Department of Labor Office of Foreign Labor Certification
Stakeholders Meeting—January 6, 2012

These notes were taken by NAFSA staff at the meeting. They reflect information provided by government officials in an informal setting. They are best used as general information concerning current agency processes and policies, 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 Attendees: William Carlson, Elissa McGovern, Brian Pasternak, Bill Rabung, Maeda Henderson, Harry Sheinfeld

Stakeholder Attendees: American Bar Association, American Council on International Personnel, American Immigration Lawyers Association, Farmworker Justice**,** NAFSA, U. S. Chamber of Commerce

Opening remarks from DOL

For the first quarter of the fiscal year (which began Oct. 1, 2011), DOL has adjudicated approximately 13,000 labor certification applications (ETA-9089s), certifying 9400, auditing 2400, and denying 600. Currently DOL has pending 21,000 ETA-9089s:

50% in analyst review	(filed October 2011 and prior)
33% in audit	(filed April 2011 and prior)
10% on appeal/reconsideration	(filed April 2010 and prior)
4% in supervised recruitment	
3% undergoing "employer existence review"	

The government error reconsideration queue is "current."

The denial rate for audited cases is approximately 55—60%, slightly higher than for FY 2010.

Prevailing wage determinations for the H-2B program are "current" (issued within 30 days). Prevailing wage determinations for the H-1B program are expected to be "current" (issued within 60 days) by January 15, 2012. Prevailing wage determination for the PERM program are expected to be "current" (issued within 60 days) by the third week in January 2012.

For the quarter DOL has received 83,000 H-1B Labor Condition Applications (LCAs), up from 73,000 from the same quarter last year. DOL is processing 99% of them within 7 business days. Approximately 7% of LCAs are denied, many due to federal Employer Identification Number (EIN) issues. Most EIN verification processes are completed with 24 to 48 hours.

In the next few months, stakeholders can expect a technical upgrade which will include some enhancements that DOL hopes to be helpful for stakeholders.

> --Some fields in the prevailing wage determination request form, Form ETA-9141 will become mandatory, and users will be prompted to complete them, which should prevent users from mistakenly submitting an incomplete form which will be denied. Also, some fields will have parameters that will prompt users to check the data they have input if, for example, it seems to be missing a digit or have an extra digit, among other "obvious errors" and "extreme value errors."
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> --Users will be able to submit an attachment (as a PDF or Word document) to an ETA-9141, such as a survey or a union contract. DOL is currently testing this function. While it seems a simple matter, accepting attachments subjects DOL to viruses and other problems, so it was a challenging development.
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> --Users will be able to request review of a prevailing wage determination by the Director of the National Prevailing Wage Center through iCERT and offer an explanation of the basis and attach documents to the request.

The design for the new PERM iCERT module is complete, and now DOL moves to the "resource plan phase." By the next quarterly stakeholder meeting DOL should be able to give a better idea about the prospects for its implementation and the general timeframe. Stakeholders requested that DOL undertake extensive user-testing before implementing the module, and DOL indicated that it would be interested in conducting limited user-testing.

DOL noted that the National Prevailing Wage Center processes approximately 2400 PWD requests per week. The center is nearing its second anniversary, and—given the fact that it is in its relative infancy—DOL is pleased with the improvements in its processes and the consistency and accuracy of PWDs. *NAFSA note: DOL's conclusion here does not necessarily track with the reports of PWD adjudication problems submitted through IssueNet and brought to the attention of ISS-RP members and NAFSA staff, and we continue to raise examples of common problems like incorrect determinations of wage level, inaccurate conclusions about applicable SOC, and NPWC's inconsistency in making varying determinations for the same position (same duties and requirements) over time.*

DOL has submitted a "paperwork package" to the Office of Management and Budget that includes a rule applicable to H-2Bs and a rule that changes Form ETA-9141, so stakeholders should watch for publication in the *Federal Register*. The rule will be followed by issuance of a revised Form ETA-9141. The changes to the form are minor, such as inclusion of a box to indicate a request use of a survey.

COMPILED LIST OF QUESTIONS SUBMITTED BY STAKEHOLDERS

Prevailing Wages

1. PW Redeterminations: We understand that the current processing time for a PW is about 60 days. Members have reported that it has taken up to six months to receive

a decision on a PW redetermination request. At what point can members inquire about redetermination requests? What is the procedure for making such an inquiry?

During the last 45 days, DOL has undertaken a sustained effort to reduce the queue, and as noted in opening comments, DOL expects PWD processing for all programs to be "current" soon. "Historically, about 2% to 4% of applications fall outside of standard processing time. When this happens, the filer should e-mail the Help Desk."

