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EMPLOYMENT AND TRAINING
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PROGRAM DESIGN ISSUES HAMPERED ETA'S ABILITY TO ENSURE THE H-2B VISA PROGRAM PROVIDED ADEQUATE PROTECTIONS FOR U.S. FORESTRY WORKERS IN OREGON

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BRIEFLY...

Highlights of Report Number **17-12-001-03-321**, issued to the Assistant Secretary for Employment and Training.

WHY READ THE REPORT

The Office of Inspector General (OIG) audited the Employment and Training Administration's (ETA) role in the H-2B visa program. Oregon Congressman Peter DeFazio asked the OIG in a letter dated September 3, 2010, to review the H-2B application process for four Oregon-based employers listed in an article in the Oregon Bend Bulletin News on August 9, 2010. The Congressman was concerned about possible H-2B visa irregularities related to Forest Service contracts in central Oregon funded by the American Recovery and Reinvestment Act (Recovery Act). According to U.S. Forest Service officials, the four employers reviewed were awarded 14 fiscal year (FY) 2010 Recovery Act contracts totaling \$7,140,782 for forestry work in Oregon.

Employers submit H-2B applications to the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) within ETA. To obtain an H-2B certification and comply with employment protections, employers self-attest that U.S. workers capable of performing the job are not available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. ETA is responsible for an initial review of the H-2B application and recruitment report. In addition, since a regulation change in January 2009, ETA can conduct post-adjudication reviews to validate employer self-attestations.

WHY OIG CONDUCTED THE AUDIT

The audit objective was to answer the following question:

Was ETA able to ensure that the H-2B visa program provided adequate protections for U.S. workers in the applications filed by the four Oregon forestry employers?

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/2012/17-12-001-03-321.pdf>

October 2011

PROGRAM DESIGN ISSUES HAMPERED ETA'S ABILITY TO ENSURE THE H-2B VISA PROGRAM PROVIDED ADEQUATE PROTECTIONS FOR U.S. FORESTRY WORKERS IN OREGON

WHAT OIG FOUND

The OIG found program design issues hampered ETA's ability to provide adequate protections for U.S. workers in the H-2B applications filed by the four Oregon forestry employers. On March 18, 2011, ETA issued proposed regulations to address these issues. We also found that certain State Workforce Agencies (SWA) did not fulfill their responsibilities, and ETA could improve its oversight and monitoring to better protect the interests of U.S. workers under the regulations.

Our audit identified that the H-2B application process did not allow for meaningful validation before applications were approved. We found two of the four employers reviewed reported to ETA they had made job offers to 29 U.S. workers; however, none of these workers began employment. Regulations required employers to post a job order and newspaper advertisement in the state of initial employment only, regardless of where subsequent work would be performed. Six of nine H-2B applications we reviewed included work in Oregon, but the work began in other states. Employers were not required to recruit U.S. workers in Oregon, and we were provided no evidence that they did. We also found that the five SWAs reviewed did not transmit posted job orders to Oregon or other states where work was occurring, and three SWAs were not making job referrals to employers — both H-2B requirements.

In addition, we identified that during the initial H-2B application review, ETA did not validate that the petitioning employer was a bonafide business or validate the employer-submitted prevailing wage. Also, during its post-adjudication process ETA did not verify the names listed on the employers' recruitment reports to determine if these individuals actually applied for employment.

WHAT OIG RECOMMENDED

The OIG recommended that the ETA Assistant Secretary reassess the requirement for employers to only recruit U.S. workers in the state of initial employment, develop and implement procedures to strengthen the application review and post-adjudication processes, and develop and implement controls to better monitor SWAs' compliance with program requirements.

The Assistant Secretary generally agreed with our recommendations and has planned to take actions to address them.

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U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210



October 17, 2011

Assistant Inspector General's Report

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Oregon Congressman Peter DeFazio asked the Office of Inspector General (OIG) in a letter dated September 3, 2010, to review the H-2B application process for four Oregon-based employers listed in an article in the Oregon Bend Bulletin News on August 9, 2010. The Congressman was concerned about possible H-2B visa irregularities related to Forest Service contracts in central Oregon funded by the American Recovery and Reinvestment Act (Recovery Act). According to U.S. Forest Service officials, the four employers reviewed were awarded 14 fiscal year (FY) 2010 Recovery Act contracts totaling \$7,140,782 for forestry work in Oregon.

Employers submit H-2B applications to the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) within the Employment and Training Administration (ETA). To obtain H-2B certification and comply with employment protections, employers self-attest that U.S workers capable of performing the job are not available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The State Workforce Agency (SWA) is responsible for accepting and placing job orders into their data system and sharing it with other relevant states; reviewing and providing referrals to employers; and verifying employment eligibility of the applicants who apply to the SWA to be referred for the job opportunity. ETA is responsible for an initial review of the H-2B application and recruitment report. In addition, since a regulation change in January 2009, ETA can conduct post-adjudication reviews to validate employer self-attestations.

To address the Congressman's complaint regarding employment protections for U.S. workers in the H-2B visa program, the audit objective was to answer the following question:

Was ETA able to ensure that the H-2B visa program provided adequate protections for U.S. workers in the applications filed by the four Oregon forestry employers?

