

U.S. Department of Labor

Office of Inspector General—Office of Audit

**EMPLOYMENT AND TRAINING
ADMINISTRATION AND
WAGE AND HOUR DIVISION**



**DEPARTMENT AUTHORITY SHOULD BE
USED MORE EXTENSIVELY IN
FOREIGN LABOR CERTIFICATION PROGRAMS**

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BRIEFLY...

Highlights of Report Number 05-10-002-03-321, to the Assistant Secretary for Employment and Training Administration (ETA) and the Deputy Administrator for Wage and Hour Division (WHD).

WHY READ THE REPORT

This report discusses the U.S. Department of Labor's (DOL) use of suspension and debarment authority within the foreign labor certification (FLC) programs. Suspension and debarment are used to assure that the government does business with only responsible parties. Suspension prohibits persons or entities from participating in government business pending the results of an agency investigation. Debarment excludes persons or entities from government business for up to 3 years for prescribed violations. The Federal government established the government-wide Excluded Parties List System as a comprehensive list of individuals and firms suspended, disqualified, or otherwise excluded from receiving business or benefits from federal agencies.

In concert with the Departments of Homeland Security and State, DOL's Office of Foreign Labor Certification (OFLC) and WHD oversee and enforce provisions of the Immigration and Nationality Act (INA) related to several visa programs that permit foreign residents to work in the United States. Violations of program requirements subject persons and entities to potential debarment from future program participation and other government business.

WHY OIG CONDUCTED THE AUDIT

The OIG conducted a performance audit to determine whether OFLC and WHD properly used suspension and debarment in administering the foreign labor certification programs.

READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency response, go to:

<http://www.oig.dol.gov/public/reports/oa/2010/05-10-002-03-321.pdf>

September 2010

DEBARMENT AUTHORITY SHOULD BE USED MORE EXTENSIVELY IN FOREIGN LABOR CERTIFICATION PROGRAMS

WHAT OIG FOUND

OFLC and WHD narrowly defined their suspension and debarment authority based only on INA provisions, rather than the broader government-wide authority (29 CFR Part 98). As a result, they did not consider debarment of individuals or entities convicted of program violations resulting from OIG investigations.

When OFLC and WHD did debar individuals or entities, they did not provide that information for inclusion in the government's Excluded Parties List System. As a result, there was an increased risk that parties who had previously violated FLC laws or regulations could continue to participate in FLC programs, or receive business or benefits from other federal agencies.

Although not related to the use of suspension and debarment authority, the audit also identified several FLC applications that contained potentially invalid Employer Identification Numbers (EIN). While the number of potentially invalid EINs was small, the review of applications for valid EINs is within OFLC's authority to "review applications for obvious errors." An invalid EIN may indicate that the applicant is not a legitimate organization.

WHAT OIG RECOMMENDED

We recommended that ETA and WHD take steps to assure that (a) debarments are considered, and decisions documented, for anyone convicted of FLC violations, and (b) FLC debarments are reported to appropriate DOL personnel for inclusion in the government-wide exclusion system. We also recommended that ETA strengthen FLC application processing controls to ensure the detection and resolution of applications with potentially invalid EINs.

The Assistant Secretary for ETA cited the need to resolve differing legal opinions concerning the use of the exclusion system and stated they had implemented additional EIN controls. WHD cited a need for further legal research over both debarment authority and use of the exclusion system.

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U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210



September 30, 2010

Assistant Inspector General's Report

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The Office of Inspector General (OIG), Office of Audit conducted a performance audit of the Employment and Training Administration's (ETA) and the Wage and Hour Division's (Wage and Hour) use of suspension and debarment authority within the Foreign Labor Certification (FLC) programs during fiscal year (FY) 2009.

The Immigration and Nationality Act (INA) established several visa types that permit foreign residents to work in the United States. These include (a) Permanent (PERM), which allows an employer to hire a foreign worker to work permanently in the United States; (b) H1B, which allows an employer to temporarily employ a foreign worker in a specialty occupation requiring a bachelor's degree or its equivalent, or as a fashion model of distinguished merit and ability; (c) H2A, which allows agricultural employers, who anticipate a shortage of domestic workers, to employ foreign workers to perform agricultural labor or services of a temporary or seasonal nature; and (d) H2B, which allows employers to hire foreign workers to perform temporary nonagricultural services or labor on a one-time, seasonal, peak load or intermittent basis. During FY 2009, Office of Foreign Labor Certification, or OFLC (Program Office), processed 321,730 labor certification applications for these visa types. It certified 309,268 (96 percent) of those applications.

