DOL OFLC Stakeholder Meeting
200 Constitution Avenue, NW
April 7, 2011
9:30 AM

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.

DOL officials present: William Carlson, Elissa McGovern, Brian Pasternak, Bill Rabung, Maeda Henderson

Stakeholders attending: NAFSA, ABA, ACIP, and AILA

DOL complied the questions below and distributed them, with the note "DP: FY2010 Performance Report and Integrity Review" before the meeting.

DP: FY2010 Performance Report and Integrity Review

From the report http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V1-01.pdf

A key and long standing challenge within the foreign labor certification programs has been balancing program integrity activities and the impact of those efforts on overall case processing times and the generation of case backlogs. Eligible U.S. employer will continue to have access to foreign workers when qualified domestic workers are not available.... Increased integrity activities such as conducting audit investigations and supervised recruitments, which began in 2009, increase the average length of time to resolve a permanent application as these are labor-intensive regulatory processes. However, these two integrity measures also generate the highest number of denials and non-certifications, outcomes which enhance program integrity and contribute to jobs being available to U.S. workers.

The results of these integrity activities are now being reported and demonstrate that a little more than one half of the resolved permanent applications during FY 2010 selected for integrity review were found in compliance. Because the regulations require employers to attest to compliance with program requirements at the time of filing a permanent application, this indicator measures the likelihood that OFLC will certify an employer application following a more thorough investigation of the employer's compliance with program requirements or when U.S. workers may be available for certain requested positions....

OFLC will apply stricter scrutiny to applications. In the future, OFLC will revise the PERM application form — which expires in June 2011 — to both strengthen its integrity (by clarifying program requirements) and seek more detailed justifications in key parts of the form. Managers at OFLC headquarters and the national processing center levels will, where feasible, attempt to implement operational strategies to maintain production levels while enhancing audit

investigations and other program integrity efforts. In FY 2011, the Department intends to propose legislation to establish an employer-paid user fee to partially fund the PERM, H-2A and H-2B programs to: make the programs more responsive to labor market demand; ensure financial resources to process applications timely; and recognize the benefit of the certification is to the employer and not the public.

Questions

1. Can DOL advise as to how applications were determined to be "in compliance" under these integrity measures? For example, are only certified applications deemed "in compliance" and are all denied applications deemed non-compliant?

2. How are withdrawn applications treated, before or after a supervised recruitment order?

3. Has integrity review included review of any certified applications? If so, have any certifications been revoked after integrity review?

DOL refused to comment on how applications are determined to be "in compliance" under the integrity measures and stated that the regulations clearly indicate what is necessary for compliance. Whether or not an application is in compliance is a "certification decision." Only denied and certified applications, not withdrawn applications, are included in the compliance rate calculations. DOL noted that revocation is something that rarely occurs, usually when DOL obtains information after certification was granted, indicating that certification should not have been granted, such as a familial relationship that was not initially disclosed on the ETA- 9089. DOL confirmed that it does not revise its performance statistics when a denial reversed, so an application could be included in the "denied" total for one quarter and later be included in the "certified" total if the denial had been reversed.

GENERAL

1. FAQ Publication

We note that the March 15, 2011 prevailing wage FAQs were not published as a stand alone document but were integrated into the consolidated FAQs on the DOL website. We believe it is important that they continue to be published as a stand alone document to ensure that the date of FAQ updates are clearly noted, and that stakeholders are notified of the relevant changes. Please advise as to whether DOL will continue publish the FAQs both as an online update, and as a separate document.

We also would like to remind DOL of our previous discussion regarding future effective dates for implementation of FAQs as appropriate to ensure that longpending cases are not penalized by changes made by FAQs long after an application was filed.

DOL has chosen to publish new FAQs as updates to its website (http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm) rather than PDFs since PDFs cannot be amended after publication. DOL chose this approach, in part, to avoid the possibility that employers and attorneys might use old guidance from outdated FAQs that had been

superseded and in an effort to eliminate multiple (possibly conflicting) PDFs on the same subject. Stakeholders mentioned the value of PDFs, such as an indication of DOL's position on a matter at the time an application was filed, and asked DOL to indicate on the web FAQs the dates of modification. DOL representatives agreed to discuss this suggestion with the IT team.

TEMPORARY PROGRAMS

Labor Condition Applications

2. iCERT System Access and Maintenance Issues. Members have noticed that iCERT has been taken offline twice for system maintenance during business hours in March. Given that employers are required to file LCAs through iCERT, removing access to iCERT, and thus foreclosing the ability to file LCAs during business hours, has a disruptive effect on many employers. Would it be possible to schedule system maintenance with more advance notice and/or for this to be done during non-business hours (evenings and/or weekends)?

DOL makes every effort to provide notice of outages as soon as possible. It is not always possible to predict outages. For various reasons dates and times of some planned outages are sometimes changed. DOL will continue to plan upgrades carefully and publish notice as an upgrade is planned.

3. iCERT Enhancements

a. Would DOL clarify whether it intends for the "point of contact" for each form always to be the primary account holder? If not, would DOL consider adding functionality to request to auto-populate the associate account holder information instead? This would be helpful because when an associate account holder logs into iCERT, the template populates only the primary account holder's biographical and contact information in Section D —Employer Point of Contact Information, which we end up changing manually on each form.

DOL is not planning at this time to such add functionality.

b. Please provide updates on the following enhancements to the iCERT program:

1) Allow users to enter a unique identifier into the LCA and PWD forms so that they can be matched up to employees - by allowing users to enter the alien's name into an optional field, or by allowing space to put a unique identifier, such as an employee ID number.

Changes to forms require administrative process (OMB clearance, etc.). Since this information is not required DOL to perform its function the Paperwork Reduction Act of 1995 make it unlikely that DOL will make such a change. DOL also cautioned against employers/attorneys annotating forms with employees' identifiers, such as inserting the employee's name or initials in the space for the preparer's name, as this can result in a denial due to obvious error or inaccuracy.

2) Allow automatic status updates by e-mail or text message so that users can be immediately informed of audit notifications, certifications, denials, etc. Also, provide notification via pdf to allow printing.

DOL will consider system improvements that would provide more detailed information concerning application status. In response to stakeholder's indications that "lost mail" often seems to result in serious problems—for instance, lost audit notification, denial notice, or certified application—DOL asked employers/attorneys to report such problems. DOL may not necessarily correct an individual case problem, but data about mail problems enables system improvements.

3) State specific reason for denial of LCA decisions so that it is clear why a case is being denied. Most decisions cite only to sections of the regulations without any substantive analysis of the facts of the case.

DOL plans to enhancing the system to provide specific reasons for denials, but DOL offered no timeframe for this upgrade and indicated that budget constraints limit DOL's ability to contract some projects like this and make it difficult to estimate when such an improvement might take place.

H-2A

4. OFLC's recent budget justification documents show that only 58 percent of H-2A applications were processed within 15 days of receipt and 30 days from the date of need. This processing time makes it difficult for employers to plan and determine when an application needs to be filed. Would DOL consider providing guidance as to common errors made by employers, perhaps by providing a list of the 10 most common errors, in order to increase the number of clean applications submitted, thereby improving the percentage? This would minimize the workload for the Department, and improve the predictability of processing times for employers, who could then minimize the errors that delay processing of their H-2A cases.

DOL stated that 70% of H-2A applications are processed within 15 days of receipt and 30 days from date of need. It has been one year since the H-2A regulations changed the process and document requirements and indicated that, as employers have become more familiar with the new regulations, DOL has noted an increase in properly prepared applications and a decrease in denials. DOL plans to issue FAQs addressing H-2A requirements, but until the new FAQs are issued, employers may continue to follow the filing tip sheets published by DOL when the new regulations.

H-2B

5. H-2B Wage Methodology. DOL's January 19 final rule on H-2B wage methodology provides that "the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012" (pg. 3462 of the Federal Register). We interpret this to mean that the rule will only apply to H- 2B employment that *commences* after January 1, 2012, and that if the H-2B

employment starts before that date, it will not be impacted by the new rule. Is that a correct understanding?

The prevailing wage methodology described in the final rule applies to wages paid for any H-2B work performed on or after January 1, 2012, including work begun before January 1, 2012, and continuing after that date. With the implementation of the new methodology, it's possible for a prevailing wage rate to change during a certification period, as DOL explained in its March 28, 2011 FAQ.

PWD

6. Current PWD Processing Times. Would DOL be willing to publish average processing times for PWDs and redeterminations?

DOL is not considering publishing prevailing wage determination processing times because determinations are being issued quickly, normally within 30 days (well within DOL's stated policy of issuing determinations within 60 days), and DOL believes—based on redetermination request rates—that the PWDs being issued are valid.

7. Use of ACWIA. As DOL is aware, USCIS recently announced that it is reviewing its policy on this issue and is applying an interim procedure to these cases until the policy is resolved. In the interim period, USCIS will defer to prior determinations on cap exemption, with the burden on the petitioner to show prior approval as a non-profit entity related to or affiliated with an institution of higher education. It is suggested that petitioners may satisfy this burden by providing evidence such as prior approval notices, copies of the underlying petition, and documentation supporting the claimed cap-exemption, as well as a statement attesting that the organization was approved as cap-exempt since June 6, 2006. Would DOL consider taking similar action with regard to ACWIA wages, which could mean deferring to prior wage determinations and permitting the employer to present evidence of prior ACWIA wage determinations from the SWA and/or DOL, or permitting the employer to present evidence that USCIS has recognized the employer as cap-exempt?

DOL is not bound by prior state workforce agency (SWA) prevailing wage determinations, including the determination of whether an employer is subject to ACWIA. DOL does, however, retain in its record whether or not an employer has established its eligibility for ACWIA, and DOL reviews such records when making determinations. Once DOL has found an employer eligible for ACWIA wages, the employer should continue to receive ACWIA determinations unless there are changes, such as a change in the employer's affiliation with a university that would make it no longer eligible.

8. PhD/ABD. Has NPC changed the policy allowing the petitioner to answer PhD/ABD (ABD = all but dissertation) in response to D.b.la?

DOL stated that ABD, "all but dissertation," is not a degree, so an employer should not list it as "Education: minimum U.S. diploma/degree required" at b.1 on Form ETA-9141. NAFSA pointed out that ABD is a commonly recognized "education level" (as Form ETA-9089 requires), so many higher education institutions who require ABD simply indicate "other" at H.4-A and indicate ABD. The problem is that DOL's Form ETA-9141 and Form ETA-9141 ask different

questions. The 9089 asks for education level, and the 9141 asks for degree required. So an employer who requires ABD should be also to so indicate on the 9141. If DOL holds to the position stated here, the employer would be forced to give an inaccurate answer on one of the forms. DOL recognized the problem posed by the conflicting questions and indicated that it would consider this issue and determine whether guidance or a change in process is necessary.

PERM

General Information

9. Processing Times on iCERT. The publication of PERM processing times on the iCERT portal by DOL is appreciated. We do note that the current list of categories (initial review, audits, standard appeals, government error appeals) is somewhat confusing since "government error appeals" are actually requests for reconsideration to the Certifying Officer rather than requests for BALCA review (appeals) and the one reporting category, "standard appeals," includes both requests for reconsideration to the CO and requests for BALCA review. To make the processing times easier to understand, we ask that DOL consider separating the "standard appeals" category into two categories: "reconsideration requests to the CO" and "BALCA appeals" with processing dates for each on the report. We also suggest that the iCERT portal clarify that "BALCA appeals" refers only to the date the case is transferred to BALCA for review, and that following the transfer, the actual processing time for the appeal would be determined by BALCA. Last, we suggest that the "government error appeals" category be renamed "government error reconsiderations."

DOL reminded stakeholders that it does not control and cannot publish BALCA processing times for cases. DOL will consider the suggested changes to the labels the explanation of "appeals." NAFSA note: changes have been made in iCERT since the stakeholder meeting.

10. PERM Statistics and Performance Data. We welcome the recent publication of quarterly performance reports for PERM and other types of cases, but we note that these reports only provide data on completed cases. We would like to know how many PERM cases are currently in process, as well as how many cases are filed each quarter. Can the Department provide information on the total number of PERM cases currently in process in Atlanta, including cases in sponsorship, final review, audit, and appeals? Would the Department be able to provide this information as a regular quarterly update on the PERM program?

DOL agreed to consider providing data on cases in process.

11. Correction after Certification. If the petitioning employer makes a typographical error on Form ETA 9089 and the PERM application is certified without audit, will DOL allow for certified Forms ETA 9089 to be corrected by filing a Motion to Reopen? This assumes that the employer can prove that the error was inadvertent and harmless; the error was immaterial to the adjudication of the PERM application; and the audit file substantiates that PERM regulatory requirements were followed.

DOL stated that it cannot correct a certified application (Form ETA 9089) and will not make determinations as to "material errors." DOL noted that USCIS may accept evidence to corroborate changes of minor points, but that is between the employer/attorney and USCIS.

12. Labor Certification Withdrawal. How can an employer withdraw a labor certification that has already been submitted to USCIS along with an 1-140 petition? DOL instructions require the original labor certification to be returned to DOL when the employer wishes to withdraw a certified labor certification application. USCIS does not return the original labor certification when the employer withdraws the 1-140. Would DOL consider allowing an employer to withdraw a certified labor certification without the original ETA 9089, but instead with proof that the 1-140 was withdrawn?

A certified application (Form ETA 9089) that has been submitted to USCIS can be withdrawn. The employer/attorney making the request must provide evidence that a request to withdrawn the Form I-140 has been submitted to USCIS.

Recruitment

13. On-line Advertisement. What is the current DOL policy on the use of online ads for special handling cases in light of *Syracuse University,* 2010-PER--00772? As background, in that case, the university ran an advertisement in the MLA, which runs both print and online editions, but the print version runs only quarterly for the express purpose (according to the MLA web site of satisfying DOL documentary requirements. The CO initially determined that the journal only qualified as an electronic journal, not a print journal, and denied the application. Subsequently, the DOL requested a remand so it could certify the application. Does this mean that advertisements placed in national professional journals that run only online are now sufficient for satisfying the advertisement requirement of the special handling regulation at 20 CFR §656.18(b)(3), or does DOL still require a print advertisement? If employers can use online media for the mandatory advertisement, are there any restrictions as to what constitutes an appropriate online venue? Would DOL publish an updated list of publications it considers appropriate for on-line ads in special handling cases?

DOL has not changed its policy concerning the paper/print ad requirement for "special handling" applications. In Matter of Syracuse University the employer did provide a paper/print ad satisfying the regulation. An online-only journal advertisement does not satisfy the print requirement.

14. Inconsistent SWA Practices. When an employer places a job order with a State Workforce Agency (SWA) in connection with PERM recruitment, sometimes the practices of the SWA are not consistent with what the employer believes might be DOL's requirements. For example, a SWA may remove the employer's name from the job description prior to posting. Although DOL's rules are not explicit as to specifically what information must be included in the job order, some employers are wary of allowing the SWA to run the job order without the employer name as that is generally a requirement for print advertisements. On the other hand, the SWA will not change their practices in response to the employer request. Where the employer properly places a job order request with the SWA, will DOL deny a PERM application where it believes that the job order was deficient where the deficiency arose from the SWA's procedures and not from the employer's actions?

DOL is unable to reverse such a denial, but if the employer/attorney will notify DOL of any instances in which a SWA has engaged in practices inconsistent with the regulations, so that the problem can be corrected before the ETA-9089 is filed. Provide case numbers and any

other pertinent information such as name of SWA personnel contacted. DOL relies on stakeholders to inform it about SWA problems.

15. ***Credit Suisse.*** Will DOL publish detailed guidance on the content that needs to be included in both mandatory recruitment, as well as professional recruitment in light of the decision?

DOL Stated that it would not do so, since Matter of Credit Suisse simply requires that employers advertise as required by 20 CFR §656.17(f), and the requirements are clearly stated there.

Audit/Denial

16. Notice of Intent to Deny (NOID). Would DOL consider issuing a notice of intent to deny, with an opportunity to respond or correct? As an example: an audit response with a clerical error, such as a referenced document is not included (maybe a photocopying issue?), or if there is an obvious inadvertent error on the form, such as 60 years rather than months on the 9089. Using a NOID could dramatically reduce the number of Motions to Reopen / Appeals.

DOL stated that the regulations do not authorize it to issue such notices, and there is no plan to change the regulations. Stakeholders asked for another mechanism to accomplish the same purpose, and DOL agreed to consider the suggestion.

17. Quality Control Mechanisms for PERM Audits. Please share the DOL's quality control mechanisms to ensure audits and decisions are of the highest quality. Are there supervisors that review the files and audits or denials before they are issued? We are seeing denials over job requirements that do not exist in the case (i.e. travel requirements), or mandating that all recruitment components match all the 9089 requirements, in clear violation of established case law to the contrary.

DOL declined to provide a response.

Supervised Recruitment

18. Cases in Supervised Recruitment. Please provide an update on the percentage of supervised recruitment cases that are approved? Denials? Withdrawals?

DOL stated that "the numbers are a moving target" and did not provide statistics but stated that the percentages have remained consistent since the supervised recruitment pilot program began. DOL added that the rate of withdrawals and denials is high, and the rate of approvals is very low.

Follow-Up

19. Extensions of PWDs. ACIP members are reporting inconsistent PWDs 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 will not extend of PWDs. DOL stated that it does look at prior PWDs for an employer when it makes a new determination to help ensure consistency.

20. Changing the PWD Form

DOL noted that the proposed H-2B regulations are out for comment, so stakeholders should submit any comments concerning Form ETA-9141 through that process. DOL acknowledged that the text box for redeterminations is too small and stated that it is considering an increase.

21. Audit Processing Times. We previously acknowledged the improved processing time for PERM applications. The contrast between processing times for cases that are not placed in audit processing and for those placed in audit processing is extremely difficult for users of the PERM program to understand. In a nutshell, there is an issue of fairness when "clean" PERM cases are resolved within weeks of filing, but audited cases take two years (or longer) for a decision. If a case is denied post-audit, the employer must either appeal or commence recruitment again, as all previous recruitment and supporting documents will be stale. While we understand that the Department's integrity review of cases may involve more time to review applications, when should we expect to see improvement in the processing time for applications in audit review?

DOL stated that audit processing times are improving and explained that it shifts resources as necessary among its functions—like the audit queue, the appeal queue, etc.—as necessary.

22. Audits–Applicant Contact. Has DOL reviewed language in the audit notification requesting "information for each U.S. worker" regarding how the employer contacted the applicant(s), i.e., by phone (telephone logs), e-mail (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)? ACIP and other stakeholders are concerned that it is excessive to require employers to contact "every applicant" even if the applicant is not qualified based on a review of her/his resume and cover letter.

DOL was unaware that audit notices requested such information and confirmed that an employer is not required to contact applicants who are not qualified. DOL asked stakeholders to provide copies of such audit notice so it can work on changing the language.

23. FAQ status: Please advise as to the status of the following FAQs:

a. Revised Employee Referral Program (ERP) FAQ. In February 2011, the FAQ was going through clearance.

DOL stated that the FAQ is still "in clearance."

b. Change of attorney, G-28 FAQ.

This FAQ has been posted.

c. Change of Attorney in Audit FAQ. In February 2011, DOL agreed to review and post FAQ on preferred practice as to how to comply with the attorney signature requirement on Form 9089 when there is a change of attorney involved in the filing of an audit response.

DOL stated that it did not agree to post an FAQ on this issue, only to consider the issue, and it agreed to continue considering it.

d. Appendix A (List of Professional Occupations). Previously scheduled to publish by February 10, 2011.

DOL published Appendix A in February.

e. "Reasonable Period of on-the Job Training." DOL will review language and develop FAQs on audit notification letters regarding "reasonable period of on the job training" in order to provide employers with some guidance as to DOL's standard for determining a "reasonable period" and suggest evidence to prove it.

DOL stated that it agreed to consider this, is still considering it, and will publish an FAQ if it decides that such is warranted.