Notes from DOL Stakeholders Meeting

October 28, 2010 – Washington, DC

DOL officials present: Bill Carlson, Elissa McGovern, Stacy Shore, Bill Rabung, Chris Conboy

General Updates

DOL just finished a multi-year IT application support contract. As the contract came to an end, maintenance activities—rather than new application development—were DOL's focus. With a new contract now in effect, DOL plans to upgrade and enhance iCERT, and DOL welcomes stakeholder suggestions. Among the iCERT upgrades will be implementation of Form ETA-9089 in iCERT. DOL did not provide a timeline for this, but stated that it expected a transition period in which both the current ETA-9089 system and the iCERT version would be effective, and stated that a notice would appear in the *Federal Register* prior to implementation in iCERT. DOL added that an employer account established in iCERT for LCA purposes would also allow access to the iCERT ETA-9089 (in other words, and employer would not need to create a new account) once the iCERT ETA-9089 is implemented. DOL has met with USCIS to discuss transformation, and the agencies are developing MOUs on the topic.

In response to stakeholder questions about the apparent increase in denials of labor certification applications, DOL indicated that several factors may be involved, including an increase in the number of applications filed and staffing changes. At the end of the fiscal year (September 2010), DOL replaced a number of staffing contracts covering a wide range of positions, from network support staff to analysts, with one consolidated, performance-based contract. DOL expects the new staffing contract to result in enhanced processing, increased production, and the implementation of higher standards for staff.

DOL noted a significant rate of "non-responsiveness" (including both complete lack of response and incomplete response) to audit letters and indicated that with the staffing increases it will be able to pursue such applicants more vigorously (including debarments, revocations, etc.).

DOL reported that approximately 1300 to 1700 applications are undergoing supervised recruitment and that approximately 40% of applications subjected to supervised recruitment are withdrawn and 50% are denied, resulting in a certification rate of only 10% of applications subjected to supervised recruitment. Expect more supervised recruitment.

Issues and Agenda Items Submitted by Stakeholders

Failure provide attorneys e-mail notification when Form ETA-9089 is certified

DOL was not aware that attorney e-mail notification had ceased, and agreed to look into the problem.

Current processing times for prevailing wage determinations

Processing times appear in iCERT. They are accurate and updated monthly. Both determinations and redeterminations are currently being issued in 30 days or less.

Case resolution and outreach

DOL continues to consider case resolution and outreach, but current staffing levels will not support a case resolution mechanism for stakeholders (NAFSA—among others—will continue to recommend a case resolution mechanism and, as an alternative or stopgap measure if DOL will not create a case resolution mechanism, to allow stakeholder liaison on certain limited problematic issues).

Prevailing Wage Redetermination Processing

Redetermination requests are handled pursuant to the regulations (20 CFR §656.41) on a first-in/first-out basis. The analyst who made the initial determination does not necessarily make the redetermination. Usually more experienced analysts process redetermination requests, but current staffing levels are insufficient to support creation of a special group of analysts dedicated to redetermination requests.

Prevailing Wage Redetermination Validity Periods

Noting that when DOL affirms the original wage determination, it issues the redetermination for the same validity period as the original determination, which means that the validity period may have elapsed by the time DOL issues the redetermination, stakeholders requested that DOL issue redeterminations for a validity period of at least 90 days. DOL stated that it does not have the authority to extend the validity period in the case of a redetermination.

Redetermination Request Field

Stakeholders suggested that DOL increase the 255-character limit for the redetermination request explanation. DOL agreed to make such a request of the new IT contractor.

Correcting Prevailing Wage Determinations

Stakeholders noted many common errors (including clearly incorrect job codes and wage levels, correct code and level but wrong wage, etc.), noted that correction of such errors may take several weeks or more, and asked DOL to increase its ability to timely issue corrections. DOL stated that it is not government error if a determination does not use the SOC code or wage level requested since determinations are based on DOL evaluation of the information provided to it. DOL suggested that applicants who disagree with a determination request a redetermination and stated that a redetermination request through iCERT is the preferred as it reduces the chances or errors, mail delivery problems, etc. (94% of redetermination requests are submitted through iCERT). DOL consider a better system for timely correcting obvious government errors on wage determinations.

Inconsistent Prevailing Wage Determinations

Stakeholders noted continuing inconsistencies in prevailing wage determinations (and offered to provide specific examples), indicating the need for additional training. DOL stated that it is working to develop a more standardized and consistent approach, but noted that in some cases applicants can expect different determinations than those previously issued by the state workforce agencies (SWAs).

Impact of Travel Requirements on Prevailing wage Determinations

Stakeholders noted that travel requirements often seem to increase the wage level assigned, though there seems to be no statutory, regulatory or other authority for this, nor any DOL guidance indicating that travel requirements would require assignment of a higher prevailing wage level. DOL stated that its long-standing practice has been to consider travel as a "special requirement," and that if the travel requirement is significant and not typical to the occupation or industry (per O*NET and OES), DOL will add a point when making the prevailing wage determination. DOL stated a concern that including travel requirements might hamper the recruitment of U.S. workers.

