			X					
Cumulative Totals	**11**	**5**	**8**	**5**	**1**	**4**	**1**	**1**	**3**

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Exhibit 3

Employment Continued

	Employment				
	Prevailing Wage				
Employer ID	Not Paid	Overtime not paid	Unauthorized deductions	Paid entire wages in one lump sum at the end of the employment period	Payroll periods not consistent
TX2					
TX4	X				
TX6	X				
TX7	X				
TX8	X	X			
TX9	X				
TX10					
TX11					
TX12	X		X		
PA2	X				
PA3	X				
PA5	X	X			
PA6					
PA8					
MD1	X				
MD2	X				
MD4	X		X		
NC1					
NC3					
NC4	X				
CA1				X	
CA2					
CA3	X				X
Cumulative Totals	**14**	**2**	**2**	**1**	**1**

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Exhibit 4

Immigration

	Immigration					
	I-9 Forms			Worker		
Employer ID	Lacked Information	Improperly Completed	Missing	In country during unauthorized period	Worked unapproved job	Was not approved to work for this employer
TX4				X		
TX6	X		X		X	
TX7						X
TX10	X	X				
TX11	X		X			
TX12		X		X		
PA2			X			
PA8				X		
MD1	X		X			
NC3	X	X				
NC4			X			
CA1	X					
CA2				X		
CA3			X			
SD1	X					
Cumulative Totals	**7**	**3**	**6**	**4**	**1**	**1**

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Exhibit 5

Pre-Filing Recruitment

	Pre-Filing Recruitment			
	Job Order			
Employer ID	**Misadvertised benefits**	**Advertised requirements not necessary of H-2B workers**	**Misadvertised contact information**	**Lacked all necessary information**
TX2	X			
TX5			X	
TX7			X	X
TX8				X
TX10				X
TX11				X
TX12		X		X
PA2				X
PA3				X
PA6				X
PA7				X
NC3			X	X
NC4				X
CA1				X
CA2				X
CA3				X
SD1				X
SD2				X
Cumulative Totals	**1**	**1**	**3**	**16**

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Appendices

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Appendix A

Background

This audit expanded the work we completed in our previous report issued September 30, 2011, which was focused on four H-2B forestry employers in Oregon. In the 2011 report, we found program design issues hampered the Employment and Training Administration's (ETA) ability to ensure that U.S. workers were provided the protections afforded by the H-2B program. In its initial H-2B application review, ETA did not validate that the petitioning employer was a bonafide business and did not independently validate that the employer submitted the proper prevailing wage on their H-2B application. Furthermore, during its post-adjudication audits, ETA did not independently verify the names listed on the employers' recruitment reports to determine if those individuals actually applied for employment. One of our recommendations was for ETA to develop and implement procedures to strengthen their application review and post-adjudication process.

The H-2B non-immigrant program permitted employers to hire foreign workers to enter the U.S. to perform temporary non-agricultural services or labor on a one-time, seasonal, peakload, or intermittent basis. Employers submitted H-2B applications to the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) within ETA. To obtain H-2B certification and comply with employment protections, employers self-attested that U.S. workers capable of performing the job were not available and that the employment of foreign workers would not adversely affect the wages and working conditions of similarly employed U.S. workers. .

Prior to obtaining an H-2B labor certification, employers must have determined that there were not sufficient U.S. workers who were capable of performing the work for which labor certification was sought. Specifically, the regulations required that the employer: (1) post a job order with the SWA serving the area of intended employment in order to obtain referrals of interested U.S. workers through the interstate job order clearance system; (2) publish two newspaper advertisements, one of which must have been on a Sunday; (3) contacted the applicable union for referral of U.S. workers if the employer was a party to a collective bargaining agreement that covered the job classification that was the subject of the H-2B labor certification; and (4) contacted workers who were laid off in the occupation and in the area of intended employment, within 120 days of the first date on which an H-2B worker was needed, to inform them of the position(s). The regulations also outlined specific information that must have been included in all newspaper advertisements and job orders, such as the name of the employer, the area of intended employment, the rate of pay, a description of the position, and whether tools or equipment would be provided by the employer.

