

**Liaison Questions Submitted by AILA and Notes from
February 3, 2009 Stakeholders Meeting**

Attendance:

For DOL: William Carlson, Elissa McGovern, Brian Pasternak, Isabel Jean-Pierre, Mada Henderson

For AILA: Catherine Haight, Chair; Ester Greenfield, Vice Chair; Punam Rogers, Sharryn Ross, Denise Hammond, Gayle Oshrin, Jeanne Malitz (H-2A/H-2B committee); Eleanor Pelta, AILA Second Vice President; Robert Deasy, Director of Liaison and Information

Other stakeholder groups represented were ACIP, ABA, and NAFSA

General Comments by DOL:

The demands of the H-2A and H-2B temporary programs, the transitioning and priorities of the new administration, and the economic downturn and rising unemployment all impact DOL's PERM work. OFLC is awaiting confirmation of the new Secretary of Labor. New H-2A and H-2B regulations recently became effective and these regulations especially have taxed OFLC resources. There was a huge surge in H-2A applications just before the effective date of the new program, which has impacted DOL's workload. Further, the prior administration pushed for the publication of the H-2A regulations before DOL could implement an IT system to handle the new process. Therefore, applications filed under the H-2A program must be processed manually. Because the H-2A program impacts the country's food supply and is time sensitive, it is a high priority for DOL. SWAs are overwhelmed, DOL has been unable to provide training, and stakeholders are confused and are asking for guidance. The H-2A regulations are also in litigation. If the courts, Congress, or the new administration require regulatory changes, it will be a massive undertaking for DOL. Similar considerations impact the new H-2B regulations; stakeholders should expect processing delays as the Chicago national processing offices struggles to cope with the two new sets of regulations. Employers have started filing applications for jobs that start many months into the future.

The rising unemployment rate is also a big concern to DOL. 180,000 jobs were lost in the last month, and 1.2 million jobs were lost in the last five months. Unemployment funding is in trouble in many states. OFLC is trying to integrate labor market information from various sources within DOL. In response to continued layoffs, DOL will increase supervised recruitment. To date, when DOL has issued supervised recruitment notices, more than half the cases have been withdrawn by the employer, which DOL perceives as suspect. Other than the example of Financial Analyst PERM applications for jobs located in New York City (see below, question 14), DOL did not mention any specific occupations or locations where its concerns about availability will lead to supervised recruitment. Mr. Carlson said that DOL will carefully analyze actual data regarding layoffs and not react solely based on news reports. However, the clear

message is that we should expect more supervised recruitment as layoffs affect new industries.

PRACTICE TIP: If you have any doubt about labor market conditions before filing a PERM application, obtain statistics from the SWA. OFLC will be looking at these statistics, media reports and other market data to determine if a case should proceed to supervised recruitment.

Responses to Liaison Questions Submitted by AILA

General

1. Please provide an update on the status of cases in the regular and audit queue.

Response: DOL distributed a quarterly report of selective statistics. As of late January 2009, DOL is processing cases with priority dates in June 2008, cases in the audit queue with priority dates in August 2007, and cases in the appeal queue of April 2007. See AILA Infonet Doc. No. 09020460 for selected statistics for the PERM program for FY 2009.

2. Case processing appears to have slowed significantly since the last stakeholders meeting. Can you please provide an explanation for the slowdown?

Response: One of the reasons that case processing slowed in the 4th quarter of 2008 was that DOL was hiring and training contractor staff for the Atlanta National Processing Center. The contract was awarded last summer, a losing contractor appealed and won the appeal, then the initial contractor sued. The workers did not come on board until last September 2008. The Atlanta Processing Center has only 40 federal employees and the rest of the staff consists of contractors. With the contractors now in place, the pace of processing has picked up. Only 4,571 PERM applications were completed in October-December 2008 but 3,500 PERM applications were completed in January 2009. However, DOL expects this will level off and processing rates will slow down again because of the limited number of federal employees available to review the contractors' work.

3. What is the status of nationalizing the prevailing wage process?

Response: The H-2B regulations provide for the nationalization of prevailing wage processes for H-1B and PERM by January 1, 2010. This timeframe might be changed under the new administration.

4. Please let us know the processing dates for final review, audit, and appeal as of February 2009.

Response: See # 1, above. DOL is now working on standard appeals of cases with priority dates of April 2007. The government error appeal queue is current.

