

U.S. Department of Labor

Office of Inspector General—Office of Audit

**REPORT TO THE WAGE AND HOUR
DIVISION & THE EMPLOYMENT
TRAINING ADMINISTRATION**



**DOL NEEDS TO IMPROVE DEBARMENT
PROCESSES TO ENSURE FOREIGN
LABOR PROGRAM VIOLATORS ARE
HELD ACCOUNTABLE**

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BRIEFLY...

DOL NEEDS TO IMPROVE DEBARMENT PROCESSES TO ENSURE FOREIGN LABOR PROGRAM VIOLATORS ARE HELD ACCOUNTABLE

September 30, 2020

WHY OIG CONDUCTED THE REVIEW

Prior OIG investigations have shown foreign labor programs are susceptible to fraud and abuse, and unscrupulous employers misusing the Foreign Labor Program to engage in human trafficking, with victims often exploited for economic gain. The Department of Labor (DOL) is responsible for ensuring that admitting foreign workers to work in the U.S. will not adversely affect the job opportunities, wages, or working conditions of U.S. workers. The Department's Employment and Training Administration (ETA) and the Wage and Hour Division (WHD) conduct investigations and audits to identify program employers who should be debarred. Debarment is part of a broader effort to confront entities committing visa program fraud and abuse. We were concerned about the Department's debarment processes.

WHAT OIG DID

Given our concerns, we conducted a review to answer the following question:

Has DOL's debarment process held H-1B, H-2A, H-2B, and PERM employers accountable for violating laws and policies to ensure U.S. workers, foreign workers, and employers who followed laws and regulations are protected?

To answer this question, we analyzed foreign labor program investigations, audits, and violations; interviewed DOL officials; reviewed applicable laws and regulations; and evaluated DOL's debarment processes. Our results focus on the temporary certification programs: H-1B, H-2A, and H-2B.

WHAT OIG FOUND

The Department needs to improve its debarment processes to ensure the full protection of U.S. and foreign workers and employers who followed laws and regulations and hold violators accountable. We based this determination on the following:

DOL has not fully used its H-1B investigation process to determine debarment. WHD cannot initiate investigations unless it receives a complaint from an aggrieved party or a credible source. Additionally, the Secretary has authority to initiate investigations, but the Department has never utilized this option. Not exercising the Secretary's authority to initiate investigations and WHD's inability to initiate any investigation can prevent DOL from holding H-1B program violators accountable.

DOL has not established a risk-based process for determining the number of H-2A and H-2B applications to audit. The current selection process does not use data analytics or account for risk when selecting applications to audit. ETA has not documented any risk factors considered before initiating an audit; thus, it is difficult to determine if the applications audited were the most likely to result in violations eligible for debarment.

WHAT OIG RECOMMENDED

We made four recommendations to the Department. For the H-1B program, develop a way of using the Secretary options to initiate H-1B investigations, define a process for assessing willfulness; and work with Congress to change a restrictive authority to launch investigations. For the H-2A and H-2B programs, use data analytics to establish and document a risk-based audit process.

DOL agreed with our recommendations.

READ THE FULL REPORT

<https://www.oig.dol.gov/public/reports/oa/2020/06-20-001-03-321.pdf>

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INSPECTOR GENERAL'S REPORT

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This report presents the results of our review of the Department of Labor's (DOL) debarment processes under the foreign labor programs.

Debarment is part of a broader effort to confront entities committing visa program fraud and abuse. We were concerned about the department's debarment processes because prior OIG investigations have shown foreign labor programs are susceptible to fraud and abuse by dishonest immigration attorneys, employers, labor brokers, and organized criminal enterprises. OIG investigations have also uncovered instances of unscrupulous employers misusing the Foreign Labor Program to engage in human trafficking, with victims often exploited for economic gain.

Given our concerns regarding DOL's debarment process, we conducted a review to answer the following question:

Has DOL's debarment process held H-1B, H-2A, H-2B, and PERM employers accountable for violating laws and policies to ensure

U.S. workers, foreign workers, and employers who followed laws and regulations are protected?

Our review reflects work completed by analyzing H-1B, H-2A, H-2B, and PERM laws and policies; DOL's debarment processes and selections; audit and investigation data; violation and penalty data; and lists of employers and individuals debarred/disqualified. Our work covered audits and investigations that DOL's WHD and ETA completed during Fiscal Years (FY) 2015-2018 (October 1, 2014, through September 30, 2018).

