

APPENDIX B: AGENCY RESPONSES TO THE REPORT

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210



September 18, 2020

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

FROM: CHERYL M. STANTON *Cheryl M. Stanton*
Administrator, Wage and Hour Division

SUBJECT: Response to the Office of Inspector General Draft Report, *DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators Are Held Accountable*
(Draft Report No. 06-20-001-03-321)

The U.S. Department of Labor's (Department) Wage and Hour Division (WHD) appreciates the opportunity to respond to the Office of Inspector General's (OIG) draft report titled "*DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Programs Violators Are Held Accountable.*"

The OIG's draft report contains three recommendations, with Recommendations 1 and 2 directed to WHD. ETA will respond separately, per your request, to Recommendation 3. WHD's responses are set forth below.

Recommendation 1: Utilize the Secretary options to initiate H-1B investigations, including identifying the criteria that would allow the Secretary to initiate an investigation.

Response: WHD agrees with this recommendation. The Department is in the process of developing procedures to initiate Secretary-certified investigations. Specifically, on July 31, 2020, the Department announced that it had entered into a Memorandum of Agreement (MOA) with the U.S. Department of Homeland Security, acting through the U.S. Citizenship and Immigration Services (USCIS). Most critically, this MOA establishes processes by which USCIS will refer suspected employer violations within the H-1B program to the Department. The enhanced collaboration and sources of information will be used by the Department in support of Secretary-certified investigations.

Recommendation 2a: Define a process for assessing willfulness to make it less difficult to determine if an employer should be debarred.

Response: WHD agrees with this recommendation. WHD will review its investigator training and its assessment process to determine what improvements can be made in assessing willful violations. WHD notes that existing regulatory and sub-regulatory guidance already define the standard and process for assessing willfulness. Specifically, the Department's regulation at 20

CFR 655.805(c) defines a willful failure as “a knowing failure or reckless disregard with respect to whether the conduct was [in violation]” and cites applicable case law, including *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1998). WHD’s internal guidance further explains and defines the process for assessing willfulness. Also citing the *Richland Shoe* decision and the regulations above, the internal guidance further explains the willfulness standard, outlines evidentiary requirements for proving willfulness, and provides case-specific examples as to when a determination of willfulness is appropriate.

This recommendation, however, appears to rest on a misunderstanding that only willful violations may result in debarment. WHD seeks to correct this potential misconception. While the Immigration and Nationality Act requires that *many* violations be willful to warrant debarment, it does not require that *all* violations be willful. The statute and regulations require debarment under 8 U.S.C. 1182(n)(2)(C)(i)(II) and 20 C.F.R. 655.810(d)(1) for a number of non-willful violations.¹

Recommendation 2b: Work with Congress to change the restrictive authority of H-1B investigations to permit WHD to initiate investigations similar to the H-2A and H-2B programs.

Response: WHD stands ready to provide technical assistance regarding proposed statutory changes to WHD’s authority to initiate investigations as requested and appropriate. As OIG has noted in its recommendations, the limitations on WHD’s H-1B enforcement authority are statutory and thus any modifications lie solely within Congress’ authority.

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

cc: Susan Boone
Deputy Administrator

Keith Sonderling
Deputy Administrator

Michael Kravitz
Associate Administrator, Office of Performance and Communications

Karen Livingston
Director, Division of Strategic Planning and Performance

Barbara Brown
WHD Audit Program Manager

¹ Specifically, a debarment period of at least one year is specified for the following non-willful violations: a violation pertaining to strike/lockout or displacement of U.S. workers; a substantial violation pertaining to notification, labor condition application specificity, or recruitment of U.S. workers; a misrepresentation of material fact on the labor condition application; an early-termination penalty paid by the employee; payment by the employee of the additional filing fee; and a violation of the requirements in 20 CFR 655 subparts H and I or the provisions regarding public access in certain cases.

U.S. Department of Labor

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



September 18, 2020

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

FROM: JOHN PALLASCH *J*
Assistant Secretary for Employment and Training

SUBJECT: Response to the Office of Inspector General Draft Report, *DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators are Held Accountable*
(Draft Report No. 06-20-001-03-321)

The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) appreciates the opportunity to respond to the Office of Inspector General's (OIG) draft report titled "*DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators are Held Accountable.*"

ETA thanks the OIG for their ongoing efforts to improve the integrity of the foreign labor certification programs administered by the Department and their collaboration with ETA to protect the employment of U.S. and foreign workers by holding employers accountable for program fraud and abuse violations.

The OIG's draft report contains three recommendations, with Recommendation 3 directed to ETA. The Wage and Hour Division (WHD) will respond separately, per your request, to Recommendations 1 and 2. ETA's response to Recommendation 3 is set forth below.

Recommendation 3: Use data analytics and other risk factors to establish a risk-based approach to determine the selection of H-2A and H-2B applications for audit.

Response: ETA agrees with this recommendation. Currently, ETA primarily uses a random selection process to audit certified H-2A and H-2B applications. The agency also conducts a limited number of targeted audits by selecting applications based on information obtained from a variety of sources such as media articles and interagency referrals. To establish a risk-based audit selection methodology, ETA believes it is critically important to work with the OIG's Office of Investigations – Labor Racketeering and Fraud (OI-LRF) and WHD given that both agencies have extensive enforcement and investigative knowledge and experience. ETA will solicit input from both agencies on viable risk factors. Additionally, feedback and information from ETA's Office of Foreign Labor Certification (OFLC) will be evaluated to identify appropriate risk factors based on adjudication experience and available H-2A and H-2B application processing data. With the input from OI-LRF, WHD, and OFLC, the agency will

establish a new risk-based selection methodology, identifying a viable pool of H-2A and H-2B certified applications for audit. Upon completion of the selected audits, ETA will conduct an assessment and convene a meeting with OI-LRF and WHD to discuss the results and solicit feedback on strategies to continuously improve the risk-based selection methodology.

Below is a summary of ETA’s action plan to develop and implement a risk-based audit selection methodology within its available resources.

Action Plan	Tentative Completion Month/Year
Conduct an assessment of viable risk factors based on input from OI-LRF, WHD, and OFLC adjudication staff	November 2020
Develop risk-based selection methodology for conducting H-2A and H-2B audits	December 2020
Identify a pool of H-2A and H-2B certifications and initiate the audit examination process	February 2021
Complete the audit examination process	July 2021
Convene meeting with OI-LRF and WHD staff to discuss audit results and solicit feedback	August 2021

Thank you for the opportunity to respond to this report and for the OIG’s dedication to assisting the Department in protecting the integrity of the foreign labor certification programs it administers.

If you have any questions, please contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, at 202-513-7350.