Additionally, the regulations required the employer to prepare, sign, and date a written recruitment report that summarized the recruitment steps undertaken and the results of such recruitment, including the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position. Employers seeking H-2B

certification must have filed an ETA Form 9142, Application for Temporary Employment Certification, along with a copy of the recruitment report.

ETA reviewed applications for any errors that would prevent certification and for compliance with the certification criteria. If the application appeared to be error-free, ETA did not request support documentation and certified or partially certified the application. If ETA determined that the application failed to comply with one or more of the criteria for certification, the agency will issued a written RFI to the employer within seven calendar days of receipt of the application. Based on the response to the RFI, ETA would certify, partially certify, issue a second RFI, or deny the application.

Subsequent to certifying an application, effective October 2009, ETA began conducting post-adjudication audits within its sole discretion and authority under 20 CFR 655.24 to verify the accuracy of the applications and ensure integrity within the H-2B program. Typically, these audits began six months after the end of the approved H-2B employment period and ETA worked to complete these audits within 120 days.

Appendix B

Objective, Scope, Methodology, and Criteria

Objective

Did ETA's management of the H-2B program ensure adequate protections for U.S. workers?

Scope

The audit focused on ETA's management of the H-2B program and 33 H-2B employer applications submitted between October 1, 2010, and September 30, 2011. We assessed whether the 33 H-2B employers could document adherence to the self-attestations allowed by the application.

Our audit work was conducted at the ETA Headquarters' Office of Foreign Labor Certification, the Chicago National Processing Center, and 31 onsite visits to employers found in the following states: Texas, Pennsylvania, Maryland, North Carolina, California, and South Dakota. We did not visit 2 employers because one employer, a crab fisherman, was out to sea, and the other employer did not hire any foreign workers. However, documentation was still provided by both employers and analyzed by our team.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on the audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objective.

Methodology

We reviewed laws and regulations governing the H-2B program and gained an understanding of program processes and procedures. We also reviewed recent performance data reported by ETA and identified data trends based on previous report years.

We conducted multiple interviews with OIG – OLRFI representatives to determine if they had any investigations or planned investigations that would have had an impact on our audit and replaced seven of our originally sampled employers due to ongoing investigations with OLRFI.

We held an entrance conference with ETA national office management and obtained H-2B policies and procedures, determined the most updated information regarding the anticipated new Final Rule, and other requested documentation.

We visited ETA's CNPC and performed the following:

1. Conducted interviews with ETA officials;
2. Had staff provide a walkthrough of the entire application review process and post-adjudication audits;
3. Obtained essential documentation including Standard Operating Procedures of the application review process and post-adjudication process; and
4. Identified internal controls for both the application review and post-adjudication processes.

We evaluated internal controls used by ETA for reasonable assurance that they complied with appropriate regulations and procedures in approving foreign labor certifications. Our consideration of ETA's internal controls for foreign labor certification procedures would not necessarily disclose all matters that might be reportable conditions. Because of inherent limitations in internal controls, noncompliance may nevertheless occur and not be detected.

Prior to our sampling process, we obtained a listing of all H-2B applications received, based on decision date, from October 1, 2010, through September 30, 2011, from OFLC's database, totaling 4,409 applications OFLC received. The data was generated from ETA's Case Management System. We performed a data reliability assessment to ensure we received a complete and accurate data file. To determine whether the data was reliable to select our sample, we performed various testing of required data elements, interviewed ETA officials knowledgeable about the data, and reviewed employer-submitted applications, which served as source data for all information found in the Case Management System, including relevant general and application controls. We concluded the data to be sufficiently reliable for our purposes.

From this database, we separated the denied applications, which resulted in 3,806 total certified (2,633) or partial certified (1,173) H-2B applications. These 3,806 applications served as our universe/population. From these 3,806, we analyzed and sorted the data based on the top 20 states which accounted for 3,049, or 80 percent, of the 3,806 total certified or partial certified applications. As such, our sampling frame was the 3,049 H-2B applications.