5. When will the 12/31/08 PERM statistics report be available?

Response: The report has already been posted. See #1, above. Office of Foreign Labor Certification (OFLC) will continue to prepare and distribute quarterly reports.

6. The PERM FAQs provide two email addresses for questions: for technical question, please email to plc.help@dol.gov; for PERM program specific or policy questions, please email to PLC.Atlanta@dol.gov. Do you anticipate posting the email set up for company registration issues (BE-RFL.Atlanta@dol.gov) as well?

Response: These emails have not changed. DOL might post the company registration email on its FAQs.

7. Who is the Director of the Atlanta processing center at the current time? Who are the Certifying Officers of the Atlanta processing center at the current time?

Response: DOL did not provide any new information. As of September 2008, the Director of the Chicago National Processing Center was Charlene Giles and the Director of the Atlanta National Processing Center was Renata Adjibodou. See AILA InfoNet Doc. No. 08091671. Bill Carlson is currently the CO named on decisions.

Requests for Review/Requests for Reconsideration

8. The PERM FAQs state that the online status indicator for an application under reconsideration or under review is “appeal.” (**Appeal:** An "appeal" status indicates the application is under reconsideration and/or review and is considered "in process.") Please provide clarification about this online status indicator. When a Request for Reconsideration or Request for Review is filed, does the online status indicator change to “appeal” or does it change to “in process?” Is the “appeal” online status indicator currently in use? Is it used for Requests for Reconsideration? Is it used for Requests for Review?

Response: DOL confirmed that its present system does not use the “appeal” online status indicator. If an employer files a Request for Reconsideration and/or Request for Review, DOL changes the online status indicator from “denied” to “in process.” Once rolled out, the new iCert portal will provide more detailed status information, including if a case is being audited or on appeal.

9. A member has reported that when a Request for Reconsideration has been filed, the status indicator does not change from “denied” for up to three months and then the status changes to “in process.” How long does it take for DOL to update the online status indicator when a Request for Reconsideration is filed? Does it depend on whether the request would move it to BALCA, move it to the audit queue, or just reopen the case?

Response: No specific response. DOL tries to update the online status indicator as quickly as possible. However, a member can email plc.help@dol.gov to request confirmation that a Request was received.

10. When the granting of a Request for Reconsideration places the case in the “audit” queue, how does the applicant know the Request has been granted? In that case, is the sole notification that fact that the online status indicator has changed from “denied” to “in process”?

Response: The online status indicator changes from “denied” to “in process.”

11. On a similar topic, is DOL treating a "Request for Reconsideration" under 20 CFR 656.24(g) and a "Request for Review" under 20 CFR 656.26 in the same manner, i.e., by placing both types of cases into a single, FIFO queue? The regulations distinguish between the two and members rely on the difference in choosing which type of Request to make after denial. Per 20 CFR 656.26(b), a Request for Review must be sent “immediately” to BALCA. Is that regulation currently being followed? How long does it take for DOL to send an appeal to BALCA? Please explain DOL’s process for handling each type of Request and the approximate time frames for each.

Response: DOL currently has one queue. DOL does reconsider requests for review prior to sending them on to BALCA to avoid sending up such requests where it believes its denial was in error.

PRACTICE TIP: 20 CFR 656.26(b) directs the CO in cases of requests for review to “immediately” assemble an Appeal File for BALCA review. Since OFLC diverts the request to its appeals queue (see above), the practitioner may wish to submit a copy of the request directly to BALCA and cite 20 CFR 656.26(b)(3), which allows the employer to “furnish or suggest” directly to BALCA additional information.

12. What is the time frame for handling PW appeals at the Atlanta processing center? How many PW appeals have been received in the last year? How many are still pending?

Response: DOL received fewer than 24 PW appeals in the last year. DOL currently has 18 PW appeals pending. DOL attempts to resolve PW appeals within 6-8 weeks.

New LCA portal implementation

13. What is the current expected rollout date of the new portal with respect to (a) company registration; (b) LCA; (c) PERM?