The Departments of Labor (Department), Homeland Security (Homeland Security), and State (State) all have oversight and approval responsibilities in these programs. Employers must first seek a "labor certification" from the Department. If approved, the certification acknowledges that (a) a need for workers exists, (b) the need cannot be

satisfied by available U.S. workers, and (c) foreign workers will receive the prevailing wage for the defined work. The Department performs its labor certification duties through the Program Office. While the Program Office processes applications for foreign labor certification, both it and Wage and Hour exercise enforcement action against applicants who violate program rules.

The federal governmentwide suspension and debarment process is used to promote economy and efficiency in federal procurement and nonprocurement activities by ensuring the government conducts business only with responsible parties. Suspension temporarily prohibits a person or entity from participating in government contracting and other specified transactions, pending completion of an agency investigation and any ensuing judicial or administrative proceedings. Debarment excludes a person or entity from government contracting and other defined transactions for a designated period of time (up to 3 years) for prescribed violations. Neither the Program Office nor Wage and Hour suspend applications or debar FLC applicants using the governmentwide suspension and debarment process.

The Program Office debars H2B, H2A, and PERM applicants under INA regulations by notifying the applicant of the reason for the debarment, providing the applicant an opportunity to appeal the debarment decision, and finalizing the debarment¹. Wage and Hour follows the same basic process for the H1B program except it notifies Homeland Security, who in turn, actually finalizes the debarment. The Program Office and Wage and Hour debarment lists showed 14 entities debarred for violations of FLC rules during FY 2009. Additional background information is contained in Appendix A.

The audit objective was to determine whether the Department properly used suspension and debarment tools in administering the foreign labor certification programs. To achieve the objective, we examined related statutes, regulations, and executive orders and reviewed draft or final suspension and debarment operating procedures, training and resource materials, and examples of case file documents. We interviewed (a) Program Office, Wage and Hour, and other Department personnel; (b) U.S. General Services Administration personnel; and (c) officials at OIG's Office of Labor Racketeering and Fraud Investigations (OLRFI). We analyzed FY 2009 data related to FLC applications the Program Office approved, Program Office and Wage and Hour debarment actions, and entries on the governmentwide Excluded Parties List System, or EPLS (exclusion system). We compared OLRFI information to FLC data and certified application data to Internal Revenue Service (IRS) Employer Identification Number (EIN) website information.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our

¹ Wage and Hour has concurrent debarment authority with the Program Office for debarments for the H2A program. 20 CFR 655.182(g).

audit objective. Our objective, scope, methodology, and criteria are detailed in Appendix B.

RESULTS IN BRIEF

The Department did not fully utilize the debarment authority provided in the INA and did not consider other regulatory suspension and debarment authority. Consequently, the Department did not consider debarment authority for 178 FLC individuals or entities with convictions resulting from 42 investigations conducted by the Department's OIG. When the Department debarred 14 individuals or entities under the INA debarment authority for FLC violations in FY 2009, it did not forward that information for inclusion on the governmentwide exclusion system. Program Office and Wage and Hour officials did not provide information for inclusion on the EPLS because they believed that the governmentwide debarment rules did not apply to FLC programs. As a result, there is an increased risk that parties who have previously violated FLC laws or regulations could continue to receive FLC certifications or new government business or benefits from other federal departments.

A separate issue not related to suspension and debarment came to our attention — the testing of FLC application data revealed 99 applications or .032 percent of the tested applications approved during FY 2009 that contained potentially invalid EINs. An invalid EIN may indicate that the applicant is not a legitimate organization recognized by IRS. While the number of potential invalid EINs is small, to review applications for valid EINs that fell within the IRS acceptable range is within the Program Office's authority to review for obvious errors and the FLC application processing controls should identify applications with potentially invalid EINs with causing an undue burden.

In response to our draft report, the Assistant Secretary for ETA stated that we had apparently concluded that all convicted individuals should be debarred. However, we only recommended that the Program Office consider and document the appropriateness of debarment. The Assistant Secretary also stated that there are differing legal opinions that need to be resolved concerning the Program Office's use of the exclusion system. The Assistant Secretary's complete response is in Appendix D.

In discussing our draft report, WHD officials expressed concern about the legality of using 29 CFR Part 98 to debar FLC applicants and reporting all FLC debarments to the exclusion system. WHD indicated it has initiated legal research to make a final determination.