We found that DOL needs to improve its current debarment processes to ensure violators are held accountable. The Department has not fully used its H-1B investigation process to determine debarment and has not established a risk-based process for determining the number of H-2A and H-2B applications to audit.

BACKGROUND

DOL is responsible for ensuring that admitting foreign workers to work in the U.S. will not adversely affect the job opportunities, wages, or working conditions of U.S. workers. The H-1B, H-2A, and H-2B programs allow employers to employ temporary foreign labor workers. The Department's Employment and Training Administration (ETA) approves/denies foreign labor applications and conducts audits to assess an employer's compliance with the terms attested in its application. The Wage and Hour Division (WHD) conducts investigations to identify and enforce actions against any employer or applicant who violates the rules within the foreign labor programs¹.

The results of ETA's audits and WHD's investigations can lead to debarment of any employer or applicant who violates program rules. Debarment prohibits the employer or an attorney or agents from future sponsorship of any immigrant on any temporary visa or as a permanent resident for a prescribed period of time, usually 1-5 years. (See Exhibits 1-3 for specific debarment periods for each temporary visa program). The Foreign Labor Program statutes require the debarring of an employer when DOL finds the employer has committed a violation that qualifies for debarment.

¹ WHD has authority to conduct investigations and debar in the H-1B, H-2A, and H-2B programs, and we reviewed WHD's role in each program. The review's results focus on WHD's authority within the H-1B program and ETA's within H-2A and H-2B.

RESULTS

The Department needs to improve its debarment processes to ensure the full protection of U.S. and foreign workers and employers who followed laws and regulations and hold violators accountable. Based on our work, we found the Department has not fully utilized the H-1B program investigation process to determine debarment and has not established a risk-based process for determining the number of H-2A and H-2B applications to audit.

DOL has not fully used its H-1B investigation process to determine debarment. DOL cannot initiate H-1B investigations unless it receives a complaint from an aggrieved party or a credible source. Additionally, the Secretary has authority to initiate investigations but the DOL has never utilized this option. Not exercising the Secretary's authority to initiate investigations and DOL's inability to initiate any investigation can prevent it from holding H-1B program violators accountable.

DOL has not established a risk-based process for determining the number of H-2A and H-2B applications to audit. The current selection process does not use data analytics or account for risk when selecting applications to audit. DOL has not documented any risk factors considered before initiating an audit; thus, it is difficult to determine if the applications audited were the most likely to result in violations eligible for debarment.

We determined that the DOL's audit and investigation processes used to identify if a violation warrants debarment needs improvement. This means that DOL's debarment practices may not adequately capture all Foreign Labor Program employers who violate laws and policies. Therefore, the Department cannot provide reasonable assurance that it identified violators and held them accountable to ensure the protections of U.S. workers, foreign workers, and employers who followed laws and regulations.

DOL HAS NOT FULLY USED ITS H-1B INVESTIGATION PROCESS TO DETERMINE DEBARMENT

The H-1B program allows employers to employ temporary foreign workers in the U.S. on a nonimmigrant basis in specialty occupations, such as in information technology or as fashion models of distinguished merit and ability. WHD is the only DOL agency with authority to conduct investigations of H-1B violations that may require debarment.

WHD may only initiate an H-1B investigation based on four scenarios: (1) a credible source complaint, (2) aggrieved party, (3) Secretary initiated random investigation of a willful violator, or (4) Secretary initiated investigation of any H-1B employer. However, WHD has only utilized the credible source and aggrieved party scenarios, increasing the risk of overlooking significant violations that may be eligible for debarment under the other two scenarios. Furthermore, DOL's H-1B investigative authority to debar is more restrictive compared to its investigative authority in the H-2A and H-2B programs, and WHD may not initiate its own investigations outside of the four scenarios.

District managers evaluate complainants' information and determine if there is reasonable cause to investigate. The complainant must be an aggrieved party, "a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the H-1B program," or a credible source, "a known person or entity likely to have knowledge of an H-1B employer's practices or labor conditions." The complaint must be filed within 12 months of the alleged violation in order for an investigation to begin.

