

# U.S. Department of Labor

Office of Inspector General—Office of Audit

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



## **OVERVIEW OF VULNERABILITIES AND CHALLENGES IN FOREIGN LABOR CERTIFICATION PROGRAMS**

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**TABLE OF CONTENTS**

INSPECTOR GENERAL’S REPORT ..... 1

RESULTS ..... 3

    Permanent Labor Certification Program ..... 4

    Temporary H-1B Program for Employment of Foreign Workers in  
    Speciality Occupations ..... 9

    Temporary H-2A Program for Employment of Agricultural Foreign  
    Workers ..... 14

    Temporary H-2B Program for Employment of Non-Agricultural  
    Foreign Workers ..... 20

EXHIBIT 1: SUMMARY OF MAJOR FOREIGN LABOR PROGRAM  
VULNERABILITIES ..... 27

EXHIBIT 2: VULNERABILITIES BY EACH FOREIGN LABOR PROGRAM ..... 28

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA ..... 32

APPENDIX B: SUMMARY OF H-2A PROPOSED RULEMAKING ..... 33

APPENDIX C: ACKNOWLEDGEMENTS ..... 34



## **INSPECTOR GENERAL'S REPORT**

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This report presents our aggregation of known vulnerabilities in four foreign labor certification programs—permanent (PERM), H-1B, H-2A, and H-2B—managed in part by the Department of Labor. The vulnerabilities identified are based on prior OIG audit and investigative work and our review of foreign labor regulations.

In 2003, the OIG issued a “white paper” similar to this report identifying vulnerabilities in these four programs.<sup>1</sup> Since the OIG issued the white paper, subsequent OIG and GAO audits and investigations have confirmed many vulnerabilities still exist. At the same time, new rules since 2003 have revamped the PERM, H-2A, and H-2B programs and addressed some of the vulnerabilities cited in these audits and investigations. However, these new rules also created challenges regarding DOL’s responsibilities.

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<sup>1</sup> Overview and Assessment of Vulnerabilities in the Department of Labor's Alien Labor Certification Programs, Report No. 06-03-007-03-321, September 30, 2003. Available at <https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=06-03-007-03-321&y=2003>

## **BACKGROUND AND REVIEW PROCESS**

The PERM program allows an employer to hire foreign nationals to work in the U.S. on a permanent basis, while the H-1B, H-2A, and H-2B programs are for temporary employment in the U.S. The H-1B program allows employers to hire foreign workers on a temporary basis in specialty occupations or as fashion models. The H-2A program allows employers to hire foreign workers for temporary agricultural jobs, in contrast to the H-2B program which is for temporary non-agricultural jobs.

DOL has two agencies that are responsible for the foreign labor programs, Employment and Training Administration (ETA) and Wage and Hour Division (WHD). ETA ensures the admission of foreign workers into the U.S. on a PERM, H-2A, or H-2B visa will not adversely affect job opportunities, wages, and working conditions of U.S. workers. For an H-1B application to be certified, ETA must ensure the application is complete and free from obvious inaccuracies. DOL's WHD investigates and determines whether employers have misrepresented or failed to comply with the H-1B, H-2A, and H-2B program requirements as well as with employment laws, principally the Fair Labor Standards Act.

We reviewed four of the six foreign labor programs—PERM, H-1B, H-2A, and H-2B—to summarize the challenges that still prevail in those programs. We did not review the D-1 Crewmembers Certification program as it has received only 24 applications from fiscal year (FY) 2012 to the present<sup>2</sup>. We also did not review the CW-1 Transitional Worker program in the Commonwealth of the Northern Mariana Islands as it is a new program to DOL that went into effect on April 4, 2019.

For each of the four programs, we reviewed regulations, current program processes on DOL's Internet, application forms, the Federal Register for proposed changes in rules, prior audit reports, news articles, and the OIG's Office of Investigations (OI) case summaries. We interviewed personnel from ETA, WHD, Office of Workforce Investment, Texas Workforce Commission, and OI. We also analyzed ETA's public disclosure data for H-1B for FY 2019.

This report presents an overview of each of the four foreign labor programs according to the three phases of these programs: the pre-filing, application filing, and post-adjudication phases shown in Table 1.

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<sup>2</sup> The total number of applications received from FY 2012 to the present is according to information found at <https://www.foreignlaborcert.doleta.gov/d-1.cfm>

**Table 1: Features of Foreign Labor Programs**

<b>Features by Phase</b>	<b>PERM</b>	<b>H-1B</b>	<b>H-2A</b>	<b>H-2B</b>
<b>Pre-Filing Phase</b>				
Employers identify the prevailing wage rate	X	X	X	X
Employers conduct pre-filing recruitment of U.S. workers	X		X	
<b>Application Filing Phase</b>				
Employers conduct recruitment of U.S. workers			X	X
Employers submit initial recruitment report to ETA			X	X
ETA may conduct quality control review of applications	X			
<b>Post-Adjudication Phase</b>				
ETA may select applications for audit			X	X
ETA/WHD may debar employers	X		X	X
WHD may conduct investigations		X	X	X

Source: The OIG’s Office of Audit generalized information from 20 CFR, Parts 655 and 656 and 29 CFR Part 501 and 503

As summarized in Table 1, we found similarities and differences across features for the PERM, H-1B, H-2A, and H-2B foreign labor programs in each of the three phases.

## RESULTS

The foreign labor certification programs face a number of challenges and vulnerabilities. DOL continues to have limited authority over the H-1B program as it can only deny incomplete and obviously inaccurate applications and conduct complaint-based investigations, challenges in protecting the welfare of the nation’s workforce. The PERM program relentlessly has employers not complying with the qualifying criteria. Therefore, the PERM and H-1B programs remain highly susceptible to fraud.

Since our 2003 white paper, DOL has implemented new rules in the PERM, H-2A and H-2B programs, which have revamped the programs. For example, these new rules implemented employer attestation programs, which allow employers to agree to the conditions of employment without providing supporting documentation to validate their agreements. However, DOL has identified

instances where the employer is not complying with the conditions of employment. As a result, these programs are highly susceptible to fraud.

This report presents continuing vulnerabilities that were noted in our 2003 report, as well as vulnerabilities identified since, according to the three phases of these programs: the pre-filing, application filing, and post-adjudication phases. The vulnerabilities for the four programs are highlighted in bold italics. For a tabulated summary of foreign labor program vulnerabilities, see Exhibit 1; and for a complete list of vulnerabilities by each program (i.e., the bold italicized text within the report), see Exhibit 2.

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## **PERMANENT LABOR CERTIFICATION PROGRAM**

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The permanent labor certification program (PERM) allows an employer to hire a foreign worker to work permanently in the U.S. The PERM program is based on the premise that employers will hire foreign workers only when (1) there are insufficient U.S. workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment; and (2) employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. In FY 2019, ETA certified 93,865 workers of which 58 percent were for specialized occupations in the IT and mathematics fields.

### **PRE-FILING**

Before an employer can file a PERM application with ETA, the employer must request and obtain a prevailing wage rate from ETA using the prevailing wage determination form. The prevailing wage rate is the average wage paid to similarly employed workers in a specific occupation in the geographic area of intended employment. Once obtained, the employer can conduct pre-filing recruitment of U.S. workers at least 30 days, but no more than 6 months before filing the application.