In order to test ETA's oversight of the four Oregon-based employers, we reviewed nine H-2B applications submitted by the four employers between October 1, 2009, and January 31, 2011. We interviewed ETA personnel and reviewed H-2B application and post-adjudication review procedures conducted by ETA's National Processing Center (NPC). We reviewed the nine H-2B applications to determine if ETA adhered to current program regulations and if the applications contained any improprieties. In addition, we interviewed SWA program officials where the four Oregon-based employers filed forestry job orders, analyzed SWA documentation for the nine job orders submitted, analyzed the corresponding recruitment reports and employer payroll records, and interviewed six U.S. workers whom these employers had reported as having hired. We also interviewed representatives from the U.S. Forest Service concerning Recovery Act forestry contracts awarded to Oregon employers. U.S. Forest Service officials informed us that the Forest Service awarded 14 fiscal year (FY) 2010 Recovery Act contracts to the four employers totaling \$7,140,782 for forestry work in Oregon. However, the H-2B applications do not identify a funding source; therefore, we could not determine how much in Recovery Act funds were actually used to pay foreign workers.

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 the audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objective. Our objective, scope, methodology, and criteria are detailed in Appendix B.

Results In Brief

Program design issues hampered ETA's ability to provide adequate protections for U.S. workers in the H-2B applications filed by the four Oregon forestry employers. On March 18, 2011, ETA proposed new regulations designed to address these issues. We also found that certain SWAs did not fulfill their responsibilities for the H-2B applications we reviewed. Furthermore, we found that ETA could improve its initial application reviews, post-adjudication processes, and monitoring activities to better protect the interests of U.S. workers under the regulations by which the program currently operates.

Program Design Issues

The current H-2B application process is an employer attestation-based model that does not permit meaningful validation before the application is approved. In proposing to revise the regulations governing the program, ETA stated that deferring many determinations of program compliance until after an application has been adjudicated does not provide an adequate level of protection for U.S. workers. As an example, our audit found that two of the four Oregon-based employers reported to ETA that they had made job offers to 29 U.S. workers at the time of their H-2B application submission.¹ We verified with the employers that none of these workers began employment. We spoke

¹ As a result, ETA reduced the employers' foreign labor certification approvals by 29 H-2B workers.

with two workers who reported that the employer used discouraging language, such as references to age and the ability to speak another language, which are not valid conditions of employment.

Under current regulations, the H-2B recruitment report that accompanies the H-2B application documents the employer's efforts to recruit U.S. workers and must be submitted to ETA no more than 4 months prior to the job start date. Allowing such a lengthy period of time between the recruitment effort and the date the employer actually needs the workers makes the recruitment less likely to result in the hiring of U.S. workers. ETA is proposing to change this rule to require the employer to file the H-2B application no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. The proposed regulations also require the SWA to keep job orders on its active file and continue to refer U.S. workers who apply for the job opportunity until 3 days before the date of need, when it is assumed that the last H-2B worker has departed for the place of employment.

The current H-2B regulations require employers to post a job order and newspaper advertisements in the state of initial employment only, regardless of whether subsequent work will be performed in other states. Our audit found that three of the four employers we reviewed listed work sites in Oregon, but the work began in other states. These employers only posted job orders with those State Workforce Agencies (SWAs) where the work began. The three employers were not required to recruit U.S. workers in Oregon, and we were provided no evidence that they did. The fourth employer did not list Oregon as a worksite on its H-2B applications.

Only two Oregonians were listed on the employer recruitment reports, indicating that workers in Oregon were likely unaware these job opportunities were available. In fact, although 146 U.S. workers were contacted by the three employers regarding possible employment, none were hired. Instead, 254 foreign workers were brought into the country for these jobs. The reasons most often cited by employers for not hiring these U.S. workers were that the employer attempted to contact applicant but received no response; the applicant was no longer interested in employment; or the applicant was looking for local work (see Exhibit 1).

Once finalized and implemented, ETA's proposed regulations will change the design and operation of the H-2B application process from a self-attestation model to a program that emphasizes the review of compliance through documentation provided to ETA in advance of the certification determination. However, until the new proposed regulations are finalized, the H-2B program continues to operate under the self-attestation model and ETA needs to address the recommendations identified in our report.

Responsibilities of SWAs

The regulations require SWAs to share job orders with states where subsequent work will be performed, thus allowing U.S. workers in those states to have an opportunity to

apply. However, the five SWAs we reviewed did not transmit posted job orders to Oregon or other states as required. We also found that three SWAs were not making job referrals to employers. This failure by the SWAs to carry out their H-2B program responsibilities further contributed to the difficulties that U.S. workers in Oregon and other states faced in becoming aware of, and applying for, jobs with these four employers.

SWAs will have increased responsibilities and involvement under the proposed new regulations, including a collaborative recruitment effort with ETA. Given the problems with SWAs' performance identified during our audit, ETA will need to more closely monitor SWA activities and results.

ETA's Application Review, Post-Adjudication Process and Monitoring Activities

- Initial Application Review

During the initial H-2B application review, ETA did not validate that the petitioning employer was a bonafide business. Also, ETA did not independently validate that the employer-submitted prevailing wage represented the specific wage for the job classification named in the submitted H-2B application for the specific geographical location(s).² While these verifications are not required by current regulations, we do not believe that ETA is precluded from verifying the information. We also identified two employer recruitment reports that did not contain all the required U.S. worker contact information, such as an applicant's first and last name, address and phone number. Without complete contact information, ETA cannot ensure the credibility of the employer assertions in the application.

- Post-Adjudication Process

Under current H-2B regulations, the primary way ETA monitors the validity of employer self-attestations is through its post-adjudication process. However, ETA's current post-adjudication process could be improved. Based on Congressman DeFazio's complaint, ETA performed post-adjudication reviews of 11 Oregon-based forestry employer applications, including four of the nine applications that we reviewed. During our analysis of these four applications, we compared employers' payroll records to the filed recruitment reports and identified 17 U.S. workers who were reported as being hired, but none actually began employment.³ Furthermore, ETA did not independently verify the names listed on the employers' recruitment reports to determine if these individuals actually applied for employment.