We recommend the Assistant Secretary for Employment and Training and the Deputy Administrator of the Wage and Hour Division implement procedures and controls to assure that the Program Office and Wage and Hour (a) use suspension when appropriate and assess and document the appropriateness of debarment for each individual convicted of an FLC violation resulting from an OIG investigation, and (b) report FLC suspensions and debarments to designated Department personnel for inclusion on the governmentwide exclusion system. We also recommend the Assistant Secretary for

Employment and Training strengthen FLC application processing controls to ensure the detection and resolution of applications with invalid EINs.

RESULTS AND FINDINGS

Objective — Was the Department properly using suspension and debarment in administering the foreign labor certification programs?

The Department did not consider debarment actions against convicted FLC violators, and did not report debarred or disqualified parties to the government's exclusion system.

The Department was not required to use suspension and was not properly using debarment in administering the foreign labor certification programs. Specifically, it did not (a) consider debarring 178 FLC applicants² based on the results of OIG investigations, and (b) report debarred or otherwise disqualified parties for inclusion on the governmentwide exclusion system. The Department's interpretation of its suspension and debarment authority and responsibilities did not include its authority under the INA to debar individuals convicted of INA violations resulting from OIG investigations, nor did it include the authority granted to all government agencies for debarment related to "nonprocurement" activities. As a result, (a) parties found to have committed criminal, civil, or administrative violations of FLC rules remained eligible to participate in FLC programs, and (b) other government agencies were not aware of FLC related debarments when evaluating the appropriateness of contracting with or providing government benefits to these parties.

Finding 1 — The Department was not considering debarment actions against all FLC applicants convicted of FLC violations

The Program Office and Wage and Hour only considered debarment actions based on the results of investigative cases that they initiated and based only on INA and the implementing regulations. From May 2008 through September 2009, the Department did not consider debarment action for 178 individuals convicted of violations of FLC programs resulting from investigations initiated by the OIG. This occurred because the Program Office and Wage and Hour narrowly interpreted their debarment authority based on the INA and its implementing regulations (20 Code of Federal Regulations (CFR) Parts 655 and 656). The Program Office and Wage and Hour also did not consider debarment of the 178 individuals under the broader governmentwide nonprocurement suspension and debarment authority granted to federal agencies. As a result, these individuals were neither prohibited from future participation in FLC programs nor were they prohibited from receiving government contracts or benefits from other federal agencies. In addition, in the cases in which the Program Office and Wage and Hour did take debarment actions based on their own investigations, individuals

² FLC applicants may include an employer, a labor contractor, an attorney for the employer or labor contractor, or any other agent of the employer or labor contractor.

debarred from participation in one FLC program were not prohibited from future participation in other FLC programs.

Violations of the INA, including convictions of fraud related to applications for the four types of employment visas (PERM, H1B, H2A and H2B), serve as the basis for debarments by the Program Office and Wage and Hour under the INA, whether the investigations are conducted by those offices or by the OIG. However, the INA debarment authority does not always result in debarment in all the visa programs. As a result, an individual debarred from filing a visa application in one program may not be prohibited from filing an application in another visa programs.

In addition to debarment authority in the INA itself, the debarment and suspension authority under the Department's governmentwide nonprocurement debarment and suspension regulations at 29 CFR Part 98 (Part 98) is also available to the Program Office and Wage and Hour. These regulations state that all nonprocurement transactions are covered transactions (i.e., covered by the debarment and suspension regulations) unless specifically excluded in the regulations. The regulations define nonprocurement transactions as "any transaction, regardless of type (except procurement contracts)." The regulations further state that a nonprocurement transaction "does not require the transfer of Federal funds." In addition, the regulations list which transactions are "not covered" transactions and the FLC programs are not included in the list. Therefore, the FLC programs meet the definition of covered transactions under the Part 98 regulations. An expanded version of these regulations is provided in Exhibit 1.

Under 29 CFR §98.800³, the Department could debar entities for a broad range of actions including conviction of a crime or a civil judgment. Convictions based on the results of OLRFI investigations, as well as convictions or findings of INA violations resulting from investigations by the Program Office or Wage and Hour, would be included in these causes for debarment. A "debarring official" is defined in 29 CFR §98.935 as

... either (1) The agency head; or (2) An official designated by the agency head.

Through Secretary Orders 03-2009 and 09-2009 the Secretary of Labor had delegated authority as debarring officials to the Assistant Secretary of ETA for the PERM, H2A and H2B programs; and to the Administrator of Wage and Hour, for the H1B program. Under 20 CFR 655.182(g), Wage and Hour has concurrent debarment authority with the Program Office for debarments for the H2A program.