To determine the level of the employer's wrongdoing, WHD focuses on the employer's actions at the time of the violation(s) and looks for evidence as to whether the employer acted intentionally or recklessly. If it is determined that a violation is applicable for debarment, WHD notifies the Department of Homeland Security's (DHS) United States Citizenship and Immigration Services (USCIS) of DOL's recommendations. The Department does not technically debar but makes the recommendation as to whether or not debarment is appropriate. It is DHS USCIS' responsibility to carry out the debarment once it has been notified. Typically, DHS accepts and enforces WHD's recommendations to debar.

WHD DOES NOT UTILIZE ALL AVAILABLE OPTIONS FOR INITIATING H-1B INVESTIGATIONS

WHD has only utilized two of the four scenarios, credible source and aggrieved party, allowed to select employers for investigations. The Department's WHD Fact Sheet 62U states that H-1B investigations may be initiated based on any of the following four scenarios:

1. WHD receives a complaint from an aggrieved person or organization.
2. WHD receives specific credible information from a reliable source (other than a complainant) that the employer has failed to meet certain Labor Condition Application (LCA) conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple employees.

3. The Secretary of Labor has found, on a case-by-case basis, that an employer (within the last five years) has committed a willful failure to meet a condition specified in the LCA or willfully misrepresented a material fact in the LCA. In such cases, a random investigation may be conducted.
4. The Secretary of Labor has reasonable cause to believe that the employer is not in compliance. In such cases, the Secretary may certify that an investigation be conducted.

For the aggrieved party and credible source scenarios, if wage violations (the most common violation) are found, WHD must obtain evidence to prove that the violator knowingly failed or recklessly disregarded the H-1B program requirement. If not, WHD does not have authority to debar. The majority of violations found are substantial failure to pay wages, which by statute do not qualify for debarment. Wage violations only qualify for debarment if they are proven to be willful — for example, if the investigator identified a history of the employer repeating the same violation. In cases in which it has to be determined whether or not there was a willful violation, it is a matter of whether employers have properly classified their workers in the right occupation and because employers are not experts in classification.

According to a WHD official, about 95 percent of investigations are initiated by an aggrieved party, and the vast majority of those are H-1B workers no longer employed by their employer. Current workers rarely initiate investigations because the H-1B worker is attached to their employer and cannot work for anyone else unless someone else files a petition for them. If the worker's employer is debarred, the H-1B worker must return home — creating a disincentive to file a complaint. Many of the H-1B workers are hoping to get a green card and stay in the country — and often, an employer will agree to assist the H-1B worker in obtaining their green card if everything works out during the employment period. As a result, H-1B workers can feel indebted to their employers, which is a reason why WHD rarely receives complaints from current employees.

Additionally, the H-1B statute requires complaints be filed within 12 months of the alleged violation — meaning that even if it was a major violation, an investigation cannot be initiated if the alleged violation happened beyond the 12-month window. The only exception to the 12-month rule is if the Secretary determines the employer is a willful violator or the Secretary certifies there is reasonable cause to believe a violation has taken place. According to WHD officials, the agency has never sought the Secretary's initiation of an investigation due to the limited information available prior to an investigation and the difficulty in establishing willfulness.

WHD completed 825 investigations that uncovered 649 cases that had one or more violations of H-1B requirements during FY 2015 through 2018 (see Exhibit 4). The Secretary initiated none of those investigations. Of those 825 investigations, 38 (5.9 percent) resulted in debarment. Based on an investigation, WHD will determine if debarment is the appropriate sanction. By only utilizing two scenarios, the credible source and aggrieved party scenarios, DOL increases the risk of overlooking significant violations that may be eligible for debarment under the other two scenarios.

WHD'S AUTHORITY TO INVESTIGATE H-1B EMPLOYERS IS RESTRICTIVE IN COMPARISON TO OTHER FOREIGN LABOR PROGRAMS

Contrary to the H-1B program, WHD can initiate investigations under the H-2A (agricultural workers) and H-2B (non-agricultural workers) programs. Congress has not given WHD authority to initiate H-1B investigations or debar, but has given it that authority within the H-2A and H-2B programs. For the H-2A and H-2B programs, WHD can initiate an investigation and is not restricted to the four scenarios as required for an H-1B investigation.