Problems in Submitting Supplemental Documentation

Stakeholders noted difficulties DOL seems to have in matching supplemental information (such as private wage surveys and Collective Bargaining Agreements submitted by applicants) to pending prevailing wage determination wage requests. DOL stated that the preferred method for submitting supplemental information is to send the information electronically to flc.pwd@dol.gov and include in the body of the e-mail message the case number. If sending by mail, include the case number in the cover letter.

Default Wage of $80/Hour for Some Positions

When there is no OES wage for a particular position DOL appears to default to assigning a wage—even for a Level 1 position—of "equal to or greater than $80 per hour or $166,400 per year" rather than looking to a related occupation or category or adjacent geographical location for the same occupation. DOL referred stakeholders to the March 24, 2010 FAQ for the basis of this. DOL also stated that it is generally not inclined to use the "all other" code and makes an effort to use the most specific SOC code for an occupation.

NPWC E-mail Problems

Stakeholders noted that e-mail messages—such as requests for correction of errors—to NPWC often go unanswered for at least several weeks and are often answered with general information such as "cases are worked in FIFO order, and your case is in process" rather than with specific information, leading to confusion, duplicate inquiries, duplicate requests, duplicate submissions of supplemental information, etc. DOL stated that it is working to improve NPWC communications, that the Help Desk response times have improved recently, and that stakeholders can expect to see faster responses in the future.

Use of ACWIA Wage Data for Teaching Hospitals

Stakeholders noted recent reports from members that DOL had refused to use ACWIA wage data in assigning prevailing wage determinations for positions at teaching hospitals 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) requiring use of the OES ACWIA Higher Education wage" and that DOL used "all industry" rather than ACWIA wage data in making prevailing wage determinations for teaching faculty, residents, and other positions even though clearly informed that "***This employer is an institution of higher education or a research entity under 20 CFR 656.40(e)***" DOL stated that it has not changed policy regarding the use of ACWIA data and that it is the responsibility of the applicant/requestor to establish ACWIA eligibility. DOL stated that it often does initial inquiries as to eligibility, such as accessing the employer's website.

Adjustments for Market Conditions

Stakeholders noted that members had received prevailing wage determinations that in no way seemed to reflect "real life" wages actually paid for the occupation in the geographic area and asked DOL to explain why it is not taking into account the current economic conditions (wage freezes, etc.) as it makes prevailing wage determinations. DOL stated that it cannot make adjustments due to current market conditions and is bound by the wage data supplied by the Bureau of Labor Statistics.

LCA processing Times and Denials

DOL stated that 99% of LCAs are processed in 7 business days and that approximately 10% of LCAs filed during the period July 2010 to September 2010 were denied. The most frequent denial reasons include: FEIN not recognized, private wage survey not recognized, wage level not included, and prevailing wage issues. DOL receives approximately 165 requests for FEIN verification daily and usually verifies the FEIN within 48 hours.

LCA Denials for "Survey Name Not Recognized"

Stakeholders noted that many members have received LCA denials on the basis that the wage survey is not a valid survey that the survey name is not recognized and asked how the ETA-9035 should be completed to avoid such problems, whether expanding the space for entry of the survey name might help solve the problem, and whether DOL would establish a process for having the survey approved before filing the ETA-9141. DOL stated that it is working on FAQs to address private wage survey issues and will attempt to answer the submitted questions on this topic in the FAQs.

Erroneous LCA Denials

DOL stated that the new staffing contract will allow it to implement iCERT system enhancements that should help reduce or eliminate erroneous LCA denials.

PERM Government Error Queue

DOL was asked to create a mechanism for informing applicants who requested reconsideration through the government error queue whether their request was accepted in the government error queue or placed in the regular queue. DOL stated that government error queue cases are being processed in 30 to 45 days, so if the employer does not hear anything in 45 days, it may assume that the case is in the regular queue and not the government error queue.

Policy Changes without Prior Notice

DOL was asked to provide notice a reasonable amount of time before it institutes a change in policy or process (for example, Employee Referral Program (ERP) documentation changed by FAQ with no advance notice on August 3, 2010). DOL stated that, while it is not required to give advance notice to exercise its authority under the regulations, it acknowledged the frustration of stakeholders and their opinion that this constitutes an issue of fairness.

Employee Referral Program

DOL was asked to provide an example of the kind of documentation an employer might provide—alternative to its web site—to establish that it utilized its employee referral program for recruitment. DOL stated that the employer must show that employees were apprised of the opening and that the position was eligible for the program. DOL will issue an FAQ regarding this.

Perm Denials

Stakeholders reported denials of ETA-9089s on the basis of a DOL determination that the employer's advertisements did not sufficiently apprise U.S. workers of the job opportunity, which seems to represent a departure from prior DOL guidance and practice of considering ads sufficient as long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application. DOL was asked whether advertisement text must match the job description on the ETA 9089. DOL advised stakeholders to refer to the FAQs to see the level of detail required in advertisements.

