NAFSA NOTES: OFLC Stakeholder Teleconference (*February 10, 2011)*

These notes were taken by NAFSA staff during the teleconference. They reflect information provided by government officials in an informal setting. They are best used as general information concerning current agency processes and policies, not formal guidance, and it is important to recognize that agency processes and policies are subject to change. NAFSA notes and liaison summaries do not constitute legal advice.

GENERAL

Opening comments: DOL will not entertain individual case inquiries. The set of questions for this stakeholder call contained such inquiries (note: NAFSA did not submit any case-specific questions). DOL is considering, for future calls, striking such questions, answering questions about larger issues and trends, and posting them on the DOL-ETA web site. DOL offered a reminder to avoid case-specific questions and indicated that it would skip them in this call. If stakeholders see consistent errors that indicate training issues, we can bring case-specific examples to DOL's attention through our other channels.

1. **Integration with USCIS Transformation**. Please update on the November 2010 meeting with USCIS regarding Transformation and the MOU referenced at the October 2010 DOL meeting.

   USCIS has provided Senior Executive briefings, and DOL officials have attended and kept abreast of plans, and USCIS is aware of DOL's role.

2. **Case Inquiry System**. Has DOL reconsidered whether to work with stakeholders to establish a case-liaison/resolution mechanism or other type of "case inquiry system"?

   DOL notes the consistent interest in this. It must take into account its IT priorities and budget priorities. DOL will keep this interest in mind.

3. **New staffing contract.** DOL reported in October that it expected the new staffing contract to result in enhanced processing, increased production, and the implementation of higher standards for staff. Please provide current processing times and describe the improvement initiatives underway.

   The transition has been made. DOL believes that it has resulted in "a number of enhancements and gains." New analysts have just been trained. DOL continues to track production daily. All indications are that the transition has been successful and DOL is pleased with the process so far.

TEMPORARY PROGRAMS

LCA

4. **iCERT upgrades and enhancements**. DOL reported at the last stakeholder meeting in October that maintenance activities rather than new application development were DOL's focus during transition between IT application support contracts. Please provide updates on the following enhancements to the iCERT program.
   - Username – allow other than email address.
   - Print case number in larger font.
   - Create a guide for the precise language that should be used on the LCA when the employer has relied on a private or custom survey. Many denials have been issued for "obvious errors" when it is unclear what language the employer is supposed to use to identify the survey.
   - Obvious Error Detection – allow detection of "obvious errors" before submission.
   - Correct & Reuse Feature - create a "Reuse" feature to allow re-use of data to correct an 'obvious error" after an LCA denial.
   - Tiered Users - allow the ability for one user to initiate or draft the LCA (i.e. do the data entry) and another user to actually submit the initiated LCA.

   DOL continues to look for suggestions from staff and stakeholders concerning ways to improve iCERT. DOL thanks stakeholders for their prior input and has assembled a team to go through the suggestions and assess the feasibility of each. Excellent ideas were submitted, and DOL will update us in future liaison calls concerning the suggestions that may be implemented and a timeline.

5. **How does DOL plan to be better prepared for H-1B filing bubble in FY 2011?**

   DOL is not aware that there was an issue in 2010 but detailed operating plans are in place, taking into account staffing needs and requirements, to ensure that DOL meets its regulatory requirements.

6. **ETA Form 9035 completion.** Please confirm that a labor condition application (ETA-9035) approved for "new employment" (by checking box 7a. in section B) may subsequently be used for an extension for the same employee. In other words, please confirm that an employer who checked 7a. "new employment" in section B, and obtained an approved LCA for a period of three years, but then filed a petition with USCIS requesting one year of H-1B classification for the employee, could use the approved ETA-9035 for a subsequent H-1B extension petition.

   DOL cannot answer this question. It is up to USCIS.

7. **Survey denials.** Members have reported receipt of LCA denials for failure to recognize a survey when using an employer's own survey. It is not clear whether the issue is substantive or IT related. Can DOL provide some guidance as to how these surveys should be reflected on the form so the LCA can be certified without delay? Some members have submitted multiple LCAs in order to obtain an approval.