***Regulations are outdated, as they require employers to advertise in the local Sunday paper twice as the primary recruiting announcement for the job opportunity.*** The employer must place 1) a job posting for 30 days with the State Workforce Agency (SWA) and 2) an advertisement on two different Sundays in a newspaper serving the area of intended employment. According to ETA, available data indicates newspapers are becoming a less effective means of notifying potential applicants in the U.S. about job opportunities and indicates that U.S. workers are now much more likely to turn to the internet and not newspapers to search for work. U.S. workers are likely to be

unaware of these employment opportunities due to the obsolete advertising methods required.

Advertisements must include the name of the employer, where to send resumes, a description of the job opportunity, the area of employment, and the prevailing wage rate or offered wage rate, whichever is higher. Employers cannot advertise a wage rate lower than the prevailing wage rate, any job requirements or duties that exceed what is listed on their application for ETA, or wages or terms and conditions of employment that are less favorable than those offered to the foreign worker.

Once pre-filing recruitment is completed, the employer must prepare a recruitment report describing the recruitment steps taken and the results achieved, such as the number of hires and, if applicable, the number of U.S. applicants rejected (categorized by lawful job-related reasons for such rejections).

## **APPLICATION FILING**

The employer must complete and submit a PERM application to ETA. A completed application will describe in detail the job duties, education, experience, and other special skills required to perform the work and outline the foreign worker's qualifications. Employers are not required to file supporting documentation, such as the recruitment report, with the application.

In addition, the employer must attest to the conditions of employment on the application.<sup>3</sup> For example, the employer attests that the position was open to any U.S. worker; U.S. workers who applied were rejected for lawful, job-related reasons; the pay was at least the prevailing wage rate; and the job opportunity's terms and condition were not contrary to federal, state, or local law.

In addition to the attestation, the following qualifying criteria apply:

- The employer must comply with the PERM process and adhere to the PERM regulations.
- The job must be a bona fide, full-time permanent opening available to U.S. workers.
- Job requirements must adhere to what is customarily required for the occupation in the U.S. and not be specific to the foreign worker's qualifications.

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<sup>3</sup> The complete list of employer's PERM attestations is available at <https://www.foreignlaborcert.doleta.gov/pdf/9089form.pdf>

- The employer must pay at least the prevailing wage for the occupation in the area of intended employment.

Once ETA receives an application, it is screened and then certified, denied, or selected for audit randomly or in accordance with selection criteria. ETA will certify an application only in the following cases:

- There are insufficient U.S. workers who are able, willing, qualified, and available to accept the job opportunity in the area of intended employment; and
- The employment of foreign workers will not adversely affect wages and working conditions of similarly employed U.S. workers.

***ETA reviews a majority of PERM applications without any supporting documentation prior to making its determination on applications.*** In 2005, the PERM program was changed to an attestation program where employers are not required to submit any documentation with their application. An application<sup>4</sup> does not provide ETA enough information to make an informed decision on whether there were no able, available, qualified, and willing U.S. workers for the job opportunity and the job opportunity would not adversely affect the wages and working conditions of U.S. workers similarly employed. The application does not require the employer to submit the information included in the original advertisement (i.e., the job location, position description, job requirements, wage, and where to send resumes). Additionally, the application does not require the employer to document the number of all applicants who applied for the job opportunity, the interviewed applicants' names, and why the employer did not hire the individuals interviewed. As a result, ETA relies entirely on the employers' attestations about U.S. workers being protected for a majority of the PERM applications.

As part of the application integrity review, ETA also reviewed applications under their audit review. ETA reviewed 16 percent of PERM applications through audits in FY 2019. ETA notified employers if their applications were selected for audit by issuing an audit letter. Within the audit letter, ETA requests the employer to provide supporting documentation including pre-filing recruitment documentation and the recruitment report. PERM audits are essentially requests for information to verify documentation associated with the application, rather than an inquiry into an actual violation of a regulation or process. As a result of supporting

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<sup>4</sup> On July 20, 2020, DOL issued a notice to conduct the information collection request (ICR) titled, ETA Form 9089 Application for Permanent Employment Certification. DOL reorganized the PERM application into a series of appendices to provide greater clarity on program requirements, reduce overall reporting burden, facilitate better quality applications for government review, and promote greater efficiency in the issuance of labor certification decisions under the PERM employment visa program.



documentation needed to verify the information on the PERM application, ETA was able to deny 21 percent of the PERM applications compared to the 3 percent of applications denied through reviews without supporting documentation. However, it took ETA an average of 7 months to process PERM applications through audit. Since the audit review process is time consuming and includes back and forth communication between ETA and the employer, it is not feasible for ETA to audit all PERM applications.

In addition to audits, ETA may require, when appropriate, an employer to go through post-filing supervised recruitment for pending applications. Supervised recruitment consists of ETA approving the advertisement, placement of the advertisements, and reviewing the recruitment report before ETA makes a final determination to certify or deny the application. The employer may be required to undergo supervised recruitment in future filings of PERM applications for up to two years if ETA determines the employer substantially failed to produce required documentation or made a material misrepresentation with respect to the application.

## **POST-ADJUDICATION**

ETA may take steps to revoke a certified application retroactively if it finds after the fact that certification was not justified. This includes ETA revoking a certified PERM application for any grounds that would have resulted in a denial of the PERM application, whether unintentional or willful.

According to 20 C.F.R. Part 656, ETA may also debar the employer, attorney, or agent that participated in any of the following:

- The sale, barter, or purchase of permanent labor applications or certifications;
- The willful provision or willful assistance in the provision of false or inaccurate information in applying for PERM application;
- A pattern or practice of a failure to comply with the terms of the application;
- A pattern or practice of failure to comply in the audit process;
- A pattern or practice of failure to comply in the supervised recruitment process; or
- Conduct resulting in a determination by a court, DHS, or the Department of State of fraud or willful misrepresentation involving a PERM application.

### ***DOL has no post-adjudication review or enforcement (previously reported).***

As stated under the Application Filing Phase, ETA reviews the majority of the applications without supporting documentation for employer attestations. Once

applications are certified, ETA does not review applications post-adjudication to validate the integrity of employers' attestations. Moreover, WHD does not conduct investigations to verify whether the worker is still working for that employer. WHD conducts broad based Fair Labor Standards Act investigations, which a PERM visa holder could be a part of but the investigator would not know. Therefore, DOL does not validate employer attestations once PERM applications are certified.

***ETA did not design measures that would enable the agency to determine if its responsibilities with respect to the PERM program would be effective in protecting U.S. workers.*** ETA has the responsibility to certify to the Department of State and Department of Homeland Security (DHS) the following:

- There are insufficient U.S. workers who are able, willing, qualified, and available for the job opening at the time of application for a visa and admission into the U.S. at the place where the foreign worker is to perform the work; and,
- The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

ETA created two measures that focus on the time it takes to resolve PERM applications not subject to audit reviews versus those subject to audit reviews. According to ETA, it is challenged to provide good customer service to employers by issuing timely decisions while still protecting U.S. workers by doing a thorough review of these applications. However, ETA reallocates staff to the temporary visa programs during peak seasons, which in turn decreases the number of PERM applications subject to audit review. In the past Congress has provided emergency funds to reduce the PERM application backlog; however, those funds offer only a temporary solution.