² Since our audit fieldwork, ETA officials stated the NPC now has access to the iCert system to independently validate the prevailing wage.

³The 17 U.S. workers reported as being hired were part of the 29 U.S. workers that we identified from the same two employers. We reviewed five additional applications that ETA did not review from the four employers listed in Congressman DeFazio's complaint and identified an additional 12 U.S. workers reported as being hired, but did not go to work for the employers.

- Monitoring Activities

In FY 2010, ETA provided \$15 million to SWAs to manage the foreign labor programs. However, ETA provided little to no guidance to the SWAs we reviewed to ensure their compliance with regulations. ETA was not aware that the five SWAs reviewed had not transmitted job orders related to the H-2B applications we reviewed to other states. ETA was also unaware that some states had not made job referrals to employers, or states that made referrals had not ensured that the individuals referred were legally able to work in the U.S. as required. ETA's ability to protect the interests of U.S. workers is dependent upon the SWAs performing their regulatory roles. Furthermore, ETA was unable to provide a breakdown of how each SWA allocated foreign labor program funds between the H-2A and H-2B programs as required. ETA informed us they did not begin reviewing the SWAs' quarterly financial reports until March 2011. As a result, ETA had no assurance that SWAs were allocating and using foreign labor program funds as intended.

We recommend the Assistant Secretary for ETA reassess the requirement for employers to only recruit U.S. workers in the state of initial employment, develop and implement procedures to strengthen the application review and post-adjudication processes, and develop and implement controls to better monitor SWAs' compliance with program requirements.

In responding to our draft report, the Assistant Secretary for Employment and Training generally agreed to our recommendations and has planned to take actions to address them. The Assistant Secretary's entire response is contained in Appendix D.

RESULTS AND FINDINGS

Objective — Was ETA able to ensure that the H-2B visa program provided adequate protections for U.S. workers in the applications filed by the four Oregon forestry employers?

ETA could not demonstrate whether or not U.S. workers were protected by the H-2B visa program.

Program design issues hampered ETA's ability to provide adequate protections for U.S. workers in the H-2B applications filed by the four Oregon forestry employers. On March 18, 2011, ETA issued proposed new regulations designed to address these issues. We also found that certain SWAs did not fulfill their responsibilities for the H-2B applications we reviewed. Furthermore, we found that ETA could improve its initial application reviews, post-adjudication processes, and monitoring activities to better protect the interests of U.S. workers under the regulations by which the program currently operates.

Current H-2B Regulations Do Not Provide U.S. Workers Adequate Protections.

The H-2B program operates under Title 20, Code of Federal Regulations (20 CFR), Part 655, and relies on employers to self attest regarding their efforts to recruit U.S. workers. Employers seeking to employ temporary H-2B workers must file an H-2B application and a corresponding recruitment report with ETA. Accompanying the application are the employer’s attestations that (1) there are not sufficient U.S. workers capable of performing the temporary services or labor at the time of and at the place where the work will be performed, and (2) employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. ETA’s NPC has 7 calendar days to review and issue a decision on the H-2B application and attestations.

Currently, 20 CFR, Part 655.15 (d), (e), and (f) only require employers to post a job order and newspaper advertisements in the state of initial employment regardless of whether subsequent work will be performed in additional states. Our audit found that three of the four employers we reviewed listed work sites in Oregon, but the work began in other states. These employers listed California, Washington, and Wyoming as the states of initial employment; and accordingly, posted the job orders with those State Workforce Agencies (SWAs). Per the regulations, employers were required to recruit U.S. workers in those states only. The three employers were not required to recruit U.S. workers in Oregon, and we were provided no evidence that they did. The fourth employer did not list Oregon as a worksite on its H-2B applications.

Only two Oregonians were listed on the employer recruitment reports, indicating that workers in Oregon were likely unaware that these job opportunities were available. In fact, although 146 U.S. workers were contacted by the three employers regarding possible employment, none were hired. Instead, 254 foreign workers⁴ were brought into the country for these jobs (see Table 1). The legal reasons employers reported that U.S. workers were not hired included the following: 1) Employer attempted to contact applicant, but received no response; 2) Applicant no longer interested; and 3) Applicant looking for local work (see Exhibit 1 for reasons U.S. workers were not hired).

Table 1: Oregon Applicants Listed on Employer Recruitment Reports

Employer Name	Number of Job Orders	Number of Workers Requested	Number of Foreign Workers Hired	Number of U.S. Applicants Listed on Employer Recruitment Report	Number of U.S. Applicants Listed on Employer Recruitment Report Not Hired	Number of Oregon Applicants Listed on Employer Recruitment Report	Number of Oregon Applicants Hired from Recruitment
Medford Cutting Edge Forestry	3	184	106	112	92	2	0
Summitt Forestry, Inc.	2	166	120	25	16	0	0
Ponderosa Reforestations, Inc.	1	50	28	9	9	0	0
TOTALS:	6	400	254	146	117	2	0

⁴ The 254 foreign workers were hired under the six job orders which listed worksites in Oregon (an employer must submit a job order to the State Workforce Agency for each H-2B application). A total of 323 foreign workers were hired under the nine job orders we reviewed in total.

Current regulations do not require employers to actively recruit U.S. workers beyond 4 months of the date of need or outside the state where the work begins. As such, interviewed unemployed U.S. workers who required immediate employment expressed reluctance to apply and accept temporary employment, which was scheduled to begin at a much later date.