2. Affiliation as a basis for ACWIA wages: In November 2011, in *Matter of Children's Hospital* BALCA found that the DOL erred in not using the ACWIA wages to determine prevailing wage for Children*'s* Hospital, based on a finding that Children's Hospital is 'affiliated' with Harvard Medical School under the third prong of three-prong test articulated by the AAO. How does DOL intend to proceed moving forward on Prevailing Wage Requests filed by other teaching hospitals (and similar affiliated entities) requesting ACWIA wages. Will it be enough just to ask for the ACWIA wage, or will employers have to provide documentary proof of the affiliation? If proof of 'affiliation' will be required, how must it be submitted to the NPWC? How much and what types of proof will be required?

DOL does not plan to change its process based on this BALCA decision. DOL is currently drafting an FAQ on the topic. Analysts try to verify the affiliation on the employer's web site. If this can't be done, they send a Request for Information concerning the affiliation. DOL does have an internal database, so analysts don't necessarily need to re-verify each time the employer submits an application unless the circumstances have changed. NAFSA note: it is not clear that DOL values this reference to prior applications as much as stakeholders would, so we hope to discuss this further in the future.

3. Minimum Number of Workers for Alternative Survey: Our members have received prevailing wage determinations that reject alternate surveys because "the survey's sample size does not meet the minimum threshold of 30 workers." While DOL has previously referenced the 30-worker threshold in providing "Suggested Survey Methodology" to employers conducting their own surveys, this threshold does not exist in the regulations that set forth the requirements for alternate surveys. Is DOL applying this suggested 30-worker threshold to all alternate surveys, including those published by established wage survey companies such as Towers Watson and Mercer? Example: P-100-11201-208672.

DOL was surprised to learn of this issue and will look into it. The policy has not changed since 1995.

LCA

4. LCAs denied for lack of valid FEIN, after FEIN was previously verified by Chicago NPC. In October and November, several members reported that LCAs were denied for lack of a valid FEIN, even though that same FEIN had been used to file iCERT LCAs, and had been verified. These denials stated "If you have previously submitted LCAs with this

FEIN that have been certified, it is still necessary… to submit the needed documentation." These denials had an extremely disruptive effect on employers, who had no reason to expect that their previously verified FEIN had suddenly become invalid, with no explanation why.

The contractor is Experion. DOL is aware that this was a possible problem in the summer due to the change-over to Experion's database. DOL considers it a far superior database and is not certain why it lacked some such data but is convinced that any such problems have been and will continue to be isolated.

In addition, we note that in the DOL's Office of Inspector General's report on Top Management Challenges (issued 11/15/2011), it was mentioned that "ETA has entered into a contract with a third-party vendor for employer verification services. Through this service, ETA indicates that it will have access to a more comprehensive employer identification database and verification system. This service will be applied to all FLC." We would request to know the name of the vendor that ETA has contracted for employer verification. This is of concern to members, as we have seen significant disruptions to case processing based on a possibly similar employer verification program that has been implemented by USCIS (VIBE).
Examples: I-200-11319-091170, I-200-11306-336582, I-200-11311-438659.

PERM

5. ETA 9089 filings and data entry problems. Numerous members have reported problems with ETA 9089s that were electronically filed, then the alien's biographical data no longer appeared on the submitted form in the correct order. In some cases, members have attempted to withdraw these cases so that they may refile, and the PERM system will not accept the withdrawals.

What is the status on correcting the data for these applications?

If members have to withdraw and 'resubmit' to fix the error, will DOL assign the original priority date to the resubmitted ETA 9089?

Examples: A-11339-21781, A-11332-20376, other examples sent directly to OFLC via email.

These problems were caused by a system upgrade that occurred around December 5 or 6, 2011 and appear to have occurred only during this two-day period. Very few users should have been affected, and DOL has contacted (apparently by telephone) each user who received an incorrect denial. The DOL online system will not, though, immediately reflect that the applications have been moved from "denied" to "in process" status since DOL is having to make these changes by hand. DOL assures that it is working on these cases. Stakeholders informed DOL that some users were told by Help Desk personnel that they should withdraw applications accepted for processing that were affected by this glitch, and stakeholders asked DOL to assist these users in regaining their "priority date" or filed date since this can be of

great consequence. DOL indicated that it was unaware of this particular Help Desk issue and will work to see that no users are negatively affected if they withdrew applications at the urging of the Help Desk. Stakeholders may notify DOL if they are ware of particular cases.

6. PERM Withdrawal Issues:

a. Please clarify whether an approved PERM must be withdrawn to file a new PERM application for the same job title and location, if the two PERMs are based on different recruitment. This second application might occur if, for example, PERM needs to be redone because a lower prevailing wage is available or the first PERM was EB-3 but a basis for EB-2 is discovered or develops.

