**DOL Stakeholders Meeting July 15, 2008**

The following information is excerpted from a DOL meeting. The comments are from Rajiv S. Khanna (RSK – me). http://www.immigraton.com

As discussed at recent stakeholders meetings and AILA conferences over the last eight months or so, with the BECs closing, DOL will now be redeploying its resources to focus on parts of the PERM regulation that were not the focus earlier, including audits and supervised recruitment. Limited by the available resources, DOL did not want to create a new processing backlog under the PERM system while it was still working on eliminating the pre-PERM backlog in the BECs. DOL looks forward to implementation of the new PERM/LCA portal which is still scheduled for rollout on January 1, 2009, at which time the new Forms ETA 9089 and 9035 will be launched. In the October/November time frame, DOL will provide public training sessions in a few sites across the U.S. regarding the new portal and the new forms. These sessions will be announced in advance and will likely be at conference centers or other large facilities.

DOL granted a new contract last week to provide contractor support for the Chicago and Atlanta NPCs. The prime contractor is TCE and the subcontractor is High Tech. Approximately 100 contractors per center will be added, with ramp up to begin over the next 30 days. Training is expected to take much longer. The contractors will provide administrative support for the mailroom, data entry, and clerical support; the positions to be filled also include database administrators and lower level analysts who will support federal analysts. Contractor analysts will provide recommendations regarding adjudication, but will not make decisions which are the responsibility of federal staff. There will be quality control by federal employees including spot-checking of work. The new contractor analysts will train on "clean" cases and will diversify to more complicated case types, such as audits, as they go through training and mentoring. DOL expects the NPC staff to be approximately 2/3 contractor, 1/3 federal employees. More information regarding the contract, including scope of work, is available on the DOL website, posted as part of the bid process at http://www.doleta.gov/sga/rfp.cfm.

For implementation of the new portal in 2009 DOL is considering having a Beta test group to help work out the "kinks." This may include input or testing by software vendors. The new portal will have one registration for the company for both PERM filings and LCAs. Also, the new PERM portal will have a registration for the attorney so the attorney can access all cases through one place, not just through separate client logons.

**Comment [RSK1]:** So can we expect faster adjudications or more audits? I do hope it is the former.

**Comment [RSK2]:** I hope DOL will take a lesson on what not to do from the poor mail handling by contractors at CIS where filings are returned without understanding f the underlying laws.

**Comment [RSK3]:** This is a welcome change for us as counsel.

Both targeted and random PERM audits will continue. Note that once a case has gone into audit, case adjudication will not make the anticipated 60-90 day time frame. The timeframe discussed in the preamble to the regulation is not binding and is irrelevant if there is an audit. Rather, it is a benchmark for "clean cases." In fact, approximately 70% of all cases filed are decided within 60 to 90 days, although 120 days is a better benchmark for managing client expectations. DOL will not provide any information regarding where/what type of audits can be expected. Audits are a big part of overall program integrity and will not be compromised. Of course there is a balance with program efficiencies, but program integrity is paramount.

**Comment [RSK4]:** Unfortunately, then the PERM process is a failure. If over 40% cases are being audited, we are not much better off than the old system.

DOL recognizes that stakeholders would like many new PERM processes implemented and have legitimate "wishlists" for DOL priorities. DOL is funded by Congressional appropriations without user fees, and cannot implement all of the good ideas it receives. In addition, publishing new FAQs may need to be prioritized below H-2A and H-2B regulations. There were over 11,000 comments submitted regarding the proposed H-2A regulations though only approximately 200 were separately identifiable distinct comments. These must be sorted through and fully considered.

As has been noted previously, LCAs for H-1Bs will be scrutinized much more closely in the future. Please remind clients that DOL may take up to 7 days to review the LCA. It is important for practitioners to reset client expectations for the processing time from 7 seconds to 7 days. Moreover, if alternate wage surveys are provided with a prevailing wage request, it could take even longer. Thus, the days of starting a new H-1B in a couple of days pursuant to a change of employer petition will end. Ramp up on increased LCA scrutiny could be this fall, or could be part of the new portal implementation.

**Comment [RSK5]:** Oh great. Another bottleneck. But this one I can understand. I have seen some shoddy LCA's that surface during enforcements. Many of them are filed by employers themselves so there is no one else we can hold responsible.

DOL is currently working clean cases with a priority date in April 2008, soon to advance to May 2008.

comments on those regulations and has not yet decided whether to implement that change. If so, DOL will need time to operationalize the change.