Our sampling method consisted of a two-stage stratified cluster sampling approach:

1. Six States selected out of total of 20 using stratification. (3 Stratum-based on applications) (Note: 20 states represents 80 percent of all certified or partial certified applications)
2. We selected 123 employer applications from 6 selected states using proportional allocation methodology.

From the 123 applications, we selected a sample of 33 applications (all numbers for each state were rounded up). Due to the amount of errors we identified during our work,

we were prevented from projecting our results to the population as these errors exceeded our total allowable error rate of 12 percent.

During our testing phase, we provided the CNPC the list of 33 employers and requested documentation to be included in each application file (i.e., recruitment report, applicant resumes, newspaper advertisements, and SWA job order postings). The CNPC complied with our request and provided the documentation.

In order to test ETA's management of the H-2B program, we contacted all 33 employers and scheduled onsite visits with 31 of them. We requested and received the following documentation for comparison to original H-2B applications and verification of attestations made from all employers:

1. ETA Form 9141 – Prevailing Wage Determination
2. Job Order and all corresponding information for the State Workforce Agency contacted, including U.S. applicant referrals made
3. ETA Form 9142 with accompanying Appendix B.1
4. Detailed list of work sites and related dates when work is scheduled to begin (i.e. Itinerary if applicable)
5. Completed Recruitment Report and all support documentation regarding recruitment efforts, which would include:
    a. for any person who applied:
        i. full name, address, and phone contact information, and
        ii. the results of that application, including whether the person was interviewed and hired
        iii. individual resumes, contact efforts, and employment resolution
6. If applicable, notification of job opportunity to any laid-off employees within 120 days of the date of need and result
7. If applicable, notification to Union Representative(s) and result
8. If federal funding was received for Fiscal Year 2011, details such as amount, date received, purpose, and use of funds
9. The first two and last two payroll records for all individuals hired (including both U.S. and foreign workers) related to H-2B application number(s), including the following information:
    a. Employee full name
    b. Beginning date of hire
    c. Last date of employment
    d. Via a check history report, the gross and net pay illustrating all detail deductions and support for each deduction, as well as the number of hours worked
    e. From the first two and last two payroll periods worked by the employee, the payroll detail including gross wages, hours worked, the job number and the location (State) of the work
10. Details and support documentation regarding all benefits provided to each person hired

11. USCIS I-9, Employment Eligibility Verification, with related documentation for each worker hired
12. Completed and approved USCIS I-129, Petition for a Non-immigrant Worker, accounting for each foreign worker hired
13. If applicable, USCIS form filed for extension of time to remain in the U.S. while employed by the company
14. If applicable, details of employees who returned to work that were used for a Fiscal Year 2010 H-2B application. Details included:
    a. Name of employee
    b. Date of original hire
    c. Date re-hired or re-employed
    d. Related I-9 documentation
    e. Related I-129 documentation

We reviewed all employer documentation required to substantiate the attestations made on the employer's FY 2011 H-2B application. We conducted onsite visits to employers to discuss their participation in the H-2B program and to verify the legitimacy and sufficiency of the documentation. In our onsite work, we conducted due diligence on USCIS' documentation and employer payroll documents to determine the number of foreign workers hired; whether the foreign worker's eligibility status was current; and whether the foreign workers worked the minimum hours and the employer paid each worker the prevailing wage. We questioned employers if any documentation was found to be insufficient or inaccurate.

We interviewed key employer personnel and observed their payroll procedures to gain an understanding of their payroll system. We assessed control activities for each employer's payroll system for general controls and application controls to ensure the integrity of the payroll data. To ensure workers actually received the compensation owed to them, we traced summary documents to source documents, including paystubs, and reconciled those documents to bank statements.

We also contacted DOL, Wage and Hour Division, personnel to discuss prevailing wage issues identified during our reviews and USCIS personnel to determine whether or not USCIS performed any type of audits or post-approval reviews on H-2B employers.