Yes. DOL will not certify two applications for the same job, for the same alien, with the same employer. If there are changes, such as a change in location of the job, then it might be appropriate to file a new application.

b. In situations where an approved PERM must be withdrawn to file a new one, DOL's message has been to withdraw the I-140 since it is not possible to retrieve the original ETA 9089 from USCIS. However, this has the collateral effect of loss of priority date that otherwise was locked in by the approved I-140 and loss of ability to file for post-6th year H-1B extensions. Can DOL achieve the goals of its withdrawal requirement in any other way, or in the alternative work with USCIS on a solution that does not have the collateral damage?

DOL does not require the physical Form ETA-9089 that has been withdrawn. DOL will accept e-mailed information concerning the withdrawal of the I-140.

PERM – AUDIT

7. Erroneous “Kellogg” denials. Several members have recently received denials after audit that appear to be clear government error. Specifically, the PERM cases were denied on the basis that the recruitment (job order, print ads, and/or online recruitment) was deficient because the words “any suitable combination of education/training and/or experience is acceptable” (i.e., Kellogg language) were not included in the recruitment. These denials are contrary to the clear guidance provided in OFLC’s currently posted FAQ on PERM recruitment, which states:

Q: Does the advertisement have to contain the so-called "Kellogg" language where the application requires it to be used on the application? ***Where the "Kellogg" language is required by regulation to appear on the application, it is not required to appear in the advertisements used to notify potential applications of the employment opportunity.*** However, the placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the program. Therefore, if during an audit or at another point in the review of the application it becomes apparent that one or more U.S. workers with a suitable combination of education, training or

experience were rejected, the application will be denied, whether or not the Kellogg language appears in the application. (Emphasis added)

As denials based on lack of Kellogg language in recruitment appear to be contrary to OFLC's guidance, we urge DOL to reconsider these denials expeditiously in the government errors queue and suggest that additional training is provided to adjudicators to prevent future denials on the same ground.
Examples: A-09345-77351, A-09072-33693, A-11103-70642, A-11073-62648.

This is a "training issue." DOL has conducted training on this topic and appreciates this information so it can consider further training.

8. *Schnabel Engineering* and documentation requested in audits. In *Schabel Engineering*, 2010-PER-01125, 11-09-2011, BALCA found that the employer's failure to submit a copy of its prevailing wage request as part of its audit response was not sufficient grounds for denial of the PERM application, noting that "While an application may be denied under § 656.20(b) due to "a substantial failure by the employer to provide required documentation," the CO does not have carte blanche to require just any documentation. The application may only be denied under §656.20(b) when the absent documentation is *required*." (Emphasis in original).

How is OFLC implementing the *Schnabel Engineering* standard in revising its audit requests?

If a member believes that documentation requested in an audit is not a required document under the regulations, or that it is not relevant to determining whether the case is substantively compliant with the regulations, how should this be addressed in the audit response?

DOL "is not implementing* Matter of Schnabel Engineering.*" DOL Solicitor Harry Sheinfeld noted that when DOL requests documentation, the most expedient response is to provide it even if the applicant may dispute whether it may be required to do so legally. He added that DOL continues to have a strong record of success at BALCA (NAFSA notes that there have also been a number of recent DOL losses as BALCA, some of which seemed inevitable) and considers this an aberrant decision. Mr. Sheinfeld also acknowledged strategic reasons (such as to provide for "AC 21" H-1B extensions) that an employer might request BALCA review of an application knowing that it is likely to lose and suggested that the system works best if employers request review only when they believe that DOL has incorrectly denied an application. He requested stakeholder assistance in encouraging this more appropriate use of the BALCA review process. Stakeholders noted that pro se employers, surprised by the unforgiving nature of DOL adjudications and lack of ability to communicate with DOL or gain specific information about the labor certification process and standards, are often the ones who request review in hopes of having "common sense" applied to their cases.

9. Audits Requiring Confirmation of Applicant Contact: PERM audit notices continue to request “how the U.S. worker was informed he or she did not qualify for the job opportunity.” If the applicant is not qualified for the PERM position, there is no requirement under the regulations that the employer contact the applicant to advise the applicant that the employer found him/her to be not qualified. This question should be removed from the audit notices. Also, there is no requirement that the employer contact all applicants to the PERM recruitment. Asking for information that is not required (and not usually created as part of the PERM recruitment) causes confusion for attorneys and employers who are trying to prepare comprehensive audit responses. (See questions about *Schnabel Engineering*)
   Examples: A-11221-98440, A-11242-03005, A-11110-72508

DOL agreed to remove this information from the audit notice.

Follow-up Issues

PW

10. Inconsistent Prevailing Wage Determinations: Members continue to experience inconsistent prevailing wage determinations, where identical or near-identical job description and requirements, often from the same employer, will receive different wage determinations. This makes it very difficult for employers to track prevailing wages for specific jobs.