**B. The following are the general verbal responses to AILA's Agenda items:**
**BEC Issues**

1. What is the process for obtaining an approval notice for a BEC case that was never received by the employer or the attorney of record, e.g. where the Public Disclosure System (PDS) shows that the case was approved?

Make a request for a duplicate certification through USCIS in conjunction with the I-140 filing. Alternatively, you can make a FOIA request. Please remember that there are no longer any BECs; physical files are now at federal records centers. Case files will be destroyed five years after final adjudication of a case. *Practice Pointer: If you need a copy of something from a BEC file, ask for it now!* The BEC Public Disclosure System will stay active until the last appeal of a BEC case is complete.
There are approximately 30 BEC cases being worked at the Chicago NPC that have been remanded by BALCA. Approximately 100 more appeals are still at BALCA.

2. Please advise how long it takes for DOL to pull a case from the Federal Records Center in order to respond to e-mails sent to bec.chicago@dol.gov. Example: Following up on a posted denial for

failure to submit a timely response to a NOF, attorney promptly e-mails bec.chicago@dol.gov with evidence of the timely filed response and no receipt of denial. How long for DOL to pull case file and respond to inquiry?

Their goal is to respond by email within 7 days to say they've received the inquiry and state whether action will be taken. IF DOL agrees it is appropriate to pull the case file, it takes approximately 30-60 days to receive the file, but could take much longer for action to be taken; timing is case specific and depends on necessary action.

**MTR/Appeals**

3. Have all of the special "DOL error" cases been pulled and processed from the special queue in the MTR/Appeal queue? If complete, and a member has not yet received communication on his or her case, should the member assume that it did not make the special queue?

All DOL error cases have been identified by analyst review. Approx 60% of those identified as government error have been worked. That government error queue is currently at cases with a priority date (i.e. PERM filing date) of November 2007. If you have an MTR or appeal pending with an earlier priority date, assume DOL has determined it was not solely a government error. DOL suggests using bright colored paper to flag denials that are in clear error (discussed below).

4. Can you provide any approximate time frame for adjudicating the current MTR/Appeals queue, or, alternatively, approximately the date which you are currently working? Is the date for processing MTR/Appeals the date of filing the labor certification, or the date the MTR/Appeal was filed?

The non-government error MTR/appeal queue is at June 2006. DOL hopes to get the backlog government error queue current by end of year so that cases that come in and are immediately determined by DOL to be government error can immediately be processed. The date of processing the MTRs/Appeals is by the priority date - the date of filing the labor cert. It is not by the date the employer responded to a denial, or by audit date, or by any other date. There are about 400 appeals in the queue in Chicago and 600 in Atlanta.
If case comes back from BALCA with an issue to be worked by the NPC the case will be worked in order of priority date so it will likely go to the front of the processing line. Anticipate 90-120 days for further action, but timing will depend on BALCA instructions.

5. Instead of denying a PERM case for failure to include the employer's name in the Notice of Posting, thus requiring an MTR/Appeal or refiling, will DOL consider requesting the employer to re-post to remedy the error?

DOL will consider this, but raised some question that they would be able to make an accommodation.

**Audits**

6. Please provide any updates on the lengthening audit queue in Atlanta. What impact has the Fragomen audit had on the audit queue for non-Fragomen cases? What impact has the Fragomen audit had on the regular processing queue?

DOL will not discuss the Fragomen audit or its impact, but noted that cases are worked in priority date order and the Fragomen cases are in line with the rest of the audit cases. There is only one audit queue. DOL does not maintain separate queues for random and targeted audits. **DOL is currently working on audited cases with priority dates of March 2007.** If you have a case that is in audit with an earlier PD, please email PLC.Atlanta@dol.gov. If no response within two weeks, contact liaison. Instructions for liaison contact will be posted on InfoNet shortly.

7. There has been a noticeable problem of denials due to failure to respond to an audit where the attorney did not receive the audit notice. In order to address this problem, will you consider either or both of the following:
a. DOL emails the attorney when the audit is issued, and/or DOL cc's by mail the employer on all audits.

These will be done in the new PERM portal. DOL does not want to take development resources away from the implementation of the new form to add email notifications to the existing process. DOL will consider implementing (b) prior to the rollout of the new portal in January 2009, but does not expect they have the resources to do so in the meantime. DOL also said that it did not have the resources to add an email notification that it has received an audit response. AILA pointed out that members report cases that are pending in the MTR queue because DOL denied the case for failure to receive an audit response that the employer sent in.