Within the next few days, DOL will post on the ETA web site updated FAQs (NAFSA note: see http://www.foreignlaborcert.doleta.gov/pdf/H1BFAQs020811.pdf) addressing this and a number of other issues.

8. **Zip Codes.** DOL indicated in October that it was not aware that zip codes starting with a "zero' digit were being truncated and agreed to look into this issue. Please provide an update concerning this problem.

The IT team worked on this last March and believed that the problem was fixed. In October the IT team tried to replicate the problem (get errors) but could not, so DOL believes that the problem has been fixed.

H-2A

9. At many points during the H-2A process, an employer is dependent on timely action by the SWA or other state or local authorities. Recently, a number of employers have reported that they have had Applications rejected (and then certification denied) because a governmental entity over which they have no control has not provided them the required information. Examples include a Maryland official who repeatedly refused to perform a housing inspection, local authorities who have failed to issue housing permits after inspections, or delays arising from a wait for test results on water systems. These denials often result in appeals, modifications, and remands for processing.

(i) Can DOL suggest what an employer might do when it cannot provide an item to DOL through no fault of its own during the certification process?
(ii) Can or is DOL taking any steps to assist employers in dealing in such a situation?
(iii) If the Certifying Officer has declined to accept an Application for filing the application is not yet pending. Why are substantive determinations being issued on the 30th day after attempted filing, before the original date of need?

DOL would like to know if stakeholders encounter persistent problems with SWAs. DOL has monthly calls with SWAs to assess any problems and re-emphasize the need to meet regulatory requirements. DOL is drafting an

FAQ. Concerning the date of issue for determinations, "DOL will continue to meet the regulatory requirements."

10. When an Application is denied, employers may ask for expedited administrative review or de novo review. The OALJ has noted that many employers do not understand that they may not present new evidence in expedited administrative review. For this reason, we ask DOL to amend its notice of appeal rights clarifying the distinction so employers can make an informed decision about what kind of appeal to request. We also ask if DOL intends to publicize this in any other way.

DOL's response is that the regulations offer these two routes, and DOL has "no expectation of changing or expanding the language in its denial letters."

PWDs

11. **Current PWD Processing Time. W**hat is the status of the backlog?

"The Prevailing Wage Center has never had a backlog." All PWDs issued within "60-day policy," and cases in which no additional information is needed are "cleared" within 30 days.

12. **iCERT enhancement.** Redetermination Field – to allow for a more substantive explanation?

Ability to change the form for the external user port is limited, but DOL will consider for the future. If filing a redetermination request, users can "push the button on the iCERT module" and submit any additional information by e-mail to FLC.PWD@dol.gov referencing the case number and indicating that it is supporting information. It is also possible to "submit the whole thing through the Help Desk."

13. **Extensions of PWDs.** ACIP members are reporting inconsistent PWD's for the same employer and position. Would DOL consider creating a PWD validity extension procedure where there are no changes to the PW request? This would allow for greater consistency in determinations and would increase efficiency as the occupation/wage level determination has already been made by DOL.

DOL's policy is not to extend the validity period of a PWD. In making PWDs, DOL does refer to prior PWD "in our review process" in an effort to ensure consistency.

14. **Use of ACWIA.** University-affiliated non-profit teaching hospitals continue to report that that NPWC occasionally refuses to use ACWIA wage data in assigning prevailing wage determinations on the basis that "the employer does not meet the definitions set forth in 20 CFR 656.40(i), 20 CFR 656.40(ii) or 20 CFR 656.40(iii)" and instead uses "all industry" wage data in making determinations. This occurs even when the employer clearly indicates "***this employer is an institution of higher education or a research entity under 20 CFR 656.40(e)***" DOL stated in October that it had not changed policy regarding the use of ACWIA data and that it is the responsibility of the applicant/requestor to establish ACWIA eligibility. Please clarify how university-affiliated non-profit teaching hospitals may obtain prevailing wage determinations that correctly utilize the ACWIA wage data. Are wage analysts encouraged to ask for evidence of eligibility before determining that the employer is not eligible?