Although OLRFI personnel provided the Program Office with information on 178 FLC related convictions from May 2008 through September 2009, the Program Office did not initiate debarment actions against any of these individuals because (a) it did not believe

³ 29 CFR §98.800 uses the same language as 2 CFR §180.800, which are the OMB Guidelines to Agencies on Governmentwide Suspension and Debarment (Nonprocurement).

it had authority under the INA to take debarment actions based on convictions obtained from OIG investigations and (b) it did not consider the debarment authority given to all FLC programs under 29 CFR Part 98. Both the Program Office and Wage and Hour only considered the debarment authority granted under INA and the implementing regulations, 20 CFR Parts 655 and 656, and believed this authority only applied to investigations that they conducted.

As a result, applicants convicted of violating FLC rules would not have been prevented from receiving FLC certifications or new government business or benefits from other federal agencies. The Department can best protect the interest of the U.S. workforce and preserve the integrity of the FLC programs by fully utilizing the authorities under the INA and 29 CFR Part 98 to debar applicants convicted of violations.

Finding 2 — The Department did not submit information on debarred or otherwise disqualified FLC applicants to designated Department personnel for inclusion on the governmentwide exclusion system.

The Department did not enter information into the government's exclusion system operated by the General Services Administration in 26 cases (14 in FY 2009) in which the Program Office or Wage and Hour did debar or disqualify a party because of a violation of FLC rules. The Program Office and Wage and Hour officials told us that the criteria for governmentwide debarment were not applicable to FLC program debarments. As a result, the potential existed that another federal agency could inappropriately award a federal contract or other benefit to a debarred FLC applicant because it was unaware of the Department's debarment.

The governmentwide exclusion system was created as the result of Executive Order 12549 (February 18, 1986) which stated that to the extent permitted by law, Executive departments and agencies will:

... participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect. [Sec 1(a)].

and

Send to the [General Services Administration] identifying information concerning debarred and suspended participants in affected programs, participants who have agreed to exclusion from participation, and participants declared ineligible under applicable law....[Sec 2(b)]

Subsequently, Executive Order 12689 (August 16, 1989) stated:

... in order to protect the interest of the Federal Government, to deal only with responsible persons, and to insure proper management and integrity in Federal activities....

... No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.

The Department implemented these Executive Orders through regulations at 29 CFR Part 98, which state, in part:

When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the EPLS. [29 CFR §98.140]

As of October 21, 2009, the Program Office's website published lists of 5 parties debarred from the PERM and H2A programs. There were no debarments listed for the H2B program. At the same time, Wage and Hour's website published a list of 21 parties disqualified from the H1B program. We searched the EPLS on January 26 and 28, 2010, and determined that none of these parties were included. Program Office and Wage and Hour officials stated that they did not provide information of the parties on their lists for inclusion on the exclusion system because they believed that the governmentwide debarment rules did not apply to FLC programs.

The EPLS contains information about persons who are excluded or disqualified from covered transactions. An "exclusion" means that a person is prohibited from being a participant in covered transactions, whether that person has been suspended, debarred, proposed for debarment under 48 CFR Part 9, subpart 9.4, or voluntarily excluded. "Disqualified" means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689), or other authority. A debarment by the Program Office or Wage and Hour under the INA meets the definition of a "disqualification." In addition, we found nothing in the Executive Orders or the Department's implementing regulations that would exclude FLC from the requirements to provide this information. Therefore, it would be appropriate for the Department to report its INA debarments, as well any Part 98 debarments, to the EPLS.

We could not determine whether other federal agencies had subsequently entered into transactions with parties that the Program Office or Wage and Hour had debarred or disqualified because there is no consolidated source of data on all federal procurement and nonprocurement transactions. However, without reporting parties to the exclusion system that have been debarred or disqualified because of FLC violations, there is a risk that other federal agencies may enter into transactions with parties that they would have otherwise avoided.

OTHER ISSUE

Testing of FLC application data revealed that 99 applications approved during FY 2009 contained potentially invalid EINs. An invalid EIN may indicate that the applicant is not a legitimate organization recognized by the IRS. The FLC application processing controls must ensure applicants provide valid EINs.

Applications with Invalid Employee Identification Numbers

The Program Office approved 99 applications that contained invalid EIN on H1B, H2A, and PERM foreign labor certification applications. An EIN, also known as a Federal Tax Identification Number, is used to identify a business entity and required by the IRS for businesses with employees. The Program Office did not require EINs for all FLC applications during our audit period because, according to officials, the requirement for applicants to include EINs on H2A and H2B FLC applications became effective January 17, 2009, and January 18, 2009, respectively. Without a valid EIN, the Program Office cannot ensure it approved applications only for legitimate employers submitting FLC applications. While the number of potential invalid EINs is small, to review applications for valid EINs that fell within the IRS acceptable range is within the Program Office’s authority to review for obvious errors. Screening FLC applications for invalid EINs is a reasonable fraud prevention measure.