8. Please confirm that cases that have been pending more than 15 months from filing should be brought to your attention through liaison. Granted that at the outset of the PERM system, DOL anticipated processing many applications within 60-90 days, what are DOL's current plans for reducing the period of time for cases to be deemed overdue from 15 months to a more reasonable interval?

Cases pending over 15 months from the date of filing should be brought to DOL's attention through the AILA Liaison process. (Instructions for liaison contact will be posted on InfoNet shortly.) The addition of the contractors should help bring down the backlog.

**Comment [RSK6]:** Note this, everyone. Hopefully we can see some movement on these cases more quickly.

9. Please confirm that cases involving clear error by DOL should be brought to your attention by clearly marking an MTR/Appeal (e.g., colored paper on top of filing).

Correct. But note that DOL determines whether there was clear error!

**Recent PERM Program Guidance**

10. The new Program Guidance states "In the Department's view, an employer's determination that a U.S. worker is minimally qualified for a position constitutes clear evidence that there are U.S. workers who are able, willing, qualified and available for the work to be undertaken." This implies that meeting **one** element of the statutory requirement (qualified) inherently meets **all four** of the statutory elements (able, willing, qualified, and available). We suggest that a more precise wording would be "In the Department's view, an employer's determination that a U.S. worker is minimally qualified for a position constitutes evidence that must be explored further to determine whether the worker is also able, willing, and available for the work to be undertaken." Can this be addressed through an FAQ or follow up Guidance?

This suggestion will be considered, as will other suggestions offered by AILA to clarify the role of attorneys in the labor certification process.

**Miscellaneous PERM Issues**

11. If a company has a name change but the FEIN number remains the same, is there a way for the company to amend their registration or do they have to go through the entire registration process?

Currently the company must re-register. Under the new PERM portal, it should be possible for a company to amend its registration.

12. If a SWA does not indicate a skill level on a prevailing wage determination that is based on a collective bargaining agreement, should item F.4. on the ETA 9089 be left blank?

Yes, the skill level field should be left blank if the prevailing wage is based on a collective bargaining agreement. If a PERM application is denied because the skill level field is blank, and the wage was based on a collective bargaining agreement, the employer may file a motion to reopen due to this DOL error.
If the SWA used OES information (rather than a collective bargaining agreement) for the determination and did not give a level, ask the SWA to determine the level, since inserting OES as the basis for the wage requires completion of the wage level field on the 9089.

13. The "twinkling lights" warnings against entering deniable data in certain fields are appreciated by members. We would like to suggest the addition of a warning in the prevailing wage validity fields so that a typographical date error will not lead to denial of substantively meritorious cases.

This will be part of the new portal but it would be too resource-intensive to add to the current system now.

14. There appears to be a PERM error that is resulting in erroneous denials. The ETA 9089 addresses the layoff situation by asking in Section I, No. 26: "[H]as the employer had a layoff in the area of intended employment in the occupation involved in this application or in a related occupation within the six months immediately preceding the filing of this application?" The next item (No. 26-A) says: "[I]f Yes, were the laid off U.S. workers notified and considered for the job opportunity for which certification is sought?" The instructions to the ETA 9089 (as published on the PERM site at www.plc.doleta.gov direct the employer to answer No. 26-A in Section I as follows: If the answer to question 26 is "Yes" and the employer notified and considered all potentially qualified laid off U.S. workers referenced in question 26, mark "Yes." If the answer to question 26 is "Yes," and the employer did not notify and consider all those U.S. workers, mark "No." **If the answer to question 26 is "Yes," but there were no potentially qualified laid off U.S. workers, mark "NA."** (emphasis added) However, if one answers question 26 "NA," because there were no potentially qualified laid off U.S. workers, the systems prompt provides a warning: "This application may not be approved for the following reason (s): Section I-26A, The U.S. workers employed in the occupation notified for the job must be "yes." Indeed, the application is then subsequently denied stating: "The application indicates a layoff by the employer occurred in the area of intended employment, and potentially qualified U.S. workers were not notified of this job opportunity. Per 656.17(k), the employer must document it has notified and considered all potentially qualified U.S. workers laid off by the employer of the job opportunity." We believe that the instructions to the layoff questions are correct as they conform to the supplementary comments to the regulations that an employer is required "to document only that it notified and considered potentially qualified U.S. workers (69 Fed. Reg. 247, December 27, 2004, p. 77355). See also, Gorchev & Gorchev Graphic Design, 1989-INA-18 (11/29/90), *en banc*. The system prompt, however, is wrong, thereby triggering erroneous denials.