ETA has proposed revisions to the H-2B regulations to strengthen employer recruiting requirements, acknowledging that the current regulations do not provide an adequate level of protection for U.S. workers. ETA is proposing to require the employer to file the H-2B application no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. The proposed regulations also require the SWA to keep job orders on its active file and continue to refer U.S. workers who apply for the job opportunity until 3 days before the date of need, when it is assumed that the last H-2B worker has departed for the place of employment.

The Department stated that deferring many determinations of program compliance until after an application has been adjudicated does not provide an adequate level of protection for U.S. workers. As an example, our audit found that two of the four Oregon-based employers reported to ETA that they had offered jobs to 29 U.S. workers at the time of their H-2B application submission.⁵ We verified with the employers that none of these workers actually began employment with them. We spoke with two workers who reported that the employer used discouraging language, such as references to age and inquiries about speaking another language, which are not valid conditions of employment.

Once finalized and implemented, ETA's proposed regulations will change the design and operation of the H-2B application process from a self-attestation model to a program that emphasizes the review of compliance through documentation provided to ETA in advance of the certification determination. However, until the new proposed regulations are finalized, the H-2B program continues to operate under the self-attestation model and ETA needs to address the recommendations identified in our report.

SWAs Did Not Fulfill Their H-2B Responsibilities.

The four employers (Summit Forestry, Cutting Edge, GE Forestry, and Ponderosa) posted job orders between October 1, 2009 and January 31, 2011, with SWAs in Arizona, California, Idaho, Washington, and Wyoming. Based on our review of the responsibilities required of the five SWAs in processing the nine job orders in our audit, we identified that none of the SWAs provided interstate clearance (i.e., shared job orders with other states on itinerary).⁶

⁵ Based on the employers' applications, ETA reduced their foreign labor certification approval by 29 H-2B workers.

⁶ We also contacted SWA officials in Oregon who stated that Oregon provides interstate clearance of each job order. However, we were unable to validate this because no job orders selected for our review were posted in Oregon.

20 CFR, Part 655.15(e), *Job Order*. (1), states:

... If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

Furthermore, none of the SWAs were able to verify whether or not actual referrals were made to employers because their data systems could not differentiate between whether an individual only viewed the job posting or applied for the job.⁷ Therefore, the SWAs were unable to verify employment eligibility of actual referrals.

20 CFR, Part 655.15(i), *Referral of U.S. workers*, states:

SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

This failure by the SWAs to carry out their H-2B program responsibilities further contributed to the difficulties that U.S. workers from Oregon and other states faced in becoming aware of and applying for jobs with these four employers.

ETA Could Improve Its Initial Review of Applications, Post-Adjudication Review Process, and Monitoring of SWAs.

- Initial Review of Applications

During the initial H-2B application review, ETA did not validate that the petitioning employer was a bonafide business. Also, ETA did not independently validate that the employer-submitted prevailing wage represented the specific wage for the job classification named in the submitted H-2B application for the specific geographical location(s).⁸ While these verifications are not required by the current regulations, we do not believe that ETA is precluded from verifying the information and ensuring the credibility of the application.

⁷ The California, Idaho, and Washington SWAs did not provide any U.S. applicant referrals to the employer.

⁸ Since our audit fieldwork, ETA officials stated the NPC now has access to the iCert system to independently validate the prevailing wage.

We also identified two employer recruitment reports from an employer that did not contain all the required U.S. worker contact information, such as applicant's first and last name, and/or address and phone number. Although the employer's recruitment reports were missing required contact information, ETA certified both applications.⁹ Without complete contact information, ETA cannot ensure the credibility of the employer assertions in the application.

- Post-adjudication Review

ETA conducts reviews of certified or partially certified H-2B applications within its sole discretion and authority under 20 CFR, Part 655.24. ETA performs these reviews to ensure quality control and program compliance, and to further validate in detail, employer-submitted support documents.

ETA's post-adjudication selection process was based on applications that had complaints against submitting employers, and were from employers on ETA's consistency watch list, as well as randomly selected applications at the discretion of a Certifying Officer (CO). For the applications selected, ETA may notify the employer of a review approximately 6 months after certification. Once ETA initiates a review, it can issue a Request for Supplemental Information, such as employer payroll records. The CO performs a final review to determine if the support documentation provided by the employer supports attestations made on the H-2B application.

Based on the complaint received from Congressman DeFazio, ETA performed reviews of 11 forestry employer applications. ETA's review included 4 applications that we reviewed. During our analysis of the four, we compared employer payroll records to the recruitment reports and identified 17 U.S. workers that were reported as being hired, but never began employment.¹⁰ While the regulations do not prohibit ETA from performing the same comparison, ETA did not verify if the U.S. workers listed on the recruitment report as hired were actually hired by the employer.

ETA lacked a standardized methodology for selecting employer applications for post-adjudication review, as well as procedures detailing the process to follow in performing the review, including which employer documents to request. In addition, ETA's post-adjudication reviews have not included comparisons of employer payroll records to names of U.S. workers listed on the recruitment reports. A thorough review of employer payroll records is essential for determining whether U.S. workers who were listed as hired were hired and paid the prevailing wage. We verified that the foreign workers the employers hired were paid the prevailing wage and were legally able to work in the U.S. (see Exhibit 2 for prevailing wages paid to foreign workers).

⁹ These H-2B applications did not contain any worksites in Oregon.

¹⁰ The 17 U.S. workers reported as being hired were part of the 29 U.S. workers that we identified from the same two employers. We reviewed five additional applications that ETA did not review from the four employers listed in Congressman DeFazio's complaint and identified an additional 12 U.S. workers reported as being hired, but were not actually hired.