We reviewed 311,918 FLC applications for FY 2009 to verify that all EINs in the programs’ application system were valid.. The tested applications consisted of H1B (268,243), PERM (38,247) and H2A (5,428 of the 8,150 with EINs). We did not test the 7,090 H2B applications because the Program Office officials recently started collecting EINs as part of this application. Based on a list of valid EINs published on the IRS’s website, our tests identified 99 approved FLC applications or .032% of the tested population with invalid EINs as summarized in the following table.

FLC Program	Approved Applications with Invalid EIN
PERM	32
H1B	56
H2A	11
Total	99

RECOMMENDATIONS

We recommend the Assistant Secretary for Employment and Training and the Deputy Administrator of the Wage and Hour Division:

1. Implement procedures and controls to assure that the Program Office and Wage and Hour assess and document the appropriateness of debarring each individual convicted of an FLC violation resulting from an OIG investigation.

2. Implement procedures and controls to assure that the Program Office and Wage and Hour report FLC suspensions and debarments to designated Department personnel for inclusion on the governmentwide exclusion system.

We also recommend the Assistant Secretary for Employment and Training:

3. Strengthen FLC application processing controls to ensure the detection and resolution of applications with invalid EINs.

We appreciate the cooperation and courtesies that ETA and Wage and Hour personnel extended to the Office of Inspector General during this audit. OIG personnel who made major contributions to this report are listed in Appendix F.



Elliot P. Lewis
Assistant Inspector General
for Audit

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Exhibit

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Expanded Criteria for Finding 1

According to regulations implementing the Department’s suspension and debarment program (29 CFR §98.210),

All nonprocurement transactions, as defined in §98.970, are covered transactions unless stated in §98.215.

Nonprocurement transactions are defined in 29 CFR §98.970 as:

(a) ... any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

1. Grants
2. Cooperative agreements
3. Scholarships
4. Fellowships
5. Contracts of assistance
6. Loans
7. Loan guarantees
8. Subsidies
9. Insurances
10. Payments for specified uses
11. Donation agreements

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds. (underlining added for emphasis)

29 CFR §98.215 defined the following transactions as “not covered”:

- (a) A direct award to—
 - (1) A foreign government or foreign governmental entity;
 - (2) A public international organization;
 - (3) An entity owned (in whole or in part) or controlled by a foreign government; or
 - (4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.
- (b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 et seq., those benefits are not covered transactions and, therefore, are not affected if the person is excluded.
- (c) Federal employment.

- (d) A transaction that the Department of Labor needs to respond to a national or agency-recognized emergency or disaster.
- (e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the Department of Labor specifically designates it to be a covered transaction.
- (f) An incidental benefit that results from ordinary governmental operations.
- (g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

As defined in 29 CFR §98.800, the Department could debar FLC applicants for a broad range of actions, including:

- (a) Conviction of or civil judgment for—
 - (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
 - (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
 - (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or
 - (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility.

Appendices

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Appendix A**Background**

The INA established several visa types that permit foreign residents to work in the United States, including:

- **PERM** – Allows an employer to hire a foreign worker to work permanently in the United States.
- **H1B** – Allows an employer to temporarily employ a foreign worker in a specialty occupation requiring a bachelor’s degree or its equivalent, or as a fashion model of distinguished merit and ability.
- **H2A** – Allows agricultural employers, who anticipate a shortage of domestic workers, to employ nonimmigrant foreign workers to perform agricultural labor or services of a temporary or seasonal nature.
- **H2B** – Allows employers to hire foreign workers to perform temporary nonagricultural services or labor on a one-time, seasonal, peak load or intermittent basis.

The Department, Homeland Security, and State all have oversight and approval responsibilities in these programs. Employers must first seek a “labor certification” from the Department. If approved, the certification acknowledges that (a) a need for workers exists, (b) wages and working conditions of workers in the United States similarly employed will not be adversely affected, (c) the need cannot be satisfied by available U.S. workers, and (d) foreign workers will receive the prevailing wage for the defined work. After receiving the labor certification, an employer may petition Homeland Security for a visa (within annual limits established for each program). If Homeland Security grants a visa, the Department of State is responsible for assuring that specific workers are admissible to the U.S. under INA provisions.