WHD is also able to enforce its own debarments in comparison to H-1B, where it must make debarment recommendations to DHS rather than enforcing its own. WHD officials detailed that when Congress has taken up immigration reform, WHD provided suggestions to consistently align its authority. However, Congress has not implemented the changes and extended WHD's authority to conduct investigations beyond the four scenarios.

Overall, debarment is supposed to help confront instances of fraud and abuse. Not exercising the Secretary's authority to initiate investigations and WHD's inability to initiate H-1B investigations are risks that can prevent DOL from holding H-1B program violators accountable.

DOL HAS NOT ESTABLISHED A RISK-BASED PROCESS FOR DETERMINING THE NUMBER OF H-2A AND H-2B APPLICATIONS TO AUDIT

ETA's authority to conduct audit examinations is an integral part of ensuring program integrity and both U.S. and foreign workers receive the full scope of protections available under the H-2A and H-2B programs. However, the selection process for auditing H-2A and H-2B applications does not use data analytics nor account for risk when selecting applications.

The H-2A temporary agricultural program allows agricultural employers — who anticipate a shortage of domestic workers — to bring nonimmigrant foreign workers to perform agricultural labor or services of a temporary or seasonal nature. ETA performs H-2A audits on certified applications for temporary employment in accordance with 20 CFR Part 655.180. From FY 2015 to FY 2018, there were 39,375 H-2A applications certified. An audit of 3,140 of those (8 percent) resulted in 57 debarments.

The H-2B program allows employers to bring foreign nonimmigrant workers to fill temporary nonagricultural jobs. ETA performs H-2B audits on adjudicated applications for temporary employment in accordance with 20 CFR Part 655.70. From FY 2015 to FY 2018, there were 27,425 H-2B applications certified. An audit of 1,354 (4.9 percent) of those resulted in 22 debarments.

ETA may debar an employer from receiving future labor certifications if the audit reveals the employer substantially violated a material term or condition of its temporary labor certification. ETA initiates an audit by sending a Notice of Audit Examination requesting documentation that shows the employer complied with regulations and the attestations outlined in its certified application for temporary employment. The response is reviewed against regulations, the employer's application, and supporting documentation to determine whether or not the employer adhered to the regulations.

ETA uses audit examinations to help ensure program integrity. In order for this to be most effective, it is important that the selection process for audit identifies those cases that present the most risk to the program. The selection process for auditing H-2A and H-2B applications, however, does not use data analytics nor account for risk when selecting applications to audit. ETA has not documented any risk factors considered before initiating an audit; thus, it is difficult to determine if the applications audited were the most likely to result in violations eligible for debarment.

According to regulations at 20 C.F.R. Part 655, the certifying officer (CO) has sole discretion in choosing which H-2A and H-2B applications to audit. The regulation does not state that the CO has to consider risk during the selection process. The regulation also does not specify how applications are selected — it only states who is responsible for choosing applications to audit. According to ETA officials, ETA's policy states the CO may request a sample based on a population category. Examples of those categories include a specific fiscal year or quarter, area of the country, industry, or occupation. We found the categories COs choose vary from audit to audit without documenting the justification. We

also found ETA did not track trends that may have explained why it audited particular categories.

ETA did not provide documentation for its approach of determining which and the number of applications to audit. Instead, the audit sampling instructions they provided to the OIG focused on what happens after the CO requests that the performance management unit create a sample based on the CO's population category. The sample created may miss the high-risk H-2A and H-2B applications because the CO's request does not consider risk factors. Although ETA officials stated that complaints from a State Workforce Agency or in news media reports may result in an audit, there was nothing documented to establish that the CO considered risk factors every time when deciding to initiate an audit.

Officials stated they do consider available resources when determining the applications to audit. Given that the CO must limit the number of audits based on available resources, using a high-risk approach would better ensure the use of resources for targeted outcomes. We found H-2A and H-2B only debarred 1.8 percent and 1.6 percent, respectively, of the applications audited between FY 2015 and FY 2018 (see Exhibit 5). These results may have been greater if a risk-based approach had been in place.

Not using a documented, risk-based approach leaves the Department at an unnecessarily elevated risk of foreign labor program abuse. DOL may be missing employers that should be debarred. Adopting a risk-based audit approach is critical in lessening the potential for fraud and other threats putting U.S. and foreign workers in jeopardy. Moreover, the Committee of Sponsoring Organizations (COSO) 2013 Framework outlines five components of internal control, one of which is risk assessment. The H-2A and H-2B programs cannot operate at optimal performance if ETA does not factor risks into its auditing process.

