Department of Labor
Office of Inspector General—Office of Audit

Employment and Training Administration

Restoring Section 245(i) of the Immigration and Nationality Act Created a Flood of Poor Quality Foreign Labor Certification Applications Predominantly For Aliens Without Legal Work Status

Date Issued: September 30, 2004
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Department of Labor
Office of Inspector General
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BRIEFLY...

Highlights of Report Number: 06-04-004-03-321, a report to the Assistant Secretary for Employment and Training. September 30, 2004.

SEPTEMBER 2004

RESTORING SECTION 245(I) OF THE IMMIGRATION AND NATIONALITY ACT CREATED A FLOOD OF POOR QUALITY FOREIGN LABOR CERTIFICATION APPLICATIONS MAINLY FOR ALIENS WITHOUT LEGAL WORK STATUS

WHY READ THE REPORT

This report details the adverse affects of the restoration of Section 245(i) of the Immigration and Nationality Act on the Employment and Training Administration's foreign labor certification program in terms of significant increase in workload, predominance of illegal aliens applying for permanent residence status, and poor quality of applications.

WHY OIG DID THE AUDIT

The Office of Inspector General (OIG) audited the Department of Labor's (DOL) permanent Foreign Labor Certification (FLC) program to answer three questions:

How was the FLC program workload affected by the Section 245(i) provision for the period January 1, 2001, through April 30, 2001?

What was the legal employment status and actual visa status of individuals applying for permanent foreign labor certification during the 4-month period covered by Section 245(i)?

What was the quality of FLC applications filed during this 4-month period as determined by the extent of incomplete and/or misrepresented applications?

READ THE FULL REPORT

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

http://www.oig.dol.gov/public/reports/oa/2004/06-04-004-03-21.pdf

WHAT OIG FOUND

Our audit found:

- a backlog in processing FLC applications (325,000 as of May 2004) due to a 450 percent increase in applications for permanent labor certifications from Fiscal Year 2000 to 2001;
- a majority of aliens did not have legal status to work (84 percent) or be (67 percent) in the U.S. (72 percent);
- most (67 percent) aliens were already working for the petitioning employer at the time of application, including nearly 28 percent who worked for the employer for 5 or more years prior to application; and
- an estimated 69 percent of the 214,406 applications filed from January 1 through April 30, 2001, and not subsequently canceled or withdrawn, were either misrepresented, incomplete, or both.

WHAT OIG RECOMMENDED

OIG recommended the Assistant Secretary for Employment and Training:

- require that the current backlog of applications are processed in accordance with applicable laws and regulations;
- verify an employer's current in-business status prior to certification; and
- refer to the OIG's Office of Labor Racketeering and Fraud Investigations any applications where the employer is determined not to be a bona fide employer.

ETA generally agreed with the report findings.

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EXECUTIVE SUMMARY

Section 245(i) of the Immigration and Nationality Act (INA) allowed aliens who had applications for permanent foreign labor certification filed on their behalf from January 1, 2001, through April 30, 2001, to remain in the United States (U.S.) without having to return to their countries of origin in order to obtain work-based visas notwithstanding the fact that the aliens entered the U.S. without inspection, overstayed, or worked without authorization.

The Office of Inspector General (OIG) audited the Department of Labor's (DOL) permanent Foreign Labor Certification (FLC) program to answer the following questions.

1. How was the FLC program workload affected by the Section 245(i) provision for the period January 1, 2001, through April 30, 2001?

2. What was the legal employment status and actual visa status of individuals applying for permanent foreign labor certification during the 4-month period covered by Section 245(i)?

3. What was the quality of FLC applications filed during this 4-month period as determined by the extent of incomplete and/or misrepresented applications?

Audit Results

Section 245(i) of the INA resulted in dramatic increases in applications for permanent labor certifications creating a major backlog in processing FLC applications. Of the 335,553 FLC applications filed **nationwide** in FY 2001, we estimate that 75 percent of the applications were filed during the period January