***PERM processing times cause employers' recruitment of U.S. workers to be invalid and, as a result, do not protect U.S. workers (previously reported).*** The employer is required to execute recruiting efforts for U.S. workers within 6 months of filing an application. Once the employer submits the application to ETA, the average processing time to get an approved application from DOL and DHS is between 15.1 months to 19.9 months depending on ETA's review process. Due to the lengthy, average processing time for applications, there is little assurance by the time a foreign worker is approved for permanent resident status that a U.S. worker was still not available and able to perform the same job.

***As employers are not complying with the qualifying criteria or conditions of employment, the PERM program still remains highly susceptible to fraud (previously reported).*** Because ETA only audits 16 percent of PERM

applications, and DOL has no post-adjudication review or enforcement to validate the integrity of employers' attestations, employers have the ability to not comply with the qualifying criteria or conditions of employment. One of the qualifying criteria and conditions of employment is the job must be a bona fide, full-time permanent opening available to U.S. workers. However, OI has identified employers who created false documentation for nonexistent jobs to help foreign workers obtain permanent resident visas. For example, a Virginia-based attorney prepared and submitted fraudulent applications for permanent employment certification to DOL on behalf of foreign nationals in exchange for a fee: approximately \$7,500 if the foreign national already had a sponsor, and approximately \$65,000 if a fraudulent sponsor needed to be arranged.

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### **TEMPORARY H-1B PROGRAM FOR EMPLOYMENT OF FOREIGN WORKERS IN SPECIALTY OCCUPATIONS**

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The H-1B program allows an employer to hire foreign workers on a temporary basis in specialty occupations or as fashion models of distinguished merit and ability. A specialty occupation requires the theoretical and practical application of a body of specialized knowledge and a bachelor's degree or the equivalent in the specific specialty (e.g., sciences, medicine, health care, education, biotechnology, and business specialties, etc.). In FY 2019, ETA certified 1,004,982 positions of which 33 percent were for software developers.

The Immigration and Nationality Act and CFR 20 Part 655 Subpart H limit the annual number of qualifying foreign workers who may be issued H-1B visas, or otherwise be provided H-1B status, to 65,000, with an additional 20,000 under the H-1B advanced degree exemption.

### **PRE-FILING**

Before an employer can file an application with ETA, the employer has the option to obtain the prevailing wage rate from 1) ETA using a prevailing wage determination form, 2) a survey conducted by an independent authoritative source, or 3) a legitimate source of wage information. The employer must also inform U.S. workers of its intent to hire a foreign worker by providing the completed application for the position to the collective bargaining representative, if applicable, or posting it at the place of employment. This must occur within the 30-day period before the employer submits the H-1B application to ETA.

## APPLICATION FILING

The employer must complete and submit electronically to ETA an H-1B application through the Foreign Labor Application Gateway (FLAG) system<sup>5</sup>, a DOL managed portal to help U.S. employers find qualified workers while ensuring protections for U.S. and foreign workers. A completed application includes information on the temporary job title, the number of workers needed, the place of employment, and the wage rate.

***ETA is unable to assess whether the foreign worker hired to fill the position is the candidate indicated on the application or possesses the required qualifications (previously reported).*** The H-1B application does not require the foreign worker's name or qualifications. The H-1B application only requires ETA's approval of the total number of positions, without any specifics regarding the foreign workers.

In the application<sup>6</sup>, an employer must also attest to four labor condition statements:

- The employer will pay foreign workers at least the prevailing wage rate or the employer's actual wage, whichever is higher, and pay for non-productive time.
- The employer will provide working conditions for foreign workers that will not adversely affect the working conditions of workers similarly employed.
- The employer is not involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area(s) of intended employment at the time of filing the application.
- The employer must provide notice of filing the application no more than 30 days before the filing.

The employer must maintain documentation to meet its burden of proof with respect to the validity of the statements made in the H-1B application and the accuracy of information provided.

There are additional attestations for employers that are either H-1B dependent employers<sup>7</sup> and/or past willful violators of the H-1B program. These attestations include the employer not displacing a U.S. worker 90 days before and after filing

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<sup>5</sup> The FLAG system is available at <https://flag.dol.gov>

<sup>6</sup> The application is available at [https://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9035.pdf](https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035.pdf)

<sup>7</sup> An H-1B dependent employer has 25 or fewer full-time equivalent employees and at least 8 H-1B foreign workers; 26-50 full-time equivalent employees and at least 13 H-1B foreign workers; or, 51 or more full-time equivalent employees of whom 15 percent or more are H-1B foreign workers.

the H-1B application and the employer making a good faith effort to recruit U.S. workers for the job opportunity. However, the employer is exempt from recruiting a U.S. worker or ensuring it does not displace a U.S. worker if it hires an exempt H-1B foreign worker who receives at least \$60,000 annual wages or has attained a master's or higher degree in a specialty related to the intended H-1B employment.

***Limited protections continue to exist for qualified U.S. workers with respect to the H-1B program (previously reported).*** Our 2003 report identified that the H-1B program does not require there be a shortage of U.S. workers in the occupation for which foreign workers are being hired. For 96 percent of the applications filed in FY 2019, employers did not have to recruit U.S. workers and, therefore, U.S. workers may not have been given an opportunity to compete for these positions. Employers only had to make the attestations described above, including that they will pay foreign workers the prevailing wage rate of the locality and the employment will not affect the working conditions of U.S. workers similarly employed.

***As long as H-1B applications are complete and free of obvious errors or inaccuracies, ETA's role continues to be limited to simply rubber-stamping during the application certification process (previously reported).***

Employers are not required to provide supporting documentation for their attestations on complying with program requirements. Once ETA receives the application, it has 7 working days to certify the application is complete and does not contain obvious inaccuracies. If the application is incomplete and/or contains obvious inaccuracies, ETA returns the application to the employer. The employer may submit a corrected application.

Once ETA certifies the application, the employer must continue to the next step in the process and submit a copy of the certified application to DHS's U.S. Citizenship and Immigration Services (USCIS) to complete the petition requesting the H-1B visa.

## **POST-ADJUDICATION**

WHD is responsible for ensuring that workers are receiving the wages promised on the application and are working in the occupation and at the location specified. WHD can only initiate H-1B related investigations based on any of following 4 factors:

- WHD receives a complaint from an aggrieved person or organization;
- WHD receives specific credible information from a reliable source (other than a complainant) that the employer has failed to meet certain

- application 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;
- The Secretary of Labor has found, on a case-by-case basis, that an employer (within the last 5 years) has committed a willful failure to meet a condition specified on the application or willfully misrepresented a material fact on the application. In such cases, a random investigation may be conducted; or
  - 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.