What can be done to improve consistency in wage determinations? Can these types of inconsistencies be sent to the NPC Director for review?

The PERM regulations indicate that DOL "will issue guidance regarding the process by which employers may obtain a wage determination to apply to a subsequent application, when the wage is for the same occupation, skill level, and area of intended employment." See 20 C.F.R. Sec. 655.40(h)(3)(i). We would welcome the opportunity to work with DOL to establish a process for "frequent users," as described in the cited regulation. The following are suggestions for processes that would both improve consistency and increase efficiency in the issuance of prevailing wage determinations:

Option A: Allow employers to alert DOL where there has been a previous PWD issued for exactly the same position that is no longer valid. DOL would then simply need to confirm the consistency of the job description and requirements and issue a new PWD for the same category and wage level.

Option B: Allow employers to list multiple locations on one PW request. Where an employer has exactly the same job description and requirements for a position, the location of the job should not affect the category and wage level. If employers were permitted to list many locations on one PW request, DOL would only be required to analyze the duties and

requirements once, then could easily issue a PWD with all locations and wages listed. Currently, DOL would be required to conduct the analysis for each PW request. Used in combination with Option A above, PWDs could be issued even more efficiently.

Option C: Allow employers to list required skills for multiple positions on one PW request. Where an employer has standard duties and requirements a job "band," but requires different skills for different positions with that band, the employer could list all of the skills on the PWD, stating that some or all of the skills may be required. Under DOL guidance, the addition of special skills may raise the wage level by one, but there should be no difference where there is one special skill listed or many special skills listed. DOL could issue one PWD that the employer could then use for multiple positions. Used in combination with Options A and B above, DOL could preserve substantial resources in the issuance of PWDs.

Examples:

Wage requests for Systems Solution Engineer, identical job requirements, same employer. Wage determination dated 11/3/2011 – accepted Radford wage survey as valid wage source, coded as Sales Engineer, 41-9031 (P-100-11237-772594); wage determination dated 12/12/2011 – rejected identical Radford data as in appropriate job match, coded as Electronics Engineer, 17-2072 (P-100-11280-653023).

Wage requests for Medical Physicist, identical job requirements, same employer. Wage determination dated 4/15/2010 coded as Physicists, 19-2012 (P-100-10050-386439); wage determination dated 10/13/2011 coded as Nuclear Medicine Technologist, 29-2033 (P-100-11222-655347)

DOL noted that if employers follow the process outlined in A, the analyst "would probably look at it." So the outcome sought can be obtained without a change in DOL process. DOL also suggested that the form now allows employers to follow the process outlined in B. DOL continues to undertake training and other measures to increase accuracy and consistency in PWDs.

LCA

11. "Unrecognizable" alternate wage survey denials: Employers continue to have serious problems with determining what specific title to use for alternative surveys on LCAs. We have received reports that often when an updated version of the survey is published and the survey name may change, the LCAs are denied because the survey becomes not recognizable. In particular, LCAs were denied this fall just before the H-1B cap was hit because a well known and long approved alternative survey (Towers Watson) was updated, leading to a minor change in its abbreviated name that the Chicago NPC would not accept. It can take days or weeks of trial and error with the NPC to determine the exact survey name that the iCert system will recognize.
    How does iCert know whether to accept a survey? Are the correct survey names entered into iCert manually by an analyst? Would DOL publish a list of surveys that

have been entered into iCert or provide a mechanism for a new or updated survey to be confirmed as a recognized survey besides the trial and error method? For example, could members (or stakeholders) provide the Chicago NPC with survey names and dates of publication for entry into iCERT?
Examples: I-200-11314-353787; I-200-11315-697236, I-200-11314-135104. For this last case, we note that the LCA denial notice recited a *different* survey name from the one that appeared on the LCA as submitted. The LCA stated the survey as "2011 Towers Watson Specialized Professional Compensation Survey." The LCA denial stated, "The survey, Towers Watson Data Services 2010/11 Survey Report on Professional Specialized Sevice, (*sic*) disclosed on the ETA Form 9035 was not obviously recognizable to the Department in conjunction with year source published of 2011."

"When a survey is approved by an analyst it auto-adds to the approved survey list." Stakeholders noted that users cannot know how a survey is captioned so have to guess and the "magic" abbreviation, acronym, etc. that will satisfy the system and asked DOL to make a list of survey names and captions available to users. DOL agreed to consider this request.

PERM

12. New SOC codes on PWDs are still not available in the online ETA Form 9089. The new SOC codes are still not available in the ETA 9089 drop-down list. Is there an update on when those codes will be available?

This is a "technological glitch," and DOL is working to fix it. It will require a brief system outage, so stakeholders should expect notice of the outage in about a week and thereafter the glitch should be fixed.