We determined that all four employers significantly overstated their actual need for foreign workers. A total of 700 workers were approved on the H-2B applications, but the employers only hired 323 foreign workers (see Table 2). We verified the number of foreign workers eligible to be employed in the United States to determine the extent to which employers actually hired foreign workers relative to the number they had requested.

Table 2: U.S. Applicant Breakdown Per Employer

Employer Name	Number of Job Orders	Number of Workers Approved	Number of Foreign Workers Hired ¹¹	Number of U.S. Applicants Listed on Employer Recruitment Report	Number of U.S. Applicants Listed on Employer Recruitment Report Not Hired	Number of U.S. Applicants Hired Per Employer Recruitment Report	Number of U.S. Applicants Hired from Recruitment
G.E. Forestry	3	300	69	41	41	0	0
Medford Cutting Edge Forestry	3	184	106	112	92	20	0
Summitt Forestry, Inc.	2	166	120	25	16	9	0
Ponderosa Reforestations, Inc.	1	50	28	9	9	0	0
TOTALS:	9	700	323	187	158	29	0

- Monitoring of SWAs’ Job Order Process

The regulations state the primary duties all SWAs must perform when processing H-2B job orders, which include accepting and placing job orders into intra and interstate clearance, reviewing and providing referrals to employers, and verifying employment eligibility of applicants referred to the employer. When we requested clarification of SWA H-2B responsibilities, ETA responded that SWAs’ role was limited to the placement of the employer’s required job order into their respective labor-exchange systems under the current attestation design. The regulations require the SWAs to perform more duties than placing the employer’s required job order into their respective labor-exchange systems. However, ETA provided little to no guidance to the SWAs we reviewed to ensure their compliance with regulations. ETA’s ability to protect the interests of U.S. workers is dependent upon the SWAs performing their regulatory roles. If SWAs do not perform their H-2B responsibilities, U.S. worker protections are further diminished.

- Monitoring SWAs H-2B Funding

For FY 2010, ETA issued TEGL 20-09, requiring the monitoring of SWAs’ allocation and use of H-2B funding by reviewing the SWAs’ (1) annual plan that identifies how foreign labor program funds would be used and how they split the allocation between

¹¹ 323 foreign workers were hired related to the nine H-2B job orders we reviewed in total (an employer must submit a job order to the State Workforce Agency for each H-2B application). Table 1 reflects only those 254 foreign workers who were hired under the six job orders which listed worksites in Oregon.

agricultural (H-2A) and nonagricultural (H-2B), and (2) quarterly financial reports submitted to ETA. However, ETA was unable to provide us with a breakdown of how each SWA allocated foreign labor program funds — totaling \$15 million — between the H-2A and H-2B programs. Furthermore, ETA informed us they did not begin reviewing the SWAs' quarterly financial reports until March 2011. As such, no monitoring of the expenditure of these foreign labor funds was conducted by the agency. As a result, ETA had no assurance that SWAs were allocating and using foreign labor program funds as intended.

During our discussions with the SWAs, we requested that each provide us with the amount of funding spent on H-2B activities. We found the following:

- California received no H-2B funding for FY 2010.¹²
- Idaho allocated less than one percent of its funding to the H-2B program.
- Wyoming could not identify the amount of funds it allocated to the H-2B program.
- Arizona, Oregon, and Washington did not provide a budget or the allocation of funds.

As a result, we requested ETA provide us a copy of each of the six SWAs' annual plans. ETA could not provide us a copy of the FY2010 annual plan for the State of California, although they provided us with a copy of the FY2009 plan. In FY2009, the State of California received \$1.5 million in H-2B funding but none in FY2010. Only two of the six states (Oregon and Washington) allocated funds between H-2A and H-2B, as required by the TEGF, by providing a percentage breakdown of the funding. Furthermore, ETA was unable to provide us with a breakdown of how the remaining SWAs and territories allocated foreign labor program funds.

ETA indicated it did not have access to the SWAs' quarterly FY 2010 reports, even though the TEGF required SWAs to submit them to ETA. ETA officials told us they have since gained access to the electronic grant management system and allocated staff to begin review of SWA quarterly financial reports. In addition, ETA stated they are in the process of implementing a full grant management and monitoring program. ETA's failure to monitor the six SWAs' allocation of foreign labor program funds increased the risk for misuse, waste, or abuse.

SWAs will have increased responsibilities and involvement under the proposed new regulations, including a collaborative recruitment effort with ETA. Given the problems with SWAs' performance identified during our audit, ETA will need to more closely monitor SWA activities and results.

¹²The California SWA declined all H-2B funding for FY2010 as it did not plan to spend extended time or funds for the H-2B program, believing the regulations relieved the state of its H-2B responsibilities

RECOMMENDATIONS

We recommend that the Assistant Secretary for Employment and Training Administration:

1. Reassess the requirement for employers to only recruit U.S. workers in the state of initial employment.
2. Develop and implement procedures to strengthen the application review and post-adjudication processes.
3. Develop and implement controls to better monitor SWAs' compliance with program requirements.

We appreciate the cooperation and courtesies that ETA personnel extended to the OIG during this audit. OIG personnel who made major contributions to this report are listed in Appendix E.