**WHD has initiated H-1B related investigations based upon only 2 of the 4 factors listed above.** WHD has never used the Secretary-certified investigation of an H-1B employer. A Secretary-certified investigation requires the Secretary to personally certify that there is reasonable cause to believe the employer is not in compliance with its obligations. The Secretary has non-delegable power to initiate an investigation. Therefore, the Secretary would have to decide, based on limited information, to initiate an investigation. However, WHD is in the process of developing procedures to initiate Secretary-certified investigations. On July 31, 2020, WHD entered into a Memorandum of Agreement with USCIS where USCIS will refer suspected employer violations within the H-1B program to WHD. According to WHD, this enhanced collaboration and source of information will be used in support of Secretary-certified investigations.

In addition, WHD has not conducted random investigations of past willful violators because according to WHD, most willful violators are debarred from the program, which significantly limits the pool of potential willful violator employers for whom random investigations may be initiated.

**WHD is constrained by time limits for complaint-driven investigations.** A statutory<sup>8</sup> time limit requires complaints to be filed within 12 months of the alleged violation. Even if it was a major violation, WHD cannot initiate an investigation if there is a delay in reporting and the alleged violation comes to WHD's attention after the 12-month window.

**DOL continues to have no control over the foreign worker abandoning employment and remaining in the U.S. (previously reported).** ETA's role is to certify applications rather than reject applications that do not meet program requirements. WHD's role is to investigate complaints and determine employers' misrepresentation of or failure to comply with program requirements. According to 20 C.F.R. Part 655 Subpart H, DHS regulations require the employer to notify

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<sup>8</sup> 20 CFR Part 655 Subpart I.

DHS that the employment relationship has been terminated so the petition can be cancelled.

***Employers are still not complying with program requirements, continuing to leave the program susceptible to fraud (previously reported).*** Because ETA does not have the authority to validate the integrity of employers' attestations and WHD does not utilize the Secretary's authority to initiate investigations, employers have the ability to not comply with program requirements. In one of the four attestations, employers are to pay the foreign worker at least the prevailing wage or the employer's actual wage, whichever is higher. However, WHD investigators found instances where companies failed to pay H-1B foreign employees' agreed-upon wages as indicated in the ETA-certified application. For example, WHD investigators found an employer failed to provide work for an employee as required when business slowed and did not pay the hourly rate indicated on the H-1B application for this idle time. In another example, WHD investigators found an employer illegally charged one employee for visa petition fees, which the employer is legally required to pay. The employer also "benched" that worker, a term for employers' failing to pay H-1B employees for nonproductive time caused by conditions related to employment, such as lack of assigned work. The WHD investigation also found that the employer paid another employee less than the hourly rate guaranteed in the Labor Conditions Application submitted for the H-1B program.

In addition, OI has identified instances where companies have created false documentation for nonexistent jobs. For example, from 2006 to 2012, an employer submitted documents to DOL and USCIS that misrepresented a need to hire H-1B workers. Once the foreign nationals were granted H-1B visas, the employer in question reassigned them to work with other companies throughout the country; otherwise, the foreign workers had to find their own employment. Some of the foreign nationals were also "benched" while waiting for another job assignment.

OI also identified companies that illegally generated profits by requiring foreign workers to pay fees and reoccurring payments to secure H-1B visas. For example, one staffing company perpetuated fraud by using the H-1B program to recruit nurses from the Philippines for nonexistent positions in the U.S. The company charged the nurses between \$8,000 and \$10,000 for the H-1B visas and required that they sign a contract to pay off their "debts." When the nurses arrived, there was no employment opportunity for them, and they remained unemployed, without any compensation, for several months. Once the nurses were able to start a job, the company would then deduct a portion of their salary to cover debts supposedly owed. In addition, the company fraudulently backdated paychecks to make it appear as though the nurses from the

Philippines were employed in the U.S. from the original start dates listed on the H-1B applications.

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## **TEMPORARY H-2A PROGRAM FOR EMPLOYMENT OF AGRICULTURAL FOREIGN WORKERS**

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The temporary H-2A program allows agricultural employers who anticipate a shortage of U.S. workers to hire foreign workers for agricultural labor or services of a temporary or seasonal nature in the U.S. This would mean work during a certain time of year by an event or pattern, such as a short annual growing cycle, or for up to one year, when an employer can show that the need for the foreign worker(s) is truly temporary. In FY 2019, ETA certified 257,667 positions for agricultural labor or services.

### **PRE-FILING**

Before filing an H-2A application, the employer must identify the highest wage among the Adverse Effect Wage Rate<sup>9</sup>, the prevailing hourly wage rate (or piece rate), the agreed-upon collective bargaining wage, and the Federal or State minimum wage. The Adverse Effect Wage Rate is the average hourly wage rate for field and livestock workers for the region, which the U.S. Department of Agriculture publishes each year. To determine the prevailing hourly wage rate, the employer must periodically visit the Department of Labor's Agricultural Online Wage Library.<sup>10</sup> Each employer who is subject to a collective bargaining wage must attach a copy of the wage to its job order.

Once the employer identifies the highest wage, the employer must submit a job order to the SWA<sup>11</sup> serving the area of intended employment no more than 75 days and no fewer than 60 days before the date of need. The job order includes

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<sup>9</sup> On November 5, 2020, DOL issued a final rule that updates the methodology for determining the annual Adverse Effect Wage Rates in the H-2A visa program, which will be effective December 21, 2020.

<sup>10</sup> DOL's Agricultural On-line Wage Library is available at <https://www.foreignlaborcert.doleta.gov/aowl.cfm>

<sup>11</sup> On July 26, 2019, DOL issued a proposed rulemaking on the Temporary Agricultural Employment of H-2A Nonimmigrants in the United States to streamline the H-2A process. One of the proposed changes is that the employer will use the FLAG system to submit the job order to ETA, and ETA will then provide it to the appropriate SWAs. For a summary of the proposed rulemaking, see Appendix B. The full text of the proposed rulemaking is available at <https://www.govinfo.gov/content/pkg/FR-2019-07-26/pdf/2019-15307.pdf>



job offer information, minimum job qualifications and requirements, the place of employment, housing information, provision of meals, transportation, referral and hiring instructions, additional material terms and conditions of the job offer, and conditions of employment. The SWA reviews the job order, works with the employer on any needed corrections, and initiates recruitment of U.S. workers. The SWA will also conduct pre-housing inspections to ensure the employer's housing meets the standards and guidelines set forth by the foreign labor programs, OSHA, as well as the state and locality. Upon completing its inspections, the SWA notifies ETA of its inspection results through the FLAG system.

## **APPLICATION FILING**

No less than 45 days before the employer's date of need, the employer must use the FLAG system to submit to ETA a completed H-2A application with a copy of the original job order that was submitted to the SWA.

A completed H-2A application describes the job opportunity and an attached statement of temporary need. In 2008, DOL updated the H-2A program to an employer attestation program. The employer must attest to 17 conditions of employment in Appendix A<sup>12</sup> of the application. Following are examples of attestations from the application that are intended to protect U.S. workers:

- The job opportunity is open to any qualified U.S. worker, and the employer has conducted and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity.
- The job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers and complies with the requirements of 20 CFR Part 655 Subpart B.