The Department performs its labor certification duties through Office of Foreign Labor Certification. While the Program Office processes FLC applications, both it and Wage and Hour exercise responsibilities to identify and take enforcement action against applicants who violate program rules. The Program Office has debarment authority over the PERM and H2B programs. Wage and Hour handles debarment for the H1B program; and the two offices share concurrent authority for debarments in the H2A program.

The federal suspension and debarment process is used to promote economy and efficiency in federal procurement and nonprocurement activities by ensuring the government conducts business only with responsible parties. According to 2 CFR §180.1015, a suspended person or entity is prohibited temporarily from government contracting and covered transactions, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. Debarment is an action

taken by a government official to exclude a person from participating in transactions that fall under the Federal Acquisition Regulations (2 CFR §180.925), and other “covered transactions” defined in the *OMB Guidelines to Agencies on Governmentwide Debarment or Suspension (Nonprocurement)* (2 CFR §180.210, 2 CFR §180.215, and 2 CFR §180.970).

The Federal government established the governmentwide Excluded Parties List System (exclusion system) as a single comprehensive list of individuals and firms suspended, disqualified, or otherwise excluded from certain transactions with Federal government agencies. Each federal agency adds information to the exclusion system on the parties it has excluded. The purpose of the nonprocurement debarment and suspension system (i.e., EPLS) is “to protect the public interest” and to ensure the integrity of federal programs by conducting business only with responsible persons (29 CFR §98.110⁴). Federal agency officials must use the exclusion system to decide whether to enter into a transaction with an entity that has been disqualified or excluded from certain transactions with the Federal government.

In addition to general government suspension and debarment authority, the INA and 20 CFR Part 655 and 656 give the Department’s Secretary authority to debar applicants from one or more foreign labor certification programs. This authority was delegated from the Secretary to ETA for H2A, H2B and PERM applicants, and Wage and Hour to disqualify H1B applicants (Secretary’s Order 3-2009 and 9-2009). Under 20 CFR 655.182(g), Wage and Hour has concurrent debarment authority with ETA for the H2A program. For H1B debarments, Wage and Hour notifies ETA and Homeland Security of the final determination of any violation requiring invalidation or non-approval of application or petitions. Under INA and 20 CFR Parts 655 and 656, a debarment or disqualification prevents an individual or entity from participating in the foreign labor certification program which the individual or entity violated for a period of 1 to 3 years.

⁴ 29 CFR §98.800 uses the same language as 2 CFR §180.800, which are the governmentwide suspension and debarment regulations.

Appendix B

Objectives, Scope, Methodology, and Criteria

Objective

The OIG audited ETA's Program Office and Wage and Hour's use of suspension and debarment authority within the FLC programs. The audit objective was to determine whether the Department properly used suspension and debarment tools in administering the foreign labor certification programs.

Scope

The OIG audited the Program Office and Wage and Hour's suspension and debarment practices and procedures in the FLC program for FY 2009. We expanded our review of OLRFI convictions to cover the period May 2008 through September 2009.

Our audit work was conducted at the Office of Foreign Labor Certification headquarters and Wage and Hour Division headquarters, both located in Washington, DC.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Methodology

To achieve the objective, we examined statutes, regulations, and executive orders related to the Department's responsibilities and authorities for screening FLC applications and enforcing FLC requirements through suspension and debarment. Specifically, we identified and reviewed the regulatory authority of the Program Office and Wage and Hour, their responsibilities under the INA, and the regulatory requirements for the governmentwide exclusion system.

To gain an overall understanding of the Program Office and Wage and Hour's FLC application screening and enforcement responsibilities, policies and practices, we reviewed relevant documents; interviewed the agencies' personnel responsible for FLC suspensions, debarments and for the development and maintenance of each debarment list; identified the Program Office's responsibilities, policies and practices for processing and screening FLC applications against the various FLC debarment lists; interviewed personnel at General Services Administration to obtain an understanding of the exclusion system and the Department's personnel responsible for entering information on the system; and interviewed officials at OIG's OLRFI to understand what information was reported to the Program Office and Wage and Hour. We also reviewed draft or final suspension and debarment operating procedures, training and resource

materials, and case file documents related to FLC debarments. In our interviews, we determined how the Program Office and Wage and Hour obtained and used the results of investigations conducted by OLRFI.

