

ETA Response to Draft Report

U.S. Department of Labor

Employment and Training Administration
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Washington, D.C. 20210



MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General

FROM: JANE OATES *Jane Oates*
Assistant Secretary

SUBJECT: Response to the Office of the Inspector General's Audit of
the Employment and Training Administration's Efforts to
Ensure That the H-2B Visa Program Provided Adequate
Protections for U.S. Forestry Workers in Oregon
Draft Audit Report 17-11-002-03-321

Date: September 30, 2011

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) efforts to ensure the H-2B visa program provides adequate protections for U.S. forestry workers in Oregon. We appreciate the time and effort OIG staff spent reviewing H-2B forestry applications, interviewing personnel at the Chicago National Processing Center (NPC), and the professional and collaborative manner in which the audit was conducted with OFLC staff. The following represents our responses and recommended actions for your consideration.

Recommendation 1: Reassess the requirement for employers to only recruit U.S. workers in the state of initial employment.

ETA Response: While our current regulations do not necessarily limit recruitment of U.S. workers to just one state, we acknowledge that we should consider strengthening the recruitment of U.S. workers for work occurring in multiple states. Under the current H-2B regulation published in December 2008, an employer is required to place an active job order for at least 10 calendar days with the State Workforce Agency (SWA) serving the area of intended employment no more than 120 calendar days before the employer's date of need. If the job opportunity contains multiple worksites within the same area of intended employment and that area covers multiple states, the regulations require the employer to place the job order with the SWA where the work is expected to begin. The SWA receiving the job order must then transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites. During the same period of time that the job order is being circulated with the SWA, the employer is required to publish an advertisement on two separate days in a newspaper of general circulation serving the area of intended employment.

Further, Training and Employment Guidance Letter (TEGL) No. 27-06 provides special procedures for processing H-2B temporary labor certification applications in tree planting and related reforestation occupations. The TEGL allows for multi-state itineraries and provides employers with the option of either filing a single master application covering multiple itineraries or separate applications for each itinerary where the tree planting or related reforestation work will begin. If the itinerary includes worksite locations covering multiple SWAs, the employer may submit a single application to the SWA where the employment will begin, or if the start dates for each worksite location in the itinerary are exactly the same, the employer may submit a single application to any one of the SWAs covered by the itinerary. The SWA receiving the job order would not only have to place the job order in its own state for 10 days but also clear the job order with the other appropriate states where the work is to be performed for 10 days and accept for referral qualified applicants from those states. We will review this TEGL in light of the Department's pending H-2B rulemaking when that process concludes.

Recommendation 2: Develop and implement procedures to strengthen the application and post-adjudication processes.

ETA Response: While we agree with the recommendation generally, the current H-2B regulation authorizes employers to simply attest to compliance with program requirements. Under this attestation-based program model, our ability to verify employer compliance with the program's regulations is limited during application processing; however, compliance reviews may be conducted following the granting of a labor certification.

We are, however, taking some steps where we can improve our ability to monitor employer compliance during the application process. OIG noted a concern about the process for employer verification as a *bona fide* business. Currently, OFLC requires the employer to provide a Federal Employer Identification Number (FEIN) on ETA Form 9142 and attest to the accuracy of the FEIN. To strengthen employer compliance, OFLC is designing an information technology system to support the H-2B program which includes verifying the FEINs provided during the initial review of the application for processing.

OIG also expressed concern about OFLC's practice for prevailing wage validation. Historically, OFLC has only validated prevailing wage determinations when there was an indication of a problem. However, with recent technological enhancements in OFLC's iCERT system, staffs now verify for each application that the employer-stated wages offered for the job opportunity meet or exceed the prevailing wage. This recent advancement allows OFLC to strengthen the validation of prevailing wage attestations.

The current H-2B regulation authorizes, for the first time, the Department to audit H-2B applications. Prior to beginning the actual audit process, OFLC had to develop the processes and standard operating procedures required to effectuate the audit of H-2B labor certifications, including the training of staff. This process delayed the immediate

implementation of the new audit authority. OFLC consistently reviews its audit procedures for continuous improvement and will continue to do so.

Recommendation 3: Develop and implement controls to better monitor SWAs' compliance with program requirements.

ETA Response: We agree that OFLC can strengthen aspects of its internal controls with respect to SWA monitoring and the office routinely receives information from a variety of sources when a SWA may not be meeting a regulatory or program guidance responsibility. OFLC increased its monitoring of SWA activities during FY 2011 and will continue to review those procedures in light of available federal and state resources.

Thank you again for the opportunity to comment on this report.