



December 20, 2024

MEMORANDUM FOR:

CAROLYN R. HANTZ  
Assistant Inspector General for Audit

FROM:

JOSÉ JAVIER RODRÍGUEZ

A handwritten signature in black ink, appearing to read "JJR", written over the printed name.

SUBJECT:

Response to Draft Report – *ETA Can Improve Its  
Management of the H-2A Program*, Report No.  
06-25-XXX-03-321

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The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) appreciates the opportunity to respond to the above-referenced draft report from the Office of Inspector General (OIG). Below are ETA's observations on the draft report, followed by ETA's responses to the recommendations.

ETA appreciates the OIG acknowledging in the draft report that "ETA's management of the H-2A program generally ensured applications were in compliance with 20 C.F.R. Part 655 for recruitment, wages, and housing." The OIG recognized the complexities of the H-2A program, and the efforts made by ETA to ensure working conditions did not adversely affect U.S. farmworkers.

The draft report discusses ETA's authority to ensure employer compliance with wage-related obligations under the H-2A program. Given the complexity of the H-2A regulations, ETA identified sections in the OIG's draft report on the wage-related obligations that use terms that differ from their regulatory definition or misconstrue responsibilities. ETA would like to clarify that in the H-2A program, the definition of prevailing wage is a wage rate established by the Office of Foreign Labor Certification (OFLC) Administrator for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area based on a survey conducted by a state that meets the requirements in 20 C.F.R. 655.120(c). Under the H-2A regulations at 20 C.F.R. 655.120(a), a prevailing wage is one of six wage sources, along with the Adverse Effect Wage Rate (AEWR), the highest of which employers must offer and pay.

Additionally, ETA wants to clarify that the regulatory scope of determining whether a wage offer is compliant with the regulations is different from assuring that the worker was actually paid that amount. OFLC's purview, including post-certification audits, is focused on wage offered and wage advertised compliance and not on determining factuality of wages paid.

Lastly, the correct regulatory citation for offered wage rate compliance is 20 C.F.R. 655.120(a), and the correct regulatory citation for reimbursement of travel expenses is 20 C.F.R. 655.122(h).

The increasing number of H-2A applications received each year continues to impact ETA's ability to meet short statutory timeframes. As a result, staffing resources must be directed to processing applications which severely impacts ETA's ability to conduct post-certification audits. In the President's Fiscal Year (FY) 2025 Budget<sup>1</sup>, the Department warned Congress that workload increases in recent years, when combined with limited appropriated resources, creates significant constraints on OFLC case processing. In FY 2023, OFLC received its highest-ever application levels, with a record number of applications submitted in the H-2A, H-2B, PERM, and Prevailing Wage programs. Over the past decade, the application levels in most of OFLC's programs have doubled or tripled, with the Department receiving three times more H-2A and H-2B applications in FY 2023 than in FY 2014. Additionally, while application levels have significantly increased, inflation-adjusted funding for federal foreign labor certification case adjudications decreased 13 percent from FY 2010 to FY 2023. When combined with statutory and regulatory processing timeframes in the temporary labor certification programs, nearly all of OFLC's case adjudication resources are dedicated to processing labor certification applications to mitigate the risk of delays, leaving limited resources available to conduct audit examinations to ensure employer compliance with program requirements.

ETA appreciates the OIG's ongoing efforts to improve the integrity of the foreign labor certification programs and the collaborative way the OIG works with ETA to better protect U.S. and foreign workers in their employment while also increasing the integrity of the H-2A program.

## **Responses to the Recommendations**

Please find below each of the recommendations contained in the draft report, followed by ETA's proposed corrective actions to address the recommendations.

### **Recommendation 1: Enhance and implement written policies or procedures to ensure H-2A applications have the correct wage information when certified by analysts.**

ETA Response: ETA agrees with this recommendation. ETA plans to update written procedures for the AEWL Change Notification Letters to include the new AEWL rate and to ensure the correct wage amount is documented within the H-2A application record. The Administrator for OFLC is responsible for this recommendation.

### **Recommendation 2: Enhance and implement written policies or procedures for post adjudication audits that target a representative number of applications appropriate for the level of risk in its application process.**

ETA Response: ETA partially agrees with this recommendation. ETA agrees to enhance and implement written policies or procedures for post-adjudication audit selections to document the reasoning for the risk factor selection and the number of audits selected. However, ETA disagrees with the omission of staff resource availability as an additional factor with level of risk when determining the appropriate number of applications to select for an audit.

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<sup>1</sup> Fiscal Year 2025 Congressional Budget Justification, Employment and Training Administration - [CBI-2025-V1-07.pdf](#).

As an alternative approach, ETA recommends updating the Risk-Based Audit Selection standard operating procedure (SOP) established in 2020 to include detailed reasoning for the quantity of audits selected and the associated risk factor for each group of audit selections. If the OIG accepts this alternative approach, the Administrator for OFLC will be responsible for this recommendation.

**Recommendation 3: Enhance and implement written policies or procedures that provide specific guidelines to ensure analysts obtain sufficient evidence of payment of wages earned and expenses incurred.**

ETA Response: ETA partially agrees with this recommendation. ETA agrees to enhance and implement written policies or procedures to provide specific guidelines on how OFLC obtains evidence of payment of wages earned and expenses incurred within the scope of H-2A regulations and policies. However, ETA disagrees with the OIG's conclusion of what is considered sufficient evidence. The OIG has consistently indicated that ETA was unable to validate if employees received payment for wages. However, the OIG failed to identify the specific authority that requires ETA to conduct validation.

ETA is authorized to audit and request evidence that further supports the employer's compliance with H-2A applications post-certification. ETA believes that the types of documentation the OIG recommends ETA request and review, related to the evidence of payment of wages and expenses, falls under the jurisdiction of the Department's Wage and Hour Division (WHD). WHD has enforcement authority to ensure employers have complied with their obligations to H-2A workers and workers in corresponding employment.

As an alternative approach, ETA recommends enhancing and implementing a guidance document to: 1) detail appropriate documentation to request when initiating audits, 2) identify how to evaluate the documentation, 3) determine additional evidence to request if the analyst has concerns about the evidence provided, and 4) determine how to arrive at a final evaluation in accordance with H-2A regulations and policy. If the OIG accepts this alternative approach, the Administrator for OFLC will be responsible for this recommendation.

**Recommendation 4: Enhance and implement written policies or procedures to ensure analysts provide a rationale and obtain sufficient evidence to document how they determine employers' compliance with the program requirements reviewed.**

ETA Response: ETA agrees with this recommendation. ETA plans to update the H-2A Post-Certification Audit SOP established in 2020 to reflect current procedures performed within the Foreign Labor Application Gateway module implemented in late 2022. The Administrator for OFLC is responsible for this recommendation.