Response: On April 15, DOL will start receiving LCAs through the new iCERT portal. On May 15, all new LCAs must be filed using iCERT, though the old LCA

online system will stay up for case status checks and withdrawals. On July 1, DOL will start receiving PERMs through the new iCERT portal. On August 1, all new PERMs must be filed using iCERT, though the existing system will stay up for case status checks and withdrawals. DOL plans on rolling out the portal prior to April 15 in order to allow attorneys, agents and employers to register as users. They will issue a Federal Register notice announcing when the new portal will be available for users to start registering themselves. See AILA Doc. No. 09020374 for dates of rollouts.

Supervised recruitment

14. Thank you for the recent supervised recruitment FAQs. Please explain your plans for supervised recruitment. Are there any current plans to send particular groups of cases (e.g. for particular occupations, industries, or geographic regions) to supervised recruitment?

Response: In December 2008, DOL received a number of PERM applications for the occupation of Financial Analyst for jobs located in New York City. This is an example of a particular occupation and location where there might be qualified U.S. workers available due to recent financial industry layoffs. DOL did not provide any other example or describe any other particular groups of cases where it would consider supervised recruitment. Currently, supervised recruitment is being handled out of the OFLC D.C. office with a plan to transfer it to Atlanta later this year. There are now approximately 200 applications in the supervised recruitment queue, up from 50 applications a few months ago. DOL said that its supervised recruitment notice would provide clear instructions to the employer. DOL said that an initial notice for supervised recruitment might request documentation regarding business necessity. The reason is that DOL would not want the employer to conduct a new recruitment only to have DOL subsequently determine that the job requirements were excessive and were not justified by business necessity. DOL pointed out that a change in pre-filing market conditions by the time of adjudication may now make supervised recruitment appropriate. AILA responded that there would be little difference between labor market conditions pre- and post-filing, if DOL adjudicated applications within a few months of filing. At this time, DOL cannot provide a timeline for how long it will take a case to get through the supervised recruitment process.

Comment [dch1]: I wasn't sure of the point you were making here.

15. One of the new Supervised recruitment FAQs states “If the employer wishes to state a wage range in the advertisement, the bottom of the range must not be lower than the prevailing wage or the wage being offered to the foreign worker named on the ETA Form 9089, whichever is higher.” This language is inconsistent with your prior FAQ under Advertisement Content, “Does the offered wage need to be included in the advertisements?” which states “the offered wage does not need to be included in the advertisement, but if a wage rate is included, it can not be lower than the prevailing wage rate.” The language of the prior FAQ correctly reflects DOL’s historical practice of allowing a foreign

worker to be paid higher than the bottom of a wage range, where the worker has qualifications that exceed the minimum requirements. For example, if the employer's wage range for Engineer I requiring a Bachelor's + 3 years experience is \$50,000-60,000, and an employee (who may be the alien) has a Bachelor's and 5 years experience, that employee may make \$55,000. We suggest that the Supervised Recruitment FAQ should be reworded to state "If the employer wishes to state a wage range in the advertisement, the bottom of the range must not be lower than the prevailing wage."

Response: DOL listened carefully to AILA's explanation that the bottom end of the range must meet or exceed the prevailing wage (for minimally qualified workers) and the top (not the bottom) of the wage range must meet or exceed the wage offered to the foreign worker. AILA will follow up with DOL to seek correction of the FAQ.

16. Placing supervised recruitment within 15 days of the date of the letter is a very short time frame to get an ad placed. The newspaper requires a draft ad, then takes 1-2 days to give a quote for the draft. Thereafter, it can take a week to get authorization from the company's accounting department for the expense. The paper typically has to have the go-ahead by Friday morning in order to make the Sunday edition. Depending on when the letter from DOL is received, the Friday deadline could be gone and the ad would have to go into the next Sunday edition. AILA proposes a 21-day window instead.

Response: The regulations on supervised recruitment allow an employer to seek an extension to any request for documentation or information. See 20 CFR § 656.21(g).

LCA issues

16. The new Form 9035, section B, question 7 mirrors section 2 of the Form I-129. The new LCA question asks for the number of workers and basis for visa classification. There is some informal USCIS guidance regarding how to complete Section 2 of the Form I-129, but USCIS does not enforce the guidance. Please confirm that the LCA will remain valid even if circumstances change for one or more of the I-129 petitions for which the LCA is supporting. E.g., the I-129 ends up being used for purpose c rather than a. For reference, the options are as follows:

- Worker positions needed/basis for visa classification supported by this application (indicate total workers in each applicable category)
- a. new employment
 - b. continuation of previously approved employment without change with the same employer
 - c. change in previously approved employment
 - d. new concurrent employment
 - e. change in employer
 - f. amended petition

Response: DOL recommends that AILA take up this question with USCIS, which asked DOL to collect this data.