Teaching Duties and "Special Handling"

DOL was reminded that in the June 2010 teleconference it stated that job duties, rather than job title or nature of the employer, would determine whether a position qualified for "special handling" but then DOL stated that coaching positions generally would not qualify, and DOL was asked to provide the basis for this conclusion. DOL was asked if it would agree, for example, that college/university coaching positions involving substantial classroom teaching duties—such as Physical Education courses required for Education majors—would, in fact, qualify. DOL stated that whether a case qualifies for special handling is a case-by-case determination. DOL looks at the entire application including job title and job duties. Thus, it is not saying that a Coach position would not ever qualify, but rather that it depends on the job description, whether there are clear teaching responsibilities listed in the job description. If teaching is barely part of the job, it might not meet the requirement.

Online Ads for College and University Teaching Positions

DOL was asked whether, in light of the continuing trend away from "paper" job ads and toward online ads and the continuing trend toward electronic publishing rather than "paper" publishing of professional journals, it will reconsider its guidance that the advertisement required for "special handling" must be in a "paper" journal and allow employers to utilize more effective and cost-effective online-only advertisements. DOL stated that it is still considering whether to allow on-line only advertisements for "special handling" cases.

Denials Due to Journal Type

DOL was asked to explain denials on the basis, for example (from a denial received by a NAFSA member), that

> The employer's use of Diverse Issues in Higher Education to advertise the job opportunity is not appropriate. This publication is specifically targeted to specific communities, namely African Americans, Asian Americans, Hispanics and Native Americans. It is determined that Diverse Issues in Higher Education is not a journal which would normally be used to advertise for a Lecturer of Mathematics, the job opportunity listed on the ETA Form 9089 for which certification is being sought, nor is it a journal most likely to bring a response from able, willing, qualified, and available U.S. workers. Therefore, the application is denied. Denial Authority: 20 CFR §656.18(b) requires that the employer engage in a competitive recruitment and selection process.

DOL acknowledged that denials of "special handling" applications for use of *Diverse Issues in Higher Education* were in error and suggested that the government error queue should be used to correct these denials.

DOL was also requested to pull from the reconsideration/appeal queue denials based solely on the use of an advertisement in the MLA publication (pursuant to BALCA's *Matter of Syracuse University* decision). DOL asked for a list of such applications and stated that it would make an effort to do so.

Calculating Business Day" for NOF Requirement

DOL was asked whether, in light of BALCA's decision in *Matter of Il Cortile Restaurant*, (2010-PER-683), it was planning to amend "Notice of Filing FAQ 1" and related guidance and whether it would pull from the reconsideration/appeal queue denials based solely on fact that employer counted as a "business day" for meeting the Notice of Filing Requirement a day other than a federal holiday or weekend day. DOL requested a list of such cases and added that in the future, employers will have the burden of proving that they are open for business on the business days counted. DOL will require more than a mere assertion by the employer (things such as brochures which indicate days of operation, or printouts from the employer's website which indicate days of operation, etc.). In light of the BALCA decision in *Il Cortile*, DOL will be reviewing its FAQ on counting business days.

System Prompt When ETA-9089 Item I.b.5 Left Blank

Stakeholders noted that members have, when they attempt to leave Form ETA 9089 item I.b.5 (Special Recruitment and Documentation Procedures for College and University Teachers: specify additional recruitment information in this space) blank, received a system prompt to fill-in the blank even though it is clear that only one print ad is required. DOL was asked whether employers should they expect a denial, audit, or other problem if they indicate "none" or "not applicable (n/a)." DOL confirmed that an application will not be denied if item I.b.5 on Form ETA-9089 is left blank and that "N/A" may also be indicated.

Multiple worksites

DOL was asked how the ETA-9089 should be completed when there is more than one worksite and more than one prevailing wage applicable (for instance, whether the employer should list the one for the "primary" site, the higher of the two determinations, etc.). DOL stated that when there is more than one worksite and more than one prevailing wage applicable, the employer should list the wage for the primary work location.

Work Sites for Telecommuters

DOL was asked how employers should determine a "work site" for telecommuters. DOL stated that it has generally indicated that employers should consider the location at which the work is being done the worksite for LCA and labor certification purposes. DOL acknowledged that this is a complicated issue and stated that it is preparing FAQs on the subject.

"Existence Checks"

Stakeholders noted an apparent slowdown in existence checks, so that some remain pending one month or more after submission of the required documents. DOL stated that existence checks are taking longer because DOL has seen a 20% to 30% increase in ETA-9089 filings. There is no mechanism for requesting expedited processing, but DOL is dramatically increasing its employer data, which should result in fewer checks. DOL suggested that employers register before beginning recruitment to avoid problematic delays.

Truncation of ZIP Codes Beginning with Zero

Stakeholders noted that the iCERT system continues to truncate zip codes beginning with zero. DOL stated that Release 3.0.2 (3/4/10) fixed this problem.