OIG'S RECOMMENDATIONS

We recommend the Administrator for Wage and Hour Division:

1. Utilize the Secretary options to initiate H-1B investigations, including identifying the criteria that would allow the Secretary to initiate an investigation.

2. Define a process for assessing willfulness to make it less difficult to determine if an employer should be debarred.
3. Work with Congress to change the restrictive authority of H-1B investigations to permit WHD to initiate investigations similar to the H-2A and H-2B programs.

We recommend the Assistant Secretary for ETA:

4. Use data analytics and other risk factors to establish a risk-based approach to determine the selection of H-2A and H-2B applications for audit.

SUMMARY OF DOL'S RESPONSE

WHD and ETA agreed with our 4 recommendations. Their respective responses discuss the efforts each agency will take to implement our recommendations. Each agency's response is included in its entirety in Appendix B.

We appreciate the cooperation and courtesies WHD and ETA extended us during this review. OIG personnel who made major contributions to this report are listed in Appendix C.



Elliot P. Lewis
Assistant Inspector General for Audit

EXHIBIT 1: WHD H-1B VIOLATIONS CRITERIA

Violations Criteria: 20 CFR Part 655.805

Debarment Authority: WHD²

Debarment Period: 1-3 years

Violations that may be investigated:

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1. Filed a labor condition application with ETA which misrepresents a material fact (Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government.)
 2. Failed to pay wages, including benefits provided as compensation for services and payment of wages for certain nonproductive time
 3. Failed to provide working conditions
 4. Filed a labor condition application for H-1B nonimmigrants during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment
 5. Failed to provide notice of the filing of the labor condition application
 6. Failed to specify accurately on the labor condition application the number of workers sought, the occupational classification in which the H-1B nonimmigrant(s) will be employed, or the wage rate and conditions under which the H-1B nonimmigrant(s) will be employed
 7. Displaced a U.S. worker (including displacement of a U.S. worker employed by a secondary employer at the worksite where an H-1B worker is placed)
 8. Failed to make the required displacement inquiry of another employer at a worksite where H-1B nonimmigrant(s) were placed
 9. Failed to recruit in good faith
 10. Displaced a U.S. worker in the course of committing a willful violation of any of the conditions in paragraphs in this section, or willful misrepresentation of a material fact on a labor condition application;
 11. Required or accepted from an H-1B nonimmigrant payment or remittance of the additional \$500/\$1,000 fee incurred in filing an H-1B petition with the DHS
 12. Required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date
 13. Discriminated against an employee for protected conduct
 14. Failed to make available for public examination the application and necessary document(s) at the employer's principal place of business or worksite
 15. Failed to maintain documentation
 16. Failed otherwise to comply in any other manner with the provisions of this subpart
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² DHS is responsible for enforcing the debarment determination WHD makes.

EXHIBIT 2: ETA H-2A VIOLATIONS CRITERIA

Violations Criteria: 20 CFR Part 655.182

Debarment Authority: ETA (audits) and WHD (investigations) have concurrent H-2A debarment authority³.

Debarment Period: 1-3 years

ETA's H-2A debarrable violations would include but would not be limited to one or more acts of commission or omission which involve:

-
1. Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;
 2. Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
 3. Failure to comply with the employer's obligations to recruit U.S. workers;
 4. Improper layoff or displacement of U.S. workers or workers in corresponding employment;
 5. Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501
 6. Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501
 7. Employing an H-2A worker outside the area of intended employment, in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;
 8. A violation of the requirements of §655.135(j) or (k);
 9. A violation of any of the provisions listed in 29 CFR 501.4(a); or
 10. A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;
 11. The employer's failure to pay a necessary certification fee in a timely manner;
 12. Fraud involving the Application for Temporary Employment Certification; or
 13. A material misrepresentation of fact during the application process.
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³ For this review, we did not report on WHD's debarment role in the H-2A program. We did not include WHD's H-2A violations regulations.

EXHIBIT 3: ETA H-2B VIOLATIONS CRITERIA

Violations Criteria: 20 CFR Part 655.73

Debarment Authority: ETA (audits) and WHD (investigations) have concurrent H-2B debarment authority⁴.