Criteria

- 20 CFR Part 655, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes
- Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA)
- ETA's internal H-2B Standard Operating Procedures
- ETA's Post-Adjudication Audit Standard Operating Procedures
- OMB Circular A 123 – Management's Responsibility for Internal Control

Appendix C

Acronyms and Abbreviations

CFR	Code of Federal Regulations
CNPC	Chicago National Processing Center
DHS	Department of Homeland Security
DOL	Department of Labor
ETA	Employment and Training Administration
FY	Fiscal Year
INA	Immigration and Nationality Act
NOAE	Notice of Audit Examination
OFLC	Office of Foreign Labor Certification
OIG	Office of Inspector General
RFI	Request for Further Information
SWA	State Workforce Agency
USCIS	U.S. Citizenship and Immigration Services

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Appendix D

ETA Response to Draft Report

U.S. Department of Labor

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

SEP 2 8 2012

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

FROM: JANE OATES
Assistant Secretary for Employment and Training

SUBJECT: Response to the Office of Inspector General's Audit of the Office of Foreign Labor Certification's Efforts to Ensure Adequate Protections for U.S. Workers in the H-2B Program Draft Audit Report 06-12-001-03-321

The Employment and Training Administration (ETA) appreciates the opportunity to respond to the Office of Inspector General's (OIG) draft audit report on the Office of Foreign Labor Certification's (OFLC) efforts to ensure that U.S. workers are provided the protections afforded by the H-2B program. We appreciate the time and effort OIG staff spent reviewing H-2B applications, interviewing personnel at the OFLC Chicago National Processing Center (NPC), and the professional manner in which the audit was conducted. The following represents our responses and recommended actions for your consideration.

We do not agree with the overall finding that strengthening ETA's management of the H-2B program is the primary means for ensuring adequate worker protections. As explained in the preamble to the 2012 H-2B Final Rule published on February 21, 2012 (77 FR 10038) and now postponed due to litigation, the Department determined that a new rulemaking effort significantly altering the 2008 Final Rule attestation-based program model was necessary. The program design and policy-related reasons for the change were discussed at length in the Notice of Proposed Rulemaking published on March 18, 2011 (76 FR 15130). We believe that the findings identified in this OIG draft report are primarily a reflection of the 2008 Final Rule program design and not a result of inadequate program management. Specifically, the expansion of job opportunities for U.S. workers; evidence of violations of program requirements some rising to a criminal level; need for better worker protections; and a fundamental lack of understanding of program obligations are supportive of the need for the re-instatement of the 2012 Final Rule.

The 2012 Final Rule would strengthen the H-2B program by implementing an evidence-based certification model that had been used from the inception of the program until the 2008 Final Rule. This model would increase protections for U.S. and foreign workers and improve the level of employer compliance regarding recruitment of U.S. workers, payment of wages, and other terms and conditions of the program. We are disappointed that both the title and the substance of the OIG draft report itself fails to adequately address fundamental program design limitations of the current H-2B regulatory framework.

Last, OIG fails to acknowledge that some of the evidence gathered for this report was obtained through field work and interviewing employers and audits records onsite. This is a process

which is costly in terms of travel and staffing and one not currently available to ETA's Office of Foreign Labor Certification. Similarly, several of the recommendations are resource sensitive and such considerations are not recognized in this report.

OIG Recommendation 1: Develop an alternative audit methodology regarding payroll areas when conducting post-adjudication audits. For example, ETA should request and review payroll source documentation to ensure purported wages represent actual wages paid. ETA should refer all identified payroll non-compliance to DOL's Wage and Hour for corrective action.

ETA Response: In conducting post-adjudication audits, the OFLC seeks to strike a balance between not overburdening employers by requiring voluminous documentation while simultaneously requesting an adequate level of supporting documentation to verify an employer's compliance with the regulations. We believe this approach is responsible as the great majority of adjudicated H-2B applications selected for audit involve small businesses. However, OFLC did revise its Notice of Audit Examination (NOAE) in May 2012 to begin requesting payroll source documentation covering three discrete months during the period of certified employment. We believe this change in procedure provides the OFLC with adequate source documentation necessary to make an initial determination as to whether employers are meeting their employment and payroll obligations under the certified H-2B application. Further, our understanding is that the Wage and Hour Division, and not the OFLC, has the authority and expertise to enforce the minimum hour guarantees under the approved H-2B application by conducting a more intensive on-site investigation of the employer's timesheets and other employment and payroll records.