Since the question mentions "occasionally," DOL is unsure whether this is really an issue or not. When an employer requests an ACWIA wage, DOL has to determine whether the employer actually meets the eligibility criteria. "It is the responsibility of the employer or the employer's agent to prove that case." DOL need not prove that the employer is ineligible. The criteria are in the regulations.

Stakeholders noted that this error is, in fact, regular. DOL is not applying USCIS criteria but the "ACWIA Act." Once an employer has proved to DOL that it is ACWIA-eligible, DOL will no longer question the matter.

15. **Default wages.** At our last meeting, we discussed DOL's use of a default of $70 to $80/hour for certain positions. We would like to revisit this prevailing wage issue for further clarification. The question and answer from the last meeting were as follows:

Question: In cases where there is no OES wage for a particular position (e.g. Dentists, General in Auburn, ME), the PW unit appears to default to assigning a wage "equal to or greater than $80 per hour or $166,400 per year," even though the position is classified as "Level I." There are several other options where there is no wage for a particular occupation, such as using a related category or using the wage for an adjacent geographical location for the same occupation, which would be a more reasonable approach. Why is DOL using $80 per hour rather than an alternative within OES?

DOL submitted this answer in writing in advance of the call:

"Answer: See the March 24, 2010 FAQ. For a few occupations where the OES survey is coming in very high, but there are not enough data samples, BLS is indicating a salary of at least $70 to $80 per hour. Despite the fact that the PWD

indicates a Level I, DOL will assign that wage if BLS indicates that the salary is at least $70 or $80 per hour. DOL will not look for other alternatives, e.g., the "all other" SOC code, or other geographic areas. Regarding the "all other" category, in general DOL is not inclined to use that code; it is trying to use the most specific SOC code for an occupation."

AILA determined after the last meeting that in fact OES does not indicate a $70 or $80 per hour prevailing wage in these instances, but rather states the following (example used is Internists in Boston, MA): "No wage data are available in Area **71654** for the occupation code **29-1063** - Employers will need to provide an alternative wage source, see 20 CFR §655.31 or 20 CFR §656.40." Therefore, we again ask that in these instances DOL look at a related category or a nearby geographical area in order to determine a more reasonable prevailing wage.

16. Please comment on the lack of consistency in emailing Prevailing Wage Determinations to the requestor. In many cases the PWD's are emailed when completed, and in others they are never emailed. Some PWD's that have come back recently indicate that the PWD is valid only as to one combination of education and experience, and specifically is not valid as to the alternate set of degree/experience requirements that was included in the PWD request.

Within the last couple of weeks DOL has experienced problems with the iCERT program, especially in issuing PWDs. Within the last few days, a large number of PWDs "previously determined" have been issued. DOL believes that this problem has been remedied. Users who had a problem opening a PWD should have received it by e-mail or now be able to open it in iCERT. Users who continue to experience problems should e-mail "the flc.pwd box." DOL will issue PWDs only on the primary duties and requirements and will not issue multiple PWDs in response to one request. DOL published an FAQ about this in March.

PERM

General Information

17. **Current PERM Processing Times. W**hat is the status of the backlog?

PERM processing times are indicated on the DOL-ETA web site, which is updated monthly (note, after the stakeholder call DOL updated this information at http://icert.doleta.gov/#fragment-2). Case processing times have improved during the last year and will continue to improve.

18. We applaud DOL's improved processing time for applications that are not audited. However, as the regular processing time decreases (and as processing time at BALCA improves), the processing time for cases in the audit queue becomes longer and longer. The lengthy processing time for Audit cases is fundamentally unfair. For example, many cases with no audit are being approved in 2 weeks to 2 months and where a case is denied without audit but appealed to BALCA we may have a decision in 6 months. Please advise as to whether DOL is or will be making efforts to reduce the backlog of cases in the Audit queue.