Debarment Period: 1-5 years

ETA's H-2B debarable violations would include but would not be limited to one or more acts of commission or omission which involve:

1. Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2B workers and/or workers in corresponding employment;
 2. Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;
 3. Failure to comply with the employer's obligations to recruit U.S. workers;
 4. Improper layoff or displacement of U.S. workers or workers in corresponding employment;
 5. Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H-2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;
 6. Failure to comply with the Notice of Deficiency process;
 7. Failure to comply with the assisted recruitment process
 8. Impeding an investigation of an employer under 29 CFR part 503 or an audit
 9. Employing an H-2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;
 10. A violation of the requirements of §655.20(o) or (p);
 11. A violation of any of the provisions listed in §655.20(r);
 12. Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;
 13. Fraud involving the *H-2B application*
 14. A material misrepresentation of fact during the registration or application process.
-

⁴ Under the 2008 H-2B regulations, WHD did not have debarment authority — they only had the authority to recommend debarment cases to ETA; but under the 2015 H-2B regulations, WHD and ETA have concurrent H-2B debarment authority. For this review, we did not report on WHD's debarment role in the H-2B program and did not include their H-2B violation criteria.

EXHIBIT 4: WHD H-1B INVESTIGATION & DEBARMENT DATA

	FY 2015 – FY 2018 TOTALS
Investigations Completed	825
Number of Investigations Completed with Violations	649
Number of Investigations Completed with Violations Divided by the Number of Completed Investigations (%)	78.7%
Number of Debarments	38
Number of Debarment Cases Divided by the Number of Investigations with Violations (%)	5.9%

Source: OIG Analysis based on data WHD provided.

EXHIBIT 5: ETA H-2A & H-2B AUDIT & DEBARMENT DATA

	FY 2015 – FY 2018 TOTALS	
	H-2A	H-2B
Applications Certified	39,375	27,425⁵
Application Audits Completed	3,140	1,354
Application Audits Completed Divided by to the Number of Certified Applications (%)	8.0%	4.9%
Number of Debarment Cases	57	22
Number of Debarment Cases Divided by to the Number of Application Audits Completed (%)	1.8%	1.6%

Source: OIG analysis based on data ETA provided.

⁵ The H-2B program also performs audits on post-adjudication applications, so this includes certified and denied applications.

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

SCOPE

This review reflects work completed by analyzing H-1B, H-2A, H-2B, and PERM laws and policies; DOL's debarment processes and selections; audit and investigation data; violation and penalty data; and lists of employers and individuals debarred/disqualified. Our work covered H-1B, H-2A, H-2B, and PERM audits and investigations that DOL's WHD and ETA completed during FYs 2015-2018 (October 1, 2014, through September 30, 2018). The PERM program allows an employer to hire a foreign worker to work permanently in the United States. Our results focus on the temporary certification programs: H-1B, H-2A, and H-2B.

METHODOLOGY

To accomplish our objective, we reviewed applicable laws, regulations, policies, processes, and controls; analyzed Foreign Labor Program investigations, audits, and violations; interviewed DOL officials; and evaluated the Department's debarment process. Specifically, we examined phases within the debarment process to determine if Foreign Labor Program employers were held accountable for any violations.

INVESTIGATION & AUDIT PROCESSES

We began our review by exploring the investigation and audit processes that ultimately determine who is debarred. First, we identified the information (complaints, investigations, violators, etc.) and source of information DOL used to select employers/individuals for an investigation and/or audit. We then identified how DOL assigned the responsibility for selecting and conducting investigations and/or audits. We then analyzed DOL completed audits and investigations from October 1, 2014, through September 30, 2018, to identify the main reasons that DOL initiated investigations.

VIOLATIONS

Next, we analyzed how Foreign Labor Program violations were determined and implemented. For Foreign Labor Program investigation and audit cases that DOL completed from October 1, 2014, to September 30, 2018, we counted the number of employers and individuals with one or more violations for each area. For the employers and individuals with one or more Foreign Labor Program

violations, we determined the total employers and individuals with violations that resulted in debarment/disqualification. For the employers/individuals that were debarred, we reviewed the investigation documentation and obtained commercially available information. We then reviewed the Foreign Labor Program applications processed by the DOL and counted the number of employers with approved applications during FY 2015 – FY 2018. We compared the number of employers who ultimately hired Foreign Labor Program workers to the number of employers that violated Foreign Labor Program requirements and to the number of employers DOL debarred/disqualified. We also analyzed Foreign Labor Program violations data and identified trends.