OIG Recommendation 2: Collaborate with DHS to explore ways for ETA to obtain the appropriate authority to request and review USCIS documents during their post-adjudication audits. ETA's immigration review methodology should include referrals to DHS if they determine any errors with the immigration documentation.

ETA Response: ETA's role in the H-2B program stems from its obligation, outlined in the Department of Homeland Security (DHS) regulations, to certify, upon application by a U.S. employer intending to petition DHS to admit H-2B workers, that there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. The use of post-adjudication audits, in conjunction with Wage and Hour's investigation authority, serve as the primary mechanisms to ensure an employer's compliance with the current attestation-based H-2B program, and to meet the Department's regulatory mandate.

As noted in the OIG draft report, we maintain that employment eligibility verification and other related nonimmigrant documentation issues are beyond the scope of the Department's authority under the H-2B program. Specifically, the responsibility for the verification of employment eligibility rests with the employer. The review of H-2B worker eligibility documentation and making determinations rests with the DHS who administers the regulations governing employment eligibility verification and the visa status of foreign workers admitted into the United States.

With respect to collaborating with DHS on information sharing, we agree with this recommendation generally and, in collaboration with the Department's Office of the Solicitor, have initiated discussions with DHS to identify the types of nonimmigrant visa petition data that the OFLC could access to enhance its administration of the H-2B program. Where it is determined that access to certain DHS nonimmigrant visa petition data would be beneficial to the OFLC's review of future temporary labor certification applications or conducting post-adjudication audits, the Department will need to develop and execute a Memorandum of Agreement with the DHS.

OIG Recommendation 3: Begin post-adjudication audits no later than 120 days into the approved employment period of the selected application and complete within 70 days, not only to deter potential fraud with the program, but also to allow the employer to take corrective action for any deficiencies identified.

ETA Response: We agree that post-adjudication audits can be initiated at an earlier stage of the employer's approved period of employment. Beginning in FY 2013, the OFLC will establish a goal to issue Notice of Audit Examination (NOAE) letters between 120 to 150 days after the certified start date of work. Additionally, the OFLC will establish an average cycle time measure to complete audit examinations within 90 to 120 days from the date the NOAE is issued. Upon completion of the audit and where violations were determined that do not rise to the level of debarment, the OFLC will provide the employer with written notification identifying the specific violation(s) or deficiency(ies) and that corrective action(s) should be undertaken. Additionally, the OFLC will continue to refer the audit findings and underlying documentation to an appropriate enforcement agency such as the Wage and Hour Division, Department of Justice, or the DHS.

OIG Recommendation 4: Continue pursuing legislative action that would require employers to provide pre-filing recruitment support documentation and a copy of the draft SWA job order the employer provides to the SWA. A review conducted at this stage by ETA prior to actual recruitment of U.S. workers should ensure employer compliance with all regulatory requirements and eliminate deficiencies identified in this audit.

ETA Response: While we agree with the conclusions reached in the OIG draft report on the unacceptable level of employer compliance with advertising and recruitment requirements, ETA believes resolution in this area is a matter of regulation and not legislation. As noted in the OIG draft report, the Department published new regulations on February 21, 2012, significantly revising the process by which employers obtain a temporary labor certification under the H-2B program as well as increased worker protections for both U.S. and foreign workers. As long as the Department is enjoined from implementing or enforcing the new regulations, the OFLC must implement the provisions of the 2008 H-2B Final Rule which requires the Certifying Officer to issue a Request for Information only in circumstances where the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification.

Thank you for the opportunity to comment on this report and should you have any questions please contact William L. Carlson, Administrator, Office of Foreign Labor Certification.

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Appendix E

Acknowledgements

Key contributors to this report were Richard A. Pena (Audit Director), Michael Kostrzewa, Fernando M. Paredes, Barry Winnicki, Jerry Howe, Enrique Lozano, Christine Allen, and Ajit Buttar.

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