We analyzed the data related to FLC applications the Program Office approved during FY 2009, Program Office and Wage and Hour debarment actions, and entries on the EPLS. Specifically, we compared (a) the Program Office and Wage and Hour H1B debarment lists to ensure Wage and Hour was reporting debarments to the Program Office; (b) both offices' H1B, H2A and PERM debarment lists to the EPLS to determine if any FLC debarments were listed in the system; (c) the Program Office debarment lists against the certified applications to determine if a debarred applicant received an FLC; and (d) OLRFI data against the Program Office's debarment lists and the certified application data to identify if applicants convicted of FLC violations were debarred by either the Program Office or Wage and Hour. In addition, we selected a sample of 170 of 226,230 H1B, 167 of 7,665 H2A, 166 of 5,871 H2B, and 170 of 29,502 PERM certified FLC applications and tested the sample against the EPLS online database to determine if any certified FLC applicants were listed.

We tested the certified application data to identify if any entities submitted applications using more than one Employer Identification Number (EIN) and if applicants provided the Program Office with valid EINs. This was an issue raised in a previous Government Accountability Office audit report.

Reliability Assessment

We obtained data for our testing procedures from the Program Office, Wage and Hour, OLRFI, and the Program Office's website. The Program Office data consisted of the H1B (268,243 applications), H2A (8,150), H2B (7,090) and PERM (38,247) FLC application data for FY 2009. The OLRFI provided data on 42 investigations related to FLC applicants that resulted in 245 actions during the period May 2008 through September 2009⁵. Using the internet, we obtained Wage and Hour's H1B list of Homeland Security debarments (26 debarred entities) and the Program Office's H2A (4 debarred entities) and PERM (1 debarred entity) debarment lists.

We assessed the reliability of the Program Office data by (1) using Audit Command Language (ACL) software to reconcile the number of data files to the Program Office's summary report for FY 2009; (2) performing logic tests of the data; and (3) reviewing third party system review reports. We assessed the reliability of the OLRFI data by (1) reviewing the system parameters used to obtain the data and (2) performing logic tests of the data. We assessed the reliability of the debarment list data by performing logic tests of the data. Based on our assessment and tests, we concluded the data were sufficiently reliable to be used in meeting our objective.

⁵ OLRFI was only able to provide documentation showing it had notified the Program Office of the investigative results for 178 of the 245 individuals.

Internal Control

In planning and performing our audit we considered the Program Office's and Wage and Hour's internal control that was relevant to our audit objective by obtaining an understanding of that control, and assessing control risk for the purpose of achieving our objective. The objective of our audit was not to provide assurance of the internal controls; therefore, we did not express an opinion on the Program Office's or Wage and Hour's internal control as a whole. Our consideration of internal control relevant to our audit objective would not necessarily disclose all matters that might be significant deficiencies. Because of the inherent limitations on internal control, noncompliance may nevertheless occur and not be detected.

Criteria

- 2 CFR Part 180
- 20 CFR Part 655
- 20 CFR Part 656
- 29 CFR Part 98
- 8 USC 1182
- 8 USC 1188
- 8 USC 1184
- Executive Order-12549
- Executive Order-12689
- Immigration and Nationality Act

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Appendix C

Acronyms and Abbreviations

CFR	Code of Federal Regulations
Homeland Security	U.S. Department of Homeland Security
Department	U.S. Department of Labor
EIN	Employer Identification Number
Exclusion System	Excluded Parties List System
ETA	Employment and Training Administration
FLC	Foreign Labor Certification
FY	Fiscal Year
IRS	U.S. Internal Revenue Service
INA	Immigration and Nationality Act
Program Office	Office of Foreign Labor Certification
OIG	Office of Inspector General
OLRFI	Office of Labor Racketeering and Fraud Investigations
Wage and Hour	Wage and Hour Division

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Appendix D

OFLC Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General

FROM: JANE OATES *Jane Oates*
Assistant Secretary

SUBJECT: Response to the Office of the Inspector General's
Audit of the Office of Foreign Labor Certification and
Wage and Hour Division Suspension and Debarment
Authority, Draft Audit Report 05-10-002-03-021

Date: September 24, 2010

The Employment and Training Administration (ETA) appreciates the opportunity to provide a response to the Office of the Inspector General's (OIG) draft audit report on the Office of Foreign Labor Certification's (OFLC) and the Wage and Hour Division's (WHD) use of suspension and debarment authority in its labor certification programs. We appreciate the time and effort OIG staff spent examining labor certification applications and labor condition applications and the professional and collaborative manner in which the audit was conducted with the OFLC staff. Our comments are only applicable to the ETA findings.

Recommendation 1: Implement procedures and controls to assure that OFLC and WHD use suspension when appropriate and assess and document the appropriateness of debarring each individual convicted of an FLC violation resulting from an OIG investigation.

