

Appendix D

ETA Response to Draft Report

U.S. Department of Labor

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



SEP 28 2012

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

FROM: JANE OATES *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.