Elliot P. Lewis
Assistant Inspector General
for Audit

Exhibits

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Exhibit 1**Reasons U.S. Workers Were Not Hired****Exhibit 1: Employer Reasons for Non-hire**

Reasons	Totals
No reason provided	5
Applicant could not fulfill requirements	8
Applicant wanted a different job	9
Applicant looking for local work	12
Applicant looking for permanent position	1
Applicant looking for higher level work	3
Employer attempted to contact applicant but received no response	38
Applicant already employed	10
Applicant no longer interested	29
Applicant could not accept job - attending school	2
Total:	117

NOTE: Of the 146 U.S. applicants listed on the employer recruitment reports, 117 were not hired for reasons noted above. Furthermore, an additional 29 workers were reported by two employers as hired on the recruitment reports; however, none actually went to work for the employer. The employers confirmed the individuals never worked for them and they did not have any payroll records for the individuals. The two employers, Summitt and Cutting Edge, provided similar reasons why the U.S. applicants did not come to work for them, such as the lag time between the application and the start of work, and the applicants were concerned about committing to a future employment date versus immediate employment.

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Exhibit 2**Prevailing Wages Paid to Foreign Workers****Exhibit 2: Prevailing Wages Paid to Foreign Workers**

Employer Case Number	Prevailing Wage	Employer Paid Prevailing Wage to Foreign Workers
GE Forestry-C-11003-52965	\$9.57 to \$10.33	Yes ¹³
GE Forestry-C-09337-47479	\$8.41	Yes
GE Forestry-C-09357-48056	\$10.86	Yes
Cutting Edge-C-09331-47412	\$10.60	N/A ¹⁴
Cutting Edge-C-10074-49639	\$10.60 to \$15.90	Yes ¹⁵
Cutting Edge-C-10316-51688	\$9.57 to \$12.92	Yes ¹⁶
Summitt-C-10306-51455	\$9.57 to \$14.05	Yes ¹⁷
Summitt-C-09313-47045	\$9.55 to \$14.33	Yes ¹⁸
Ponderosa-C-10243-50945	\$9.18 to \$12.62	Yes ¹⁹

¹³ Based on payroll records reviewed, GE Forestry paid all workers the prevailing wage for the 3 job orders, however, the information provided did not distinguish between foreign or U.S. workers.

¹⁴ Application denied

¹⁵ 67 foreign workers

¹⁶ 39 foreign workers

¹⁷ 51 foreign workers

¹⁸ 69 foreign workers

¹⁹ 28 foreign workers

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Appendices

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Background

Concerned about the potential for abuse in the H-2B visa program, Oregon Congressman Peter DeFazio in a letter dated September 3, 2010, asked the OIG to review the certification of H-2B applications for those employers listed in the Oregon Bend news article, dated August 9, 2010, for any improprieties. He was concerned that the H-2B visa program, which was created to provide American employers access to foreign workers for temporary, non-agricultural jobs, was preventing U.S. workers in Oregon from getting forestry jobs. Furthermore, he was concerned that the forestry employers were hiring non-American workers for projects funded by Recovery Act funds from contracts with the U.S. Forest Service. According to U.S. Forest Service officials, the four employers reviewed were awarded 14 FY 2010 Recovery Act contracts totaling approximately \$7,140,782 for forestry jobs in Oregon.

The H-2B nonimmigrant program permits employers to hire foreign workers to come temporarily to the U.S. and perform temporary nonagricultural services or labor on a one-time, seasonal, peakload or intermittent basis. The H-2B visa program regulations require the petitioning employer to first apply for a temporary labor certification from the Secretary of Labor indicating that (1) there are not sufficient U.S. workers who are capable of performing the temporary services or labor at the time of filing the petition for H-2B classification, and at the place where the foreign worker is to perform the work; and (2) the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. The Secretary has delegated H-2B responsibilities to ETA. Within ETA, OFLC processes applications for labor certification.

For the period October 1, 2009, through January 31, 2011, there were 7,007 H-2B applications requesting 169,363 positions submitted. Of these, 6,051 H-2B applications for 145,094 positions were certified or partially certified. ETA amended its regulations in January 2009 to modernize the procedures for ETA's issuance of labor certifications to employers sponsoring H-2B non-immigrants and the procedures for enforcing compliance with attestations made by those employers, including post-adjudication reviews. Specifically, this Final Rule re-engineered the application filing and ETA's review process by centralizing processing and by enabling employers to conduct pre-filing recruitment of U.S. workers.

Prior to obtaining an H-2B labor certification, employers must determine that there are not sufficient U.S. workers who are capable of performing the work for which labor certification is sought. Specifically, the regulations require that the employer (1) post a job order with the SWA serving the area of intended employment in order to obtain referrals of interested U.S. workers through the interstate job order clearance system; (2) publish two newspaper advertisements, one of which must be on a Sunday; (3) contact the applicable union for referral of U.S. workers if the employer is a party to a collective bargaining agreement that covers the job classification that is the subject of

the H-2B labor certification; and (4) contact workers who were laid off in the occupation and in the area of intended employment, within 120 days of the first date on which an H-2B worker is needed, to inform them of the position(s). The regulations also outline specific information that must be included in all newspaper advertisements and job orders, such as the name of the employer, the area of intended employment, the rate of pay, a description of the position, and whether tools or equipment is to be provided by the employer.

Additionally, the regulations require the employer to prepare, sign, and date a written recruitment report that summarizes the recruitment steps undertaken, and the results of such recruitment, including the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position. Employers seeking H-2B certification must file an ETA Form 9142, Application for Temporary Employment Certification, along with a copy of the recruitment report. In Section F.c, of the completed form, employers are required to list the specific place(s) of employment.

ETA reviews the H-2B application and recruitment report. Prior to rendering a decision, ETA can request further documentation through a Request for Information (RFI) when the employer has submitted an application that does not comply with the regulations. Based on their review, they can certify, partially certify, issue a second RFI, or deny the application. Subsequent to certifying an application, effective January 2009, ETA can conduct a post-adjudication review. The purpose of the post-adjudication review is to verify the accuracy of applications, particularly those applications with complaints against the filing employer and employers on the consistency watch list, with the goal of acting as a deterrent to employer fraud.