ETA reviews the H-2A application and job order for compliance with program requirements within 7 business days of receipt. ETA will notify the employer in writing whether the application and/or the job order needs to be corrected; otherwise, the recruitment may proceed. When ETA notifies the employer to conduct recruitment, the agency will also notify the SWA to place the job order in the interstate clearance system. In addition, ETA then promptly advertises the H-2A job opportunity by posting it on SeasonalJobs.dol.gov.

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<sup>12</sup> The complete list of employer's H-2A attestations is available at [https://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142A\\_Appendix\\_A\\_7369.pdf](https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_Appendix_A_7369.pdf)

In October 2019, ETA issued a final rule<sup>13</sup> that modernized H-2A recruitment by rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment. According to the final rule, ETA will advertise the employer's job opportunity on SeasonalJobs.dol.gov, an improved and expanded version of ETA's electronic job registry. SeasonalJobs.dol.gov will facilitate broader dissemination of available job opportunities by making a standard set of job data available to third-party job search websites. However, ***ETA has not performed a study or evaluation to gauge the effectiveness of the SeasonalJobs.dol.gov website to reach a greater population of U.S. workers.***

Once ETA notifies the employer to proceed with recruitment, the employer must first contact former U.S. workers as possible candidates and, if directed by ETA, conduct any additional recruitment in the U.S.

The employer must complete all employer-conducted recruitment before submitting its initial recruitment report. The initial recruitment report must contain the following information:

- Name of each recruitment source;
- Name and contact information of each U.S. worker who applied or was referred for the job and hiring status of each worker;
- Confirmation of former U.S. employees contacted and by what means; and,
- If applicable, an explanation of the lawful, job-related reasons for not hiring U.S. workers who applied.

Once the employer submits the initial recruitment report on the date specified by ETA, ETA makes a determination to either certify or deny the application no later than 30 calendar days before the date of need. ETA determines whether:

- There are sufficient U.S. workers able, willing, qualified, and available to perform the temporary and seasonal agricultural employment for which H-2A workers are being considered; and
- The employment of H-2A workers will adversely affect the wages and working conditions of workers similarly employed in the U.S.

In order to certify the application, ETA ensures the employer established the temporary need; attested to program requirements; complied with the job order, housing, and wage requirements; and met all recruitment obligations. ETA will

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<sup>13</sup> The full text for the final rule on Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States, issued September 20, 2019, is available at <https://www.govinfo.gov/content/pkg/FR-2019-09-20/pdf/2019-19674.pdf>

review documentation regarding housing and worker compensation provided by employers to ensure employers comply with the associated attestations. In addition, ETA will review the initial recruitment report and ensure the employer did not reject any available U.S. worker for unlawful reasons. Even though an employer submits the initial recruitment report and some supporting documentation for ETA's review, ***ETA makes its determination on the submitted application without all supporting documentation regarding the employer's 17 attestations on complying with program requirements.***

The employer must continue to maintain the recruitment report throughout the recruitment period including the 50 percent of the employment period on the job order and application. The employer is obligated to continue to update the recruitment report and prepare a final recruitment report. However, the employer is not required to submit the final recruitment report to ETA. The employer must retain it in the event of a post-certification audit or WHD investigation.

***ETA did not design measures that would enable it to determine if its responsibility with respect to the H-2A program was effective (previously reported).*** ETA has the responsibility to certify the following:

- There are insufficient U.S. workers who are able, willing, qualified, and available to perform the temporary and seasonal agricultural employment for which H-2A workers are being considered; and
- The employment of H-2A workers will not adversely affect the wages and working conditions of workers similarly employed in the U.S.

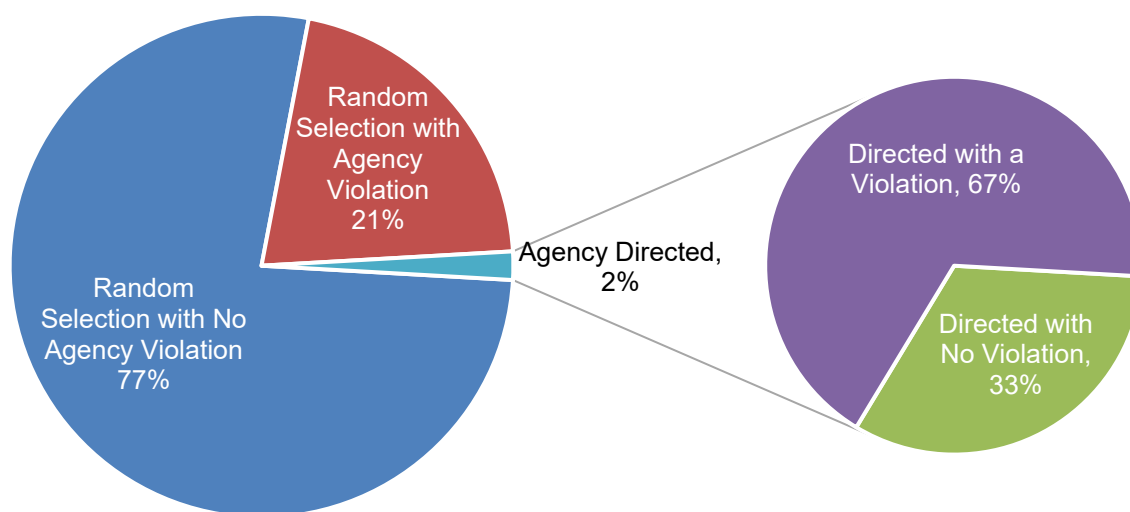
ETA has only one measure for how quickly the agency completes its portion of the process. According to ETA, they have a difficult task to provide good customer service to employers while still trying to protect U.S. workers. In order to process these applications in a timely way, ETA reallocates staff from the PERM program to the temporary programs and reduces the number of applications selected for audit. As stated previously in the PERM section, Congress has provided temporary funding to reduce the backlog of applications. As no permanent fix has been identified, ETA will continue with its existing approach of prioritizing timely application processing in order to provide good customer service to employers who are submitting applications for foreign labor programs.

## **POST-ADJUDICATION**

For the H-2A program, ETA has the authority to conduct audits of adjudicated applications, revoke approved applications, and debar an employer, agent, or attorney.

In 2008, DOL implemented audits of adjudicated applications to ensure quality control, review compliance, and identify abusers of the H-2A program. ETA may conduct audits of certified adjudicated applications. ETA can initiate an audit in the latter part of employment. ETA has the sole discretion to select applications, randomly or agency directed, for such audits. As shown in Figure 1, ETA utilized the random selection option the majority of the time.

FIGURE 1: H-2A APPLICATIONS SELECTED FOR ETA AUDITS (October 2014 to February 2019)



Source: Unaudited ETA data.

According to ETA, agency directed audits are periodically performed based on information received from multiple sources. ETA identified a higher percentage of H-2A violations in applications selected directly for audit compared to those selected randomly. However, ***ETA does not maximize audit resources by identifying high-risk employers or applications for post-adjudication audits.***

An employer’s failure to comply with the audit process may result in revocation of the certification or program debarment. ETA may take steps to revoke a certified application, if it finds any of the following:

- Fraud or misrepresentation in the application process;
- Substantial violation of a material term or condition of the approved H-2A application;

- Failure to cooperate with a DOL investigation, inspection, audit or law enforcement function; or
- Failure to comply with one or more sanctions or remedies imposed by WHD, DOL, or a court of law.