Same answer as above. DOL has worked very hard to reduce processing times, and stakeholders will continue to see progress.

19. **System Support.** Please update us on the status of the system enhancements described at the October 2010 in-person meeting: stepped up adjudications and customer service, and more audits and supervised recruitment?

Answered in #4 above.

Note that the recent iCERT outages were not a problem at DOL but problems with DOL's network provider. DOL will deal with any harm to employers (for example, who ran out of time to file) on a case-by-case basis.

20. **iCERT.** What is the timeframe for implementation of the new ETA Form 9089 in iCERT?

No answer.

21. **Help Desk Emails**. What is status of improving the email responses from the help desk?

All e-mails are responded to within 48 to 72 hours, and DOL continues to work on improving the content of the messages.

22. **Appendix A.** We ask that you consider posting Appendix A to the PERM reg, the list of professional occupations, to the DOL website. Posting the Appendix would make it more accessible to employers as it appears that members have had some difficulty locating it.

Appendix A has been posted (see http://www.foreignlaborcert.doleta.gov/pdf/AppendixA.pdf).

23. **Telephonic communication**. We would like to thank DOL for its efforts to improve customer service. In this regard we have seen an increase in the use of telephonic communication to obtain certain types of information. Can you address what kinds of guidelines have been given to customer service staff and other staff as to the types of matters or issues on which telephonic communication is appropriate? It would appear to be most beneficial to all where the call relates to facts that will permit the quick resolution of issues and avoid unnecessary delays. We understand that, in some cases, phone calls are being made regarding questions of law. We know attorneys receive these calls and believe that employers also receive them. We are concerned that where larger legal issues are involved, the consequences are too important to be resolved without written communication. In these instances, does DOL agree that written correspondence should be issued? An example of such a case could be where withdrawal of an application is an issue.

DOL would like to hear about problems. Telephone calls usually result when a notice or e-mail from DOL has not received a response.

24. **ETA Form 9089 completion -** What suggestions for completing question H.6-A (number of months of experience required) would DOL offer a college or university that has advertised a teaching position with a general teaching experience requirement such as "must have college-level teaching experience in the discipline"?

The employer must specify how much teaching is required.

Follow-up

25. At our last meeting, DOL indicated that language in Audit Notification letters related to a "reasonable period of on-the job training" (see attached Audit Request 4 for an example) would be reviewed in order to provide employers with some guidance as to DOL's standard for determining a "reasonable period" and suggest evidence to prove it. Can DOL provide some guidance at this time?

DOL notes that this language is found in audit notices, and it is considering issuing FAQs. In the meantime, it is up to the employer to establish what constitutes a "reasonable period." The employer is responsible to determine what's reasonable, and if DOL requires more information, it will request such.

26. At our last meeting, we left with the understanding that a revised ERP FAQ would be forthcoming. The need for a new FAQ would appear to be supported by the recent

BALCA decisions. Please provide an update on the status of the ERP FAQ. (See attached Audit Request 3 for an example.)

Employer referral program FAQ has been drafted and is being reviewed.

27. At our last meeting, DOL indicated that we could expect to see an increase in debarment activities due to the new contract and additional resources. Please provide an update regarding debarment activities.

a. How many debarment proceedings have been commenced?
b. On what types of matters?
c. How many have been completed?
d. What were the outcomes?

Debarment data is posted on the DOL-ETA web site (see http://www.foreignlaborcert.doleta.gov/pdf/Debartment_List_Revisions.pdf).

28. At our last meeting, we advised DOL of our concern that attorneys are no longer receiving e-mail notification of the certification of applications. This has become increasingly more significant with the limited validity period on the labor certification. We were hoping that restoring these e-mails could be accomplished simply and quickly. Please provide an update in this regard.

Unfortunately, DOL has not been able to find a "quick fix" for this problem. DOL is making efforts to revive the process but cannot make any guarantees.

29. When can we expect to see an FAQ on recruitment for roving employees?

DOL continues to consider this issue, but until further notice the prior guidance continues to apply.