Appendix B

Objective, Scope, Methodology, and Criteria

Objective

Was ETA able to ensure that the H-2B visa program provided adequate protections for U.S. workers in the applications filed by the four Oregon forestry employers?

Scope

The audit focused on four Oregon forestry employers noted in the Bend Bulletin news, who submitted nine H-2B applications between October 1, 2009, and January 31, 2011, and ETA's application and post adjudication review process for the period October 1, 2009 to January 31, 2011.

Field work was conducted at both, ETA's National Office located in Washington, D.C., and the ETA's NPC in Chicago, Ill.

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 the audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objective.

Methodology

We compiled background information concerning Congressman DeFazio's complaint by researching various media outlets to include news publications and internet news sites. We also researched the Recovery Act's website and determined that Recovery Act funding does not prohibit an employer from participating in the H-2B program or using H-2B labor. During this process, we identified prior and current laws and regulations governing the H-2B program and gained understanding of program processes and procedures. We also reviewed recent performance data reported by ETA and identified data trends based on previous report years.

We conducted multiple interviews with OIG – Office of Labor Racketeering and Fraud Investigations representatives to determine if they have any investigations or planned investigations that would have an impact on our audit.

We held an entrance conference with ETA national office management to obtain H-2B policies and procedures, ETA's response to Congressman DeFazio's complaint, and other requested documentation.

We contacted U.S. Forest Service representatives to determine if they require contractors to describe the type of workers they will use if awarded forestry contracts,

including H-2B workers. Additionally, we confirmed Recovery Act funded employers are not precluded from hiring H2-B workers.

We visited ETA's NPC to perform the following:

1. Conduct interviews with ETA officials.
2. Have staff provide a walkthrough of the entire application review process, including post-adjudication reviews.
3. Obtain essential documentation including Standard Operating Procedures of the application review process and post-adjudication process.
4. Identify internal controls for both the application review and post-adjudication processes.

We evaluated internal controls used by ETA for reasonable assurance that they complied with appropriate regulations and procedures in approving foreign labor certifications. Our consideration of ETA's internal controls for foreign labor certification procedures would not necessarily disclose all matters that might be reportable conditions. Because of inherent limitations in internal controls, noncompliance may nevertheless occur and not be detected.

To test the controls, we judgmentally reviewed six Forest Industry H-2B applications not related to the complaint and identified areas where these processes can be improved. We discussed potential recommendations with ETA's NPC management.

Prior to our sampling process, ETA provided us with all H-2B applications received and processed beginning October 1, 2009, through January 31, 2011. The data was generated from ETA's Case Management System. We performed a data reliability assessment to ensure we received a complete and accurate data file. To determine whether the data was reliable to select our sample, we performed various testing of required data elements, interviewed ETA officials knowledgeable about the data, and reviewed employer-submitted applications, which served as source data for all information found in the Case Management System, including relevant general and application controls. We concluded the data to be sufficiently reliable for our purposes.

From this universe, we extracted all Forest Industry applications submitted by employers listed in Congressman DeFazio's complaint to include:

1. G.E. Forestry
2. Medford's Cutting Edge Forestry
3. Summitt Forests Inc.
4. Ponderosa Reforestation

During our testing phase, we provided the NPC the list of 4 forestry employers and requested documentation to be included in each application file (i.e. recruitment report, applicant resumes, newspaper advertisements, and SWA job order postings). The NPC complied with our request and provided the documentation.

In order to facilitate our analysis of employer recruitment/hiring efforts, we contacted the four employers and requested the following documentation for comparison and verification:

1. A comprehensive Recruitment Report, which would include full names, addresses and phone contact information for any worker who applied, and the results of that application, including whether interviewed and hired
2. Supporting documentation for recruitment, including applications, resumes, and any other applicant documentation
3. A copy of the completed U.S. Citizenship and Immigration Services (USCIS) I-9, Employment Eligibility Verification, with related documentation
4. A copy of the completed and approved USCIS I-129, Petition for a Non-immigrant Worker
5. For any person hired, the last available payroll records for each hired, accompanied by the state location of the worker during this time. Specifically, we requested the payroll records include gross pay, any payroll deductions, net pay, the number of hours worked, and the hourly rate.

USCIS documentation and employer payroll documents were used to determine the number of foreign workers hired; the number of foreign workers who were retained or rehired from a prior H-2B Job Order; whether the foreign worker's eligibility status was current; and whether the employer paid each worker the prevailing wage. Moreover, the employers actual hiring of foreign workers was compared to the number of foreign workers requested by each employer on the H-2B applications. Additionally, the Recruitment Reports and supporting documentation were used to verify the number of U.S workers hired by the employer, and to contact individual U.S workers, including those reported as hired, to discover their recruitment experiences with the given employer.

We requested and obtained contact information from ETA for the SWAs responsible for posting the job orders related to the four forestry employers. The resulting SWAs were Arizona, California, Idaho, Oregon, Washington, and Wyoming. We contacted each of the six SWAs to determine their role in assisting employers identify U.S. applicants for Forest Industry employment. If available, we also requested the SWA employee referrals to Forestry H-2B employers and compared the referrals to each employer's recruitment report. We initially contacted the applicants listed by employers on their recruitment report who were not hired and determined the reason for not hiring. Subsequently, we contacted applicants only reported as hired by the employers. Their reasons were then compared back to the reason provided by the employers on their respective recruitment reports to identify any variances.