ETA may also debar the employer or successor in interest if the agency finds that the employer substantially violated a material term or condition of its application with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

WHD is responsible for conducting investigations to determine the employer's compliance with obligations under a work contract. WHD will initiate H-2A investigations based upon a complaint and agency initiated.

***WHD has no subpoena authority to obtain documents in a timely manner, which could impede WHD from debarring the employer due to the 2-year statute of limitations on debarment.*** According to WHD, most employers will provide information requested; however, the issue is more about the timing to obtain the information since there is a 2-year statute of limitation on pursuing debarment as a punitive action. WHD might have to wait longer for the documentation.

***Employers are not complying with the conditions of employment, leaving the H-2A program susceptible to fraud.*** Because ETA does not maximize its audit resources to validate the integrity of employers' attestations, employers have the ability not to comply with the conditions of employment. WHD identified various employers that did not uphold one or more of the attestations that they had agreed to on the H-2A application. For example, according to WHD's investigation, one employer rejected a qualified U.S. worker who applied for a job, failed to pay H-2A workers' transportation expenses for travel from their home countries, and retained H-2A workers' passports and visas.

In another case, WHD investigator found an employer who violated several conditions of the H-2A program, such as the following:

- Preferential treatment towards H-2A workers by paying U.S. workers lower wages than those paid to H-2A workers;
- Failure to reimburse H-2A workers for the round-trip cost of their transportation between their home towns and the job site;
- Failure to ensure workers were offered at least three-fourths of the work hours as indicated in their contracts;
- Failure to provide written work contracts to local U.S. workers engaged in similar work as H-2A workers; and

- Unlawful lay off of U.S. workers.

Additionally, WHD has identified instances in which employers placed foreign workers in unsanitary living conditions. For example, WHD investigators found farm workers living in dilapidated and trash-strewn housing, with no hot water for showers or working fire extinguishers. They also found workers sleeping on mattresses on the floor, with sleeping quarters for one family separated from other workers only by a garbage bag hung from the ceiling. Workers also reported seeing rodents throughout the housing facility.

OI further identified companies that inflated the number of foreign workers needed and submitted false documentation to obtain H-2A visas. For example, one particular company submitted fraudulent H-2A applications to DOL and USCIS. The company inflated the total number of foreign workers needed by one client and sent the surplus of H-2A workers to other clients in exchange for illegal under-the-table payments.

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## **TEMPORARY H-2B PROGRAM FOR EMPLOYMENT OF NON-AGRICULTURAL FOREIGN WORKERS**

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The temporary H-2B non-agricultural program permits employers to hire foreign workers on a temporary basis to perform non-agricultural labor or services in the U.S. due to a shortage of U.S. workers for the jobs in question. The employment by program definition must be short-term, 9 months or less, such as a one-time occurrence, or seasonal, peak load, or intermittent need. The employment must also be full-time (35 hours or more a week). In FY 2019, ETA certified 150,465 positions of which 44 percent were for occupations in landscaping and grounds keeping.

The Immigration and Nationality Act limits the annual number of foreign workers who may be issued an H-2B visa to 66,000, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 - March 31) and 33,000 for those who begin employment in the second half of the fiscal year (April 1 - September 30).

### **PRE-FILING**

Before an employer can file an H-2B application, employers must file an H-2B registration to ETA 120 to 150 days before the date of need. For the H-2B registration, employers indicate the temporary need, which includes the number

of positions in the first year, the time period of employment, and the nature of service or labor. With the implementation of the new FLAG system, the online registration process has not been operational. However, ETA has been reviewing the temporary need once employers file the application. In addition, the employer must request and obtain a prevailing wage rate from ETA using the prevailing wage determination form at least 60 days before the date of need.

## **APPLICATION FILING**

Upon receiving the prevailing wage rate, the employer must file a job order to the SWA serving the area of intended employment. The job order must offer U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Each job qualification and requirement must be bona fide, disclosed in the job order, and consistent with the normal and accepted qualifications and requirements set forth by non-H-2B employers in the same occupation and area of intended employment.

The employer must submit a completed job order to the SWA at the same time the employer submits the H-2B application to ETA. The employer uses the FLAG system to submit the H-2B application, a copy of the job order, and copies of all contracts and agreements with any agent and/or recruiter to ETA. A completed H-2B application will describe the temporary need, job opportunity, minimum requirements, place of employment, wage, other terms and conditions of the job offer, and information on how applicants may apply.

In 2008, DOL updated the H-2B program to an employer attestation program. In 2015, DOL and DHS updated the H-2B regulations. Under these regulations, the employer attests to their knowledge of and compliance with 26 conditions of employment applicable to H-2B workers and/or U.S. workers hired during the recruitment period for positions covered by this application. Following are examples of attestations from the application that are intended to protect U.S. workers<sup>14</sup>:

- The job opportunity is open to any qualified U.S. worker until 21 days before the date of need.
- U.S. workers applying for the job are hired, unless the employer has a lawful, job-related reason(s) for the rejection; the employer will retain records of all rejections.

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<sup>14</sup> The complete list of employer's H-2B attestations is available at [https://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142B\\_Appendix\\_B.pdf](https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B_Appendix_B.pdf)

- The employer will not offer terms, wages, and working conditions to U.S workers less favorable than those offered or will be offered to H-2B workers.
- The offered wage is equal to or exceeding the highest of the applicable Federal, State, or local minimum wage, or the prevailing wage rate for the occupation.
- The employer conducts all required recruitment activities.
- The employer cooperates and continues to do so with the SWA by accepting referrals and hiring all qualified and eligible U.S. workers who apply for the job opportunity until 21 days before the date of need.

ETA reviews the H-2B application and job order for compliance with program requirements within 7 business days of receipt. ETA will notify the employer in writing whether the application and/or job order needs to be corrected or whether recruitment may begin. When ETA notifies the employer to conduct recruitment, the agency will also notify the SWA to place the job order in the intrastate and interstate clearance systems. ETA will then promptly advertise the H-2B jobs opportunities by posting them on [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov).

In December 2019, ETA issued a final rule that modernized H-2B recruitment by eliminating advertising in newspapers. According to the final rule, [SeasonalJobs.dol.gov](http://SeasonalJobs.dol.gov) will facilitate broader dissemination of available job opportunities by making a standard set of job data available to third-party job search websites available to U.S. workers. ***However, ETA has not performed a study or evaluation to gauge the effectiveness of the SeasonalJobs.dol.gov website to reach a greater population of U.S. workers.***

Within 14 days of receiving ETA's written notification, the employer must conduct recruitment by contacting its former U.S. workers, contacting the bargaining representative (if any), or announcing the job opportunity to the employer's current employees, and conducting any additional recruitment if directed by ETA.