30. **Equivalency** – Please provide any updates to discussion between DOL and USCIS regarding education and experience equivalency issues. ACIP provided DOL with a memorandum on this issue. See March 22, 2010, ACIP memorandum titled The Use of Alternative Requirements in Labor Certification Applications and the Meaning of "Substantially Equivalent".

DOL continues to work with USCIS on this issue, "it is an ongoing process," and a slow process.

Audit/Denial

31. **Denial Without Audit**. Has DOL completed quality assurance steps for denials without audits?

DOL did not understand this question and did not answer it.

32. **Applicant Contact**. Recent language in Audit Notification letters requests "information for each U.S. worker" regarding how the employer contacted the applicant(s), i.e., by phone (telephone logs), email (dated copy of electronic transmission) and/or by mail (copy of letter sent to applicant(s) along with a copy of certified mail/"signed" green return receipt card. (See attached Audit Request 4 for an example.) We are concerned about the breadth of this request including, but not limited to, the fact that employers are not required to contact applicants when it can be determined from the face of their resumes and cover letters that they are not qualified for the position. To make such information a requirement would appear to be excessive. We ask that DOL reconsiders the request for such documentation.

DOL policy has not changed. "Employers are required to consider potentially qualified U.S. applicants." DOL clarified that ***only*** "potentially qualified U.S. applicants" must be considered (not clearly unqualified applicants), so DOL is "reviewing the letter to determine whether any further clarification is necessary" since the letter suggests that even obviously unqualified U.S. workers must be considered.

33. **Advertising Denials after audit based on unlawful rejection of U.S. workers for reasons not specified in the advertisements.** The basis for some recent denials appears to be inconsistent with prior guidance from OFLC on the content of advertising for which the standard previously set forth has been merely to "apprise" U.S. workers of the job opportunity. OFLC has repeatedly advised that advertising need not include the complete job descriptions or all requirements. Yet the denials would indicate that unless all requirements are included in the ads, rejection of a U.S. worker for lack of any of an unlisted requirement is unlawful.

The following are examples:

> From Denial #1:"Specifically, the employer's recruitment report states that U.S. applicants were not qualified for lacking [the education, experience and/or special requirements]. However, the employer's [newspaper advertisements and job search website] do not list the required education, work experience, and special requirements for which U.S. applicants were rejected. This violates the conditions of employment as outlined in Section N of ETA Form 9089."

AUTHORITY FOR DENIAL: 20 CFR 656.10 requires the employer certify under penalty of perjury under 18 U.S.C. 1621(2) to the conditions of employment listed on the application for Permanent Employment Certification to include that, "The job opportunity has been and is clearly open to any U.S. worker." Per Section 656.10(c)(9), the employer must certify that "U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons."

From Denial #2: "The employer's recruitment report made very specific statements that U.S. workers did not meet the employer's minimum requirements. However, they were rejected for education, skills or required years of experience that were not in newspaper advertisements."

AUTHORITY FOR DENIAL: Per 20 CFR 656.17(g)(I), The employer must prepare a recruitment report signed by the employer or employer's representative noted in Section 20 CFR 656.10(b)(2)(ii) describing "the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reason for such rejections.

Is this a training issue? Can DOL clarify the reasoning behind these decisions?

DOL understood that this was an issue and recently undertook "reinforcement training" to make sure its adjudications would be proper. DOL emphasized that the ETA-9089 should include all requirements indicated in advertisements (it is not strictly necessary that every requirement stated in the ETA-9089 must be included in the advertisements). Stakeholders noted that recent denials were based on the fact that not every work not every word on the ETA-9089 is in the advertisement. DOL agreed to continue "reinforcement training" on this issue. Employers should request "government error" queue when submitting these for reconsideration. DOL added that even if employers don't request reconsideration via the "government error" queue, reconsideration requests are evaluated to determine if they involve government error anyway.

34. Denial after audit based on Notice of Filing that "does not disclose the location of where it was posted as required by the regulation."