Technical/Warnings in the Program

17. Please confirm that “twinkling light” warning has now been turned off when answering N/A to question I.e.26a re layoffs after answering yes to I.e.26. The form instructions specifically permit this combination of answers.

Response: The warning has not been turned off. DOL will not push for more changes to the currently PERM system in light of the rollout of the iCERT portal. However, if an employer experiences a PERM denial because I.e.26a was answered N/A, and that answer was correct, DOL suggests that the employer file a Request for Reconsideration/Review and flag its request as “government error.”

18. Do all date ranges now have “twinkling light” warnings to alert users when they have created a typo in the date range so that the start date is later than the end date of a required event, such as a recruitment step? As an example, a member received a denial that took two months to process when 2208 was entered rather than 2008 for start date of recruitment.

Response: DOL recommends that employers proofread their applications before filing. Again, with the release of the new portal coming soon, DOL will not be adding any more warnings to the current system.

19. Please explain why the forms program, Immigration Tracker, does not upload 9089s into the PERM system. INS Zoom and LawLogix are now working, but numerous attorneys use Tracker. What is the expected date by which the functionality of uploading data in Tracker will be working?

Response: AILA members reported that Immigration Tracker has fixed this problem. DOL said it could not comment as to problems with particular immigration software packages.

20. We wish to alert you to another warning in the PERM system that does not seem appropriate. If the requirements exceed those which are normal to the occupation, and H-14 is blank, a warning appears:

"Section H-14, Specific skills or other requirements is a required entry if requirements normal for the occupation equals 'No'."

Consider an occupation in Job Zone 4 with requirements of BA+ five years of experience in the job offered and no special requirements. H-14 would be blank. A member has noted that the above warning appears in this situation.

Response: DOL suggests that this problem can be avoided if the employer enters any text, such as “no special requirements” or “N/A”, into Box 14.

Miscellaneous

21. Does DOL plan to issue an FAQ regarding the applicability of the fraud rule to sports cases?

Response: Yes. However, DOL did not indicate when it would post such an FAQ.

22. Does the new FAQ regarding substitution of attorney in a Supervised Recruitment case apply to cases that are not designated as Supervised Recruitment as well? If so, please note in the FAQ.

Response: DOL accepts substitutions of attorneys and always has. DOL recommends mailing in a G-28 and following the procedures for change of attorneys described in the FAQs regarding Supervised Recruitment.

23. How does an attorney withdraw him/herself from a case after filing a PERM? There may be instances where an attorney is no longer representing the employer but neither the new attorney nor the employer has notified the DOL.

Response: The withdrawing attorney should mail a letter to the Atlanta processing center and should include documentation that it has notified the employer.

24. Members report that they are still having major issues with the NJ SWA: It is difficult to place the job order; a SWA staff member has stated that it is “wrong” to use the PERM program in this economy; SWA staff members do not follow guidelines for private surveys or for wage leveling. Can DOL help in any way?

Response: DOL pointed out that NJ has all new staff. Members of the DOL national office have provided in-person training to the NJ SWA. However, it is the states that control the operations of the SWAs (including NJ), not DOL. An employer may appeal a PWD to the Atlanta national processing center. Otherwise, an employer should contact the executive office in state with oversight responsibility for the SWA.

25. Members are reporting that they are still having problems re-registering a company with a simple name change (no change in FEIN.) Members are also reporting receipt of burdensome RFEs for business existence.

Response: DOL said that it has seen instances where small companies re-register in an effort to deceive the system. Therefore, it has been careful in accepting re-registrations. DOL suggests following a common-sense approach of submitting official documentation of the name change.

26. How does an employer withdraw a registration for a previous company if there are no PERM cases on file for the old name?

Response: DOL will post a FAQ on this.

27. When a Job Zone is changed by BLS, please confirm that for purposes of completing H.12, employers may apply the job zone that was applicable at the time the PWD was issued or the first recruitment activity commenced.

Response: DOL confirmed that the job zone on the PWD or when the first recruitment commences would control how to complete H.12.