Before the employer submits the initial recruitment report, the employer must complete all employer-conducted recruitment. According to 20 CFR Part 655 Subpart A, the initial recruitment report must contain the following information:

- Name of each recruitment activity or source.
- A statement confirming the contact of the bargaining representative or the posted job opportunity to all of its employees in the job classification and area in which the work will be performed by the H-2B workers.
- The means by which the employer posted the job notice for its current employees.
- If applicable, a statement that the employer:



- Contacted its former U.S. workers and by what means;
- Contacted the community-based organization designated by ETA; and
- Conducted any additional recruitment directed by ETA.
- Name and contact information of each U.S. worker who applied or was referred for the job and the status of each worker's application.
- Clear indication of whether each worker was offered the job and, if so, whether the worker accepted or declined the offer.
- The lawful, job-related reason(s) for not hiring U.S. workers who applied for the job and were under consideration.

Once the employer submits the initial recruitment report, ETA will make a determination to either certify or deny the application. ETA will certify the application in the following cases:

- There are insufficient U.S. workers who are qualified and available to perform the temporary services or labor for which foreign workers are being considered, and
- The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

Even though employers submit the initial recruitment report for ETA's review, ***ETA makes its determination on applications without supporting documentation for employers' attestations on complying with program requirements.*** Employers must continue to accept referrals and applications of all U.S. applicants interested in the position until 21 days before the date of need. The employer is obligated to continue to update the recruitment report and prepare a final recruitment report, but is not required to submit final recruitment report to ETA. The employer must retain the final recruitment report in case of a post-certification audit or WHD investigation.

***ETA did not process H-2B applications within 30 days of the employer's date of need (previously reported).*** In a prior OIG report<sup>15</sup>, ETA did not timely process H-2B applications, which created a backlog. In FY 2016, ETA did not process 73 percent (5,209 out of 7,149) of applications within 30 days of the employer's date of need. According to ETA, there is tremendous amount of pressure to timely process applications. As a result, ETA reallocates staff from the PERM program to the temporary programs during peak seasons to timely process H-2B applications.

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<sup>15</sup> ETA's Lack of Key Controls Over the H-2B Application Process Jeopardized Businesses That Depend on H-2B Workers, Report 06-18-002-03-321, September 28, 2018. Available at <https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=06-18-002-03-321&y=2018>

***ETA did not design a measure that would enable it to determine whether its responsibility in relation to the H-2B program was effective.*** ETA has the responsibility to certify the following to the DHS:

- There are insufficient U.S. workers who are qualified and available to perform the temporary services or labor for which foreign workers are being considered; and
- The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

ETA created a measure that focused on the time it takes to process H-2B applications within 30 days of receipt. According to ETA, the agency is customer-based and strives to make timely decisions on employers' application by reallocating staff from the PERM program to review applications in the temporary programs. ETA also reduces the number of adjudicated applications selected for audit, which translates into less protection for U.S. workers.

## **POST-ADJUDICATION**

For the H-2B program, ETA has the authority to conduct audits of adjudicated applications, require the employer to engage in assisted recruitment for any future application, revoke approved applications, and debar an employer, agent or attorney.

***ETA does not leverage its auditing function in this phase by identifying high-risk employers or applications for post-adjudication audits.*** In 2008, DOL implemented post-adjudication audits to establish accountability and ensure employers' adherence to program requirements. ETA can initiate an audit of certified, denied, or withdrawn applications in the latter part of employment. ETA has the sole discretion to select applications, randomly and agency directed, for such audits. However, from October 2014 through February 2019, without any review process, risk analysis, or information gathered before deciding to audit an employer, ETA opted to randomly select 99 percent of its audits.

An employer's failure to comply with the audit process may result in ETA ordering assisted recruitment for future filings, revocation of certification, or debarment from the H-2B program and any other foreign labor program that ETA administers.

The assisted recruitment process allows ETA to closely monitor an employer's advertisement and recruitment process for U.S. workers. An employer subject to assisted recruitment must comply with the standard recruitment requirements as well as additional instructions from ETA. Moreover, ETA may require the

employer to submit evidence of recruitment efforts and results, such as proof of posting for the job order or proof of contact with all SWA referrals and the employer's former U.S. workers.

ETA may take steps to revoke a certified application, if it finds during its investigation:

- The certified application was not justified due to fraud or willful misrepresentation of a material fact;
- The employer substantially failed to comply with any of the terms or conditions of the certified application;
- The employer failed to cooperate with a DOL investigation or DOL official performing an investigation, inspection, audit, or law enforcement; or
- The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary of Labor regarding the H-2B program.

ETA may also debar the employer, attorney, or agent for any of the following:

- Willfully misrepresenting a material fact in ETA's H-2B application or DHS's H-2B petition;
- Substantially failing to meet any of the terms and conditions in the H-2B application or H-2B petition; or
- Willfully misrepresenting a material fact to the Department of State during the visa application process.

In 2008, DHS delegated enforcement authority in the H-2B program to DOL for the first time, and it was delegated within DOL to WHD. WHD is responsible for investigating and determining an employer's misrepresentation of a material fact or failure to comply with the H-2B program requirements. WHD will initiate H-2B investigations based upon complaints, agency initiation, or random selection.

***WHD does not have the authority to enforce corresponding employment or the three-fourths wage guarantee rule, which are 2 of the 26 conditions of employments to which employers attest.*** Since 2016, Congress has included in each DOL Appropriations Act language that prohibits WHD from using any agency funds to enforce the definition of either corresponding employment or the three-fourths wage guarantee rule. Corresponding employment ensures H-2B and U.S. workers have the same working terms and conditions. The three-fourths wage guarantee rule ensures that an employer offers the H-2B and U.S. workers employment for a total number of work hours equal to at least 75 percent of the workdays. Since current appropriations continue to restrict applying agency

funding towards either case, WHD is still prohibited from enforcing these provisions to its fullest extent.

***Employers are not complying with the conditions of employment.*** WHD has cited employers for not complying with the H-2B program requirements. For example, WHD investigators found an employer who violated H-2B requirements in the following ways:

- Paying workers less than the required wage rate;
- Failing to notify federal agencies of early separation of six H-2B workers;
- Assigning H-2B employees to work in locations outside the certified job location in South Dakota;
- Assigning H-2B workers to perform job duties outside the certified job description;
- Failing to identify accurately the number of workers needed and the period of need;
- Failing to pay workers' inbound and outbound transportation costs from their home countries as required;
- Failing to pay housing and visa costs as required;
- Taking impermissible deductions from H-2B workers' wages; and
- Failing to post the required H-2B poster at the worksite.

***The H-2B program is highly susceptible to fraud.*** OI agents have cited foreign recruiters who charged foreign workers fees for the purchase of H-2B visas and transportation to the U.S. In addition, OI cited companies falsifying documentation for nonexistent jobs with fake companies to be able to obtain foreign worker visas. For example, a recruiting agency submitted false employment-based petitions to DOL and other agencies in order to obtain work visas for foreign workers. An agent within the company unlawfully charged foreign workers \$500 to \$4,000 to purchase fraudulent visas.