PENALTIES & APPEALS

After analyzing how violations were determined, we interviewed DOL officials and staff to gain an understanding of how they complete the debarment process. We also reviewed companies that have pending appeals and companies that have been through the appeal process.

AGENCY COMMUNICATION

Lastly, we identified the procedures and policy DOL has to notify other agencies of potential violators. We determined what violation information DOL used from other Federal agencies when initiating Foreign Labor Program audits and investigations. We also gained an understanding of the process DOL used to share information about potential or known violators with other involved agencies.

The review methodology is based on the following guidance and standards:

- Council of the Inspectors General on Integrity and Efficiency (CIGIE), *Quality Standards for Inspection and Evaluation*, (Washington, DC: January 2012).

CRITERIA

- 20 CFR Part 655 Subpart H – Labor Condition Applications and Requirements for Employers Seeking To Employ Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b1 and E-3 Visas in Specialty Occupations
- 20 CFR Part 655 Subpart I – Enforcement of H-1B Labor Condition Applications and H-1B1 and E-3 Labor Attestations
- 20 CFR Part 655 Subpart A – Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers)
- 20 CFR Part 655 Subpart B – Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)
- 20 CFR Part 656 – Labor Certification Process for Permanent Employment in the United States
- ETA's Random Audit Sampling Instructions
- WHD Fact Sheet #62S: What is a willful violator employer?
- WHD Fact Sheet #62U: What is the Wage and Hour Division's enforcement authority under the H-1B program?

APPENDIX B: AGENCY RESPONSES TO THE REPORT

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210



September 18, 2020

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: CHERYL M. STANTON *Cheryl M. Stanton*
Administrator, Wage and Hour Division

SUBJECT: Response to the Office of Inspector General Draft Report, *DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators Are Held Accountable*
(Draft Report No. 06-20-001-03-321)

The U.S. Department of Labor's (Department) Wage and Hour Division (WHD) appreciates the opportunity to respond to the Office of Inspector General's (OIG) draft report titled "*DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Programs Violators Are Held Accountable.*"

The OIG's draft report contains three recommendations, with Recommendations 1 and 2 directed to WHD. ETA will respond separately, per your request, to Recommendation 3. WHD's responses are set forth below.

Recommendation 1: Utilize the Secretary options to initiate H-1B investigations, including identifying the criteria that would allow the Secretary to initiate an investigation.

Response: WHD agrees with this recommendation. The Department is in the process of developing procedures to initiate Secretary-certified investigations. Specifically, on July 31, 2020, the Department announced that it had entered into a Memorandum of Agreement (MOA) with the U.S. Department of Homeland Security, acting through the U.S. Citizenship and Immigration Services (USCIS). Most critically, this MOA establishes processes by which USCIS will refer suspected employer violations within the H-1B program to the Department. The enhanced collaboration and sources of information will be used by the Department in support of Secretary-certified investigations.

Recommendation 2a: Define a process for assessing willfulness to make it less difficult to determine if an employer should be debarred.

Response: WHD agrees with this recommendation. WHD will review its investigator training and its assessment process to determine what improvements can be made in assessing willful violations. WHD notes that existing regulatory and sub-regulatory guidance already define the standard and process for assessing willfulness. Specifically, the Department's regulation at 20

CFR 655.805(c) defines a willful failure as “a knowing failure or reckless disregard with respect to whether the conduct was [in violation]” and cites applicable case law, including *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1998). WHD’s internal guidance further explains and defines the process for assessing willfulness. Also citing the *Richland Shoe* decision and the regulations above, the internal guidance further explains the willfulness standard, outlines evidentiary requirements for proving willfulness, and provides case-specific examples as to when a determination of willfulness is appropriate.

This recommendation, however, appears to rest on a misunderstanding that only willful violations may result in debarment. WHD seeks to correct this potential misconception. While the Immigration and Nationality Act requires that *many* violations be willful to warrant debarment, it does not require that *all* violations be willful. The statute and regulations require debarment under 8 U.S.C. 1182(n)(2)(C)(i)(II) and 20 C.F.R. 655.810(d)(1) for a number of non-willful violations.¹

Recommendation 2b: Work with Congress to change the restrictive authority of H-1B investigations to permit WHD to initiate investigations similar to the H-2A and H-2B programs.

Response: WHD stands ready to provide technical assistance regarding proposed statutory changes to WHD’s authority to initiate investigations as requested and appropriate. As OIG has noted in its recommendations, the limitations on WHD’s H-1B enforcement authority are statutory and thus any modifications lie solely within Congress’ authority.

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

cc: Susan Boone
Deputy Administrator

Keith Sonderling
Deputy Administrator

Michael Kravitz
Associate Administrator, Office of Performance and Communications

Karen Livingston
Director, Division of Strategic Planning and Performance

Barbara Brown
WHD Audit Program Manager

¹ Specifically, a debarment period of at least one year is specified for the following non-willful violations: a violation pertaining to strike/lockout or displacement of U.S. workers; a substantial violation pertaining to notification, labor condition application specificity, or recruitment of U.S. workers; a misrepresentation of material fact on the labor condition application; an early-termination penalty paid by the employee; payment by the employee of the additional filing fee; and a violation of the requirements in 20 CFR 655 subparts H and I or the provisions regarding public access in certain cases.


U.S. Department of Labor

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



September 18, 2020

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: JOHN PALLASCH 
Assistant Secretary for Employment and Training

SUBJECT: Response to the Office of Inspector General Draft Report, *DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators are Held Accountable*
(Draft Report No. 06-20-001-03-321)

The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) appreciates the opportunity to respond to the Office of Inspector General's (OIG) draft report titled "*DOL Needs to Improve Debarment Processes to Ensure Foreign Labor Program Violators are Held Accountable.*"

ETA thanks the OIG for their ongoing efforts to improve the integrity of the foreign labor certification programs administered by the Department and their collaboration with ETA to protect the employment of U.S. and foreign workers by holding employers accountable for program fraud and abuse violations.

The OIG's draft report contains three recommendations, with Recommendation 3 directed to ETA. The Wage and Hour Division (WHD) will respond separately, per your request, to Recommendations 1 and 2. ETA's response to Recommendation 3 is set forth below.

Recommendation 3: Use data analytics and other risk factors to establish a risk-based approach to determine the selection of H-2A and H-2B applications for audit.

Response: ETA agrees with this recommendation. Currently, ETA primarily uses a random selection process to audit certified H-2A and H-2B applications. The agency also conducts a limited number of targeted audits by selecting applications based on information obtained from a variety of sources such as media articles and interagency referrals. To establish a risk-based audit selection methodology, ETA believes it is critically important to work with the OIG's Office of Investigations – Labor Racketeering and Fraud (OI-LRF) and WHD given that both agencies have extensive enforcement and investigative knowledge and experience. ETA will solicit input from both agencies on viable risk factors. Additionally, feedback and information from ETA's Office of Foreign Labor Certification (OFLC) will be evaluated to identify appropriate risk factors based on adjudication experience and available H-2A and H-2B application processing data. With the input from OI-LRF, WHD, and OFLC, the agency will

establish a new risk-based selection methodology, identifying a viable pool of H-2A and H-2B certified applications for audit. Upon completion of the selected audits, ETA will conduct an assessment and convene a meeting with OI-LRF and WHD to discuss the results and solicit feedback on strategies to continuously improve the risk-based selection methodology.

Below is a summary of ETA's action plan to develop and implement a risk-based audit selection methodology within its available resources.

Action Plan	Tentative Completion Month/Year
Conduct an assessment of viable risk factors based on input from OI-LRF, WHD, and OFLC adjudication staff	November 2020
Develop risk-based selection methodology for conducting H-2A and H-2B audits	December 2020
Identify a pool of H-2A and H-2B certifications and initiate the audit examination process	February 2021
Complete the audit examination process	July 2021
Convene meeting with OI-LRF and WHD staff to discuss audit results and solicit feedback	August 2021

Thank you for the opportunity to respond to this report and for the OIG's dedication to assisting the Department in protecting the integrity of the foreign labor certification programs it administers.

If you have any questions, please contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, at 202-513-7350.

APPENDIX C: ACKNOWLEDGEMENTS

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