Please correct the system prompt to correct erroneous denials. DOL confirmed AILA's understanding was correct; AILA provided the case example where such a denial occurred so the logic can be tracked and corrected.

15. In DOL's Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995, submitted with the new PERM ETA Form 9089, and available for public viewing at

http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200707-1205-012, in response to a request by a commentator to modify the accompanying instructions for H.h.27 (of the new form) to read "If the employer's requirements for the job opportunity exceed those assigned to the occupation by the SWA on the PWD using the O*Net Job Zone..." DOL stated that it "declines to use this wording because the ultimate responsibility for determining the occupation lies not with the SWA, but with the employer." Does this mean that the employer can determine and utilize a different O*NET occupation for purposes of answering H.h.27 than that provided by the SWA and entered in Section F of the new form? If so, may the employer now determine and utilize its own determination of the appropriate O*NET occupation for purposes of answering H.12 of the current form rather than the one provided by the SWA and entered into Section F of the current form?
No. DOL was referring to the employer's description of the job duties, which is the underlying basis for the SWA determination. If you believe the SWA-issued classification is wrong, take it up with the SWA prior to filing the case.

16. Can DOL issue a receipt for mailed in cases? Currently, it is our understanding that employers do not receive any formal receipt or case number when they file an ETA 9089 form by mail. When they contact the NPC they are not given any specific information on the processing of their application and thus they have no proof that the case is in process for purposes of establishing USCIS benefits.

DOL understood the advantage of a receipt for mail-in cases, but indicated it would be resource intensive to send out receipts. DOL will not guarantee prompt resolution.
10-15% of cases are mailed in. DOL hopes that percent will continue to decrease. It is a big drain on resources.
***Practice Pointer****: Some members note that they have to paper file because they are down to a deadline with recruitment and there is a hold up with the employer's registration. It is best to register the employer at the front end of the case to avoid the need to paper file. Paper filers do not get the benefit of the warning system for typos. Data entry clerks enter what is on the paper form. If there is a typo on the paper form, the clerks will not make an independent decision to correct. The case could then be denied due to the typo. These denials then take up resources on appeal. BEST TO AVOID PAPER FILING!!*

**Recruitment**

17. Must an employer consider and follow up with applicants for a labor certification position who have submitted their resumes from another country, where all indicia of residence and citizenship, such as address, phone, all schools, and all employment are foreign, and there is no indication of ever having any sort of tie to the U.S. whatsoever? Given internet recruiting activities, employers are now receiving applications from foreign nationals in foreign countries, some of whom do not provide even an e-mail address. Employers could be burdened with extensive costs and/or delays to correspond by phone or international mail with foreign workers who are interested in jobs in the U.S.

If the facts are as stated in this hypo, the employer need not consider the foreign worker. But caution! This can be a slippery slope. If there are any facts that could indicate that the worker could possibly be a U.S. worker, the employer should move forward with consideration.

18. Please confirm that an employer is not required to respond to a recruiter/recruitment agency which sends unsolicited resumes in response to a PERM recruitment activity where the recruiter/agency requires payment of a fee for referring candidates.

DOL will need to gather more facts regarding this. Discussion is deferred to the next liaison meeting.

**Layoffs**

19. Please provide an update on when we can expect a new layoff FAQ re "notify and consider" issues.

No date set. This is in line to be drafted but DOL has other priorities. DOL would welcome a list of pressing layoff issues it would like discussed.

**SWA Issues**

20. What can an employer do to dislodge a prevailing wage appeal that has been pending at the SWA for more than 6 weeks?

Provide liaison with case specific history of attempts to contact SWA and DOL will follow up. (Instructions for liaison contact will be posted on InfoNet shortly.)

**Supervised Recruitment Issues:**

DOL will work on pilot processes for supervised recruitment out of the national office in Washington DC until the end of the year, when responsibility for supervised recruitment will transfer to the Atlanta NPC. Standard operating procedures are being developed. Employers should expect future supervised recruitment, especially where DOL believes there is U.S. worker availability or where response to audit was inadequate. The employer will get a letter saying the case is going into supervised recruitment. A case may go into SR without first being audited. And DOL may issue audits in supervised recruitment cases. The letter informing the employer of SR may also include audit-type questions such as justification of business necessity. DOL is working on FAQs for supervised recruitment. They are currently working on 50 supervised recruitment cases. Data mining is showing that some employers are routinely not responding to audits. Such employers may be required to file under supervised recruitment in the future.