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



Elliot P. Lewis  
Assistant Inspector General for Audit

**EXHIBIT 1: SUMMARY OF MAJOR FOREIGN LABOR PROGRAM VULNERABILITIES**

Vulnerabilities	PERM	H-1B	H-2A	H-2B
<b>Pre-Filing Phase</b>				
Regulations are outdated as they require employers to advertise in the local newspaper	X			
<b>Application Filing Phase</b>				
ETA is unable to assess whether foreign workers hired possess required qualifications		X		
There are limited protections for U.S. workers		X		
ETA has not performed a study/evaluation to gauge the effectiveness of the SeasonalJobs.dol.gov website to reach a greater number of U.S. workers			X	X
ETA's role is limited to rubber-stamping applications		X		
ETA reviews applications without supporting documentation prior to making its determination	X	X	X	X
<b>Post-Adjudication Phase</b>				
ETA does not identify high-risk employers or applications for post-adjudication audits			X	X
WHD has initiated investigations based on only two of the four regulated scenarios		X		
WHD is constrained by time limits regarding complaint-driven investigations		X		
DOL has no post-adjudication review and enforcement	X			
WHD does not have the authority to enforce corresponding employment and the three-fourths wage guarantee				X
WHD has a 2-year statute of limitations on debarment			X	
ETA processing times causes employers' recruitment of U.S. workers to be invalid	X			
Employers are not complying with program requirements, leaving the foreign labor certification program susceptible to fraud	X	X	X	X

**EXHIBIT 2: VULNERABILITIES BY EACH FOREIGN LABOR PROGRAM**

**PERM Program Vulnerabilities**

1. Regulations are outdated, as they require employers to advertise in the Sunday paper twice as the primary recruiting announcement for the job opportunity.
2. ETA reviews a majority of PERM applications without any supporting documentation prior to making its determination on applications.
3. DOL has no post-adjudication review and enforcement.
4. ETA did not design measures that would enable the agency to determine if its responsibilities with respect to the PERM program would be effective in protecting U.S. workers.
5. PERM processing times causes employers' recruitment of U.S. workers to be invalid and, as a result, does not protect U.S. workers.
6. As employers are not complying with the qualifying criteria or conditions of employment, the PERM program still remains highly susceptible to fraud.

### **H-1B Program Vulnerabilities**

1. ETA is unable to assess whether a foreign worker hired to fill position is the candidate indicated on the application or possesses the required qualifications.
2. Limited protections continue to exist for qualified U.S. workers with respect to the H-1B program.
3. As long as H-1B applications are complete and free of obvious errors or inaccuracies, ETA's role continues to be limited to simply rubber-stamping during the application certification process.
4. WHD has initiated H-1B related investigations based on only two of the four regulated scenarios.
5. WHD is constrained by time limits for complaint-driven investigations.
6. DOL continues to have no control over foreign workers abandoning employment and remaining in the U.S.
7. Employers are not complying with program requirements, continuing to leave the program susceptible to fraud.

### **H-2A Program Vulnerabilities**

1. ETA has not performed a study or evaluation to gauge the effectiveness of the SeasonalJobs.dol.gov website to reach a greater number of U.S. workers.
2. ETA makes its determination on the submitted applications without supporting documentation regarding the employer's 17 attestations on complying with program requirements.
3. ETA did not design measures that would enable it to determine if its responsibilities with respect to the H-2A program were effective.
4. ETA does not maximize audit resources by identifying high-risk employers or applications for post-adjudication audits.
5. WHD has no subpoena authority to obtain documents timely, which could impede WHD from debarring the employer due to the 2-year statute of limitations on debarment.
6. Employers are not complying with the conditions of employment, leaving the H-2A program susceptible to fraud.



### **H-2B Program Vulnerabilities**

1. ETA has not performed a study or evaluation to gauge the effectiveness of the SeasonalJobs.dol.gov website to reach a greater number of U.S. workers.
2. ETA makes its determination on applications without supporting documentation for employers' attestations on complying with program requirements.
3. ETA did not process H-2B applications within 30 days of the employer's date of need.
4. ETA did not design measures that would enable it to determine whether its responsibility in relation to the H-2B program was effective.
5. ETA does not leverage its auditing function in this phase by identifying high-risk employers or applications for post-adjudication audits.
6. WHD does not have the authority to enforce corresponding employment or the three-fourths wage guarantee rule, which are 2 of the 26 conditions of employments to which employers' attest.
7. Employers are not complying with the conditions of employment.
8. The H-2B program is highly susceptible to fraud.

## **APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA**

### **SCOPE**

The OIG reviewed 4 of the 6 foreign labor programs to determine current and potential future vulnerabilities. We did not review the D-1 Crewmembers Certification program or CW-1 Transitional Worker Program. We did not review the D-1 Crewmembers Certification program as it has received only 24 applications from FY 2012 to the present, according to ETA's website. We also did not review the CW-1 Transitional Worker program in the Commonwealth of the Northern Mariana Islands as it is a new DOL program that went into effect on April 4, 2019.

### **METHODOLOGY**

For each of the 4 programs, we reviewed regulations, current program processes on DOL's Internet, application forms, the Federal Register for proposed changes in rules, prior audit reports, news articles, and the OIG's OI case summaries. We interviewed personnel from ETA, WHD, Office of Workforce Investment, Texas Workforce Commission, and OI. We also analyzed ETA's public disclosure data for H-1B for FY 2019.

### **CRITERIA**

- Code of Federal Regulations, Title 20, Part 653, Services of the Wagner-Peyser Act Employment Service System.
- Code of Federal Regulations, Title 20, Part 655, Temporary Employment of Foreign Workers in the United States.
- Code of Federal Regulations, Title 20, Part 656, Labor Certification Process for Permanent Employment of Aliens in the United States.
- Code of Federal Regulations, Title 29, Part 501, Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 218 of the Immigration and Nationality Act.
- Code of Federal Regulations, Title 29, Part 503, Enforcement of Contractual Obligations for Temporary Nonimmigrant Non-Agricultural Workers Described in the Immigration and Nationality Act.
- United States Code, Title 8, Section 1184, Admissions of Nonimmigrants.

## **APPENDIX B: SUMMARY OF H-2A PROPOSED RULEMAKING**

On July 26, 2019, DOL published in the Federal Register a notice of proposed rulemaking on the Temporary Agricultural Employment of H-2A Nonimmigrants in the United States.<sup>16</sup> It was an amendment to the H-2A regulations to streamline the process by which ETA reviews employers' H-2A applications and to focus on modernizing the H-2A program and eliminating inefficiencies.

DOL proposed the following:

- Employers to file their job orders in the FLAG system where DOL would send the job orders to the appropriate SWA for posting the job opportunity for U.S. workers.
- Modernizing the prevailing wage standards to allow the SWAs to conduct surveys using more practical standards and establish reliable and accurate prevailing wage rates for workers and employers.
- Increasing the inspection time period from every application to 24 months only under certain circumstances, which could result in decreased protections of U.S. and foreign workers. WHD cited instances where employers provide workers with dirty housing even though SWAs are currently inspecting and approving housing for every application.
- Sending electronically the certification of an H-2A application and job order to the employer and DHS.
- Revising the debarment provisions for the H-2A program to improve integrity and promote compliance with program requirements. This includes clarifying that if an employer, agent, or attorney is debarred from participating in the H-2A program, that employer, agent, attorney, or their successors may not file future H-2A applications during the period of debarment.

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<sup>16</sup> Available at <https://www.govinfo.gov/content/pkg/FR-2019-07-26/pdf/2019-15307.pdf>

## **APPENDIX C: ACKNOWLEDGEMENTS**

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