The Assistant Secretary for Employment and Training responded to draft report No.17-11-002-03-321. However, our final report was not issued until FY12, and was renumbered as 17-12-001-03-321.

Criteria

- 20 CFR Part 655, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes
- Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA)
- Federal Register E928963
- TEGL 27-06: Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations
- ETA's internal H-2B Standard Operating Procedures
- ETA's Post Adjudication Audit Standard Operating Procedures
- OMB Circular A 123 – Management's Responsibility for Internal Control

Appendix C

Acronyms and Abbreviations

CFR	Code of Federal Regulations
CO	Certifying Officer
DOL	Department of Labor
ETA	Employment and Training Administration
FY	Fiscal Year
INA	Immigration and Nationality Act
NPC	(Chicago) National Processing Center
OFLC	Office of Foreign Labor Certification
OIG	Office of Inspector General
RFI	Request for Further Information
SWA	State Workforce Agency
TEGL	Training and Employment Guidance Letter
USCIS	U.S. Citizenship and Immigration Services

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ETA Response to Draft Report

U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
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 Employment and Training Administration's Efforts to
Ensure That the H-2B Visa Program Provided Adequate
Protections for U.S. Forestry Workers in Oregon
Draft Audit Report 17-11-002-03-321

Date: September 30, 2011

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) efforts to ensure the H-2B visa program provides adequate protections for U.S. forestry workers in Oregon. We appreciate the time and effort OIG staff spent reviewing H-2B forestry applications, interviewing personnel at the Chicago National Processing Center (NPC), and the professional and collaborative manner in which the audit was conducted with OFLC staff. The following represents our responses and recommended actions for your consideration.

Recommendation 1: Reassess the requirement for employers to only recruit U.S. workers in the state of initial employment.

ETA Response: While our current regulations do not necessarily limit recruitment of U.S. workers to just one state, we acknowledge that we should consider strengthening the recruitment of U.S. workers for work occurring in multiple states. Under the current H-2B regulation published in December 2008, an employer is required to place an active job order for at least 10 calendar days with the State Workforce Agency (SWA) serving the area of intended employment no more than 120 calendar days before the employer's date of need. If the job opportunity contains multiple worksites within the same area of intended employment and that area covers multiple states, the regulations require the employer to place the job order with the SWA where the work is expected to begin. The SWA receiving the job order must then transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites. During the same period of time that the job order is being circulated with the SWA, the employer is required to publish an advertisement on two separate days in a newspaper of general circulation serving the area of intended employment.

Further, Training and Employment Guidance Letter (TEGL) No. 27-06 provides special procedures for processing H-2B temporary labor certification applications in tree planting and related reforestation occupations. The TEGL allows for multi-state itineraries and provides employers with the option of either filing a single master application covering multiple itineraries or separate applications for each itinerary where the tree planting or related reforestation work will begin. If the itinerary includes worksite locations covering multiple SWAs, the employer may submit a single application to the SWA where the employment will begin, or if the start dates for each worksite location in the itinerary are exactly the same, the employer may submit a single application to any one of the SWAs covered by the itinerary. The SWA receiving the job order would not only have to place the job order in its own state for 10 days but also clear the job order with the other appropriate states where the work is to be performed for 10 days and accept for referral qualified applicants from those states. We will review this TEGL in light of the Department's pending H-2B rulemaking when that process concludes.

Recommendation 2: Develop and implement procedures to strengthen the application and post-adjudication processes.

ETA Response: While we agree with the recommendation generally, the current H-2B regulation authorizes employers to simply attest to compliance with program requirements. Under this attestation-based program model, our ability to verify employer compliance with the program's regulations is limited during application processing; however, compliance reviews may be conducted following the granting of a labor certification.

We are, however, taking some steps where we can improve our ability to monitor employer compliance during the application process. OIG noted a concern about the process for employer verification as a *bona fide* business. Currently, OFLC requires the employer to provide a Federal Employer Identification Number (FEIN) on ETA Form 9142 and attest to the accuracy of the FEIN. To strengthen employer compliance, OFLC is designing an information technology system to support the H-2B program which includes verifying the FEINs provided during the initial review of the application for processing.

OIG also expressed concern about OFLC's practice for prevailing wage validation. Historically, OFLC has only validated prevailing wage determinations when there was an indication of a problem. However, with recent technological enhancements in OFLC's iCERT system, staffs now verify for each application that the employer-stated wages offered for the job opportunity meet or exceed the prevailing wage. This recent advancement allows OFLC to strengthen the validation of prevailing wage attestations.

The current H-2B regulation authorizes, for the first time, the Department to audit H-2B applications. Prior to beginning the actual audit process, OFLC had to develop the processes and standard operating procedures required to effectuate the audit of H-2B labor certifications, including the training of staff. This process delayed the immediate

implementation of the new audit authority. OFLC consistently reviews its audit procedures for continuous improvement and will continue to do so.

Recommendation 3: Develop and implement controls to better monitor SWAs' compliance with program requirements.

ETA Response: We agree that OFLC can strengthen aspects of its internal controls with respect to SWA monitoring and the office routinely receives information from a variety of sources when a SWA may not be meeting a regulatory or program guidance responsibility. OFLC increased its monitoring of SWA activities during FY 2011 and will continue to review those procedures in light of available federal and state resources.

Thank you again for the opportunity to comment on this report.

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Appendix E

Acknowledgements

Key contributors to this report were Tracy Katz (Audit Director), Michael Kostrzewa, Barry Winnicki, Jerry Howe, Kathy Vochatzer, Fernando M. Paredes, and David Sterling.

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