ETA Response: While in principle and practice we fully agree with the recommendation, we have concerns about the incorrect assumptions made by the audit that every individual convicted of an immigration violation (FLC violation) is debarable in OFLC's programs. Specifically, the report assumes that "[v]iolations of the [Immigration and Nationality Act], including convictions of fraud related to applications for the four types of employment visas, serve as the basis for debarments by the Program Office...." Unfortunately, this is not factually accurate with respect to any debarment authority, whether it comes from the INA or the Department's implementing regulations. Our understanding is that violations of the Immigration and Nationality Act (INA) by an OFLC certified entity, attorney, agent or employee does not always necessarily correlate to an actionable offense which permits debarment under OFLC regulations. The current regulations contain differing standards for debarable offenses; however one generalization that can be made is that, at a minimum, the offense must relate to the labor certification programs (in fact, the program in which the

debarment is sought) and involve fraud, misrepresentation, or a flagrant disregard for the obligations of the program. Our internal review produced an understanding that in fact, very few of the individuals referred were debarable under OFLC regulations, because their convictions or other violations were not directly related to OFLC programs. To further the analysis, when the violations did directly relate to OFLC programs, they may not be the type of violation that leads to debarment under the relevant regulation, or are violations too old to permit debarment as OFLC did not have debarment authority under older regulations. Of the 178 names cited, our review found many are convictions for visa marriage fraud, harboring and other human trafficking offenses, and other visa fraud on which OFLC, based upon our understanding, has no legal authority to debar.

In addition, even when the conviction is for an offense for which OFLC may debar, it may not be actionable given the types and dates of violations. For example, Robert J. Mahood, was sentenced to 18 months' imprisonment and 36 years probation for his involvement in an immigration fraud scheme involving the submission of over 1,400 fraudulent labor certifications. The labor certifications in question were filed prior to his indictment in 2004, at a time when OFLC had no debarment authority in the permanent labor certification program. Accordingly, we could not legally debar him from the program.

We note a factual inaccuracy: That an individual debarred from filing H-1B visa applications would not be prohibited from filing applications in the Permanent Labor Certification Program (PERM) or other visa programs. The INA at 8 U.S.C. 212(n)(5)(e)(ii) and OFLC regulations at 20 CFR 655.855(c) and (d) specifically prohibit individuals and entities debarred by WHD from participating in any visa program (immigrant or nonimmigrant) for the debarred period. In addition, it is WHD, not OFLC, which has the authority to debar in this program. Therefore, the paragraph on page 4 of the report that states that an individual debarred in H-1B is not prohibited from filing applications in other visa programs is not accurate based upon our understanding of the applicable law and regulation.

Recommendation 2: Implement procedures and controls to assure that OFLC and WHD report FLC suspensions and debarments to designated Department personnel for inclusion on the government-wide exclusion system.

ETA Response: We respectfully disagree with this recommendation for the following reason. Historically, our understanding has been that OFLC cannot refer to the government-wide exclusion system created by Executive Order 12549 (February 12, 1986), as amended by Executive Order 12689 (August 16, 1989). This non-referral is based upon the understanding that the transactions covered by those orders, and the implementing Department regulations, do not include OFLC granted labor certifications. This was mentioned during the audit process and discussed at the informal briefing. We believe there are differing

legal opinions on the utilization of the exclusion system and that difference must be formally resolved in order to definitively answer this question prior to a finding of this nature.

Recommendation 3: Strengthen FLC application processing controls to ensure the detection and resolution of applications with invalid EINs.

ETA Response: OFLC staffs continually examine the need for improvements to program review controls, and appreciates the OIG bringing this to our attention even though it was not included in the audit. Invalid EINs are the primary reason for the denial of an LCA. LCA or H-1B invalid EINs is an example of an obvious error and OFLC believes it has sound statutory authority for issuing denials. While it is less clear that we have the authority to do so in other FLC programs, in those programs where we identify an invalid EIN, internal procedures are employed to verify the validity of the EIN.

We note that OIG reviewed a sample of published EINs on the web site of the Internal Revenue Service (IRS) and found a total of “potentially” 99 invalid EINs out of a sample of more than 306,000 applications. We strongly note the fact that this error rate is extremely low but will continue to use internal systems to improve.

Last, OFLC has implemented additional EIN controls in the LCA program in the iCERT system, with further implementation across programs to follow.

Thank you for the opportunity to comment on this report.

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Appendix E

Acknowledgements

Key contributors to this report were Charles Allberry (Audit Director), Robert Swedberg, Stephen Lawrence, Charmane Miller, and Jennisa Paredes.

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