A denial notice states: AUTHORITY FOR DENIAL: Pursuant to 20 CFR 656.10(d)(1)(ii), the employer must give notice of the filing of the Application for Permanent Employment Certification "by posted notice to the employer's employees at the facility or location of the employment."

This language, or substantially similar language, has appeared on multiple denials. In many of these cases, the NOF was on letterhead, stated the worksite, and the

employer stated that it had posted the NOF. Such a denial would imply that the cases were denied solely because the employer did not state that the notice was posted at a specific location. If the posting is on letterhead reflecting the worksite address and there is a statement that the notice was posted, is this not sufficient to meet the requirement? Is this a training issue?

This appears to DOL to be a single instance, so if the employer disagrees with the denial it should appeal or request reconsideration. Stakeholders noted that this language is actually common in recent denials. DOL said that employers in these cases should request reconsideration or appeal. Stakeholders noted that there is no specific regulatory provision or DOL guidance indicating the proper location for a notice of filing and asked why, in these cases, the employers should be subjected to a lengthy reconsideration queue due to obvious government error. DOL suggested that employers use a "common sense approach in light of the spirit of the regulation" to determine the proper location for posting the notice of filing.

35. Denial after audit based on Notice of Filing that does not include the magic language.

The denial notice states: The notice of filing for the Application for Permanent Employment Certification does not apprise the U.S. worker of the job opportunity. The job described in the notice does not match the job described on the ETA Form 9089 Section H. Specifically, the 9089 states that any suitable combination of education, training or experience is acceptable; however, the notice of filing does not provide the same description.

AUTHORITY FOR DENIAL: Per 20 CFR 656.10(d)(4), the notice must contain the information required for advertisements by Section 656.17(0, which requires in subparagraph (3) that advertisements must "provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought."

This would also appear to be a training issue. Does DOL agree?

DOL said that employers in these cases should request reconsideration or appeal.

36. Live-In Housekeeper and NOF. A member reports a denial on a live in housekeeper application for failure to post the NOF. We understand the NOF is not required for this type of application. Please confirm.

DOL said that 20 CFR 656.10(b)(2) applies and if the employer does not think that DOL made the correct decision, it should request reconsideration or appeal.

37. **Change of Attorney in Audit**. Please explain DOL's preferred practice as to how to comply with the attorney's signature requirement on Form 9089 when there is a change of attorney involved in the filing of an audit response.

DOL is reviewing procedures to make sure that it is consistent and is considering whether to post a related FAQ.

Supervised Recruitment

38. **Cases in SR** – Please provide recent update on the percentage of supervised recruitment cases that are approved? Denials? Withdrawals?

Since program inception, approximately:
Certified 12%
Denied 65%
Withdrawn 23%

39. The Certifying Officer may determine that an employer is required to conduct supervised recruitment pursuant to Section 656.21 in future filings of labor certification applications for up to two years from the date of the final determination. However, when an employer withdraws an application that has been placed in supervised recruitment, the employer is advised that any subsequent application for the same employee and the same job opportunity will be subject to supervised recruitment for what appears to be indefinite duration. Please clarify whether the two year limit applies in this case as well and, if not, kindly explain why it would not.

DOL believes that the two-year limit applies; however, that doesn't preclude DOL from requiring in supervised recruitment beyond that period, depending on the circumstances.

40. In certain instances, it is impossible for the employer to follow DOL supervised recruitment instructions, for example, because the newspaper in which the employer is advised to advertise is no longer in existence or the newspaper no longer publishes every day of the week and therefore there can be no 3 consecutive day ad in that paper. In such a case, we are advised to e-mail the unit and explain the problem in order to obtain further instructions. Where DOL is advised of the issue in a timely manner but the employer does not receive a response from DOL in sufficient time to meet the previously issued response date for recruitment, will a new response date be issued when DOL provides further guidance?

If you receive such a request, and it is not possible to comply, contact the Supervised Recruitment Help Desk, and they will give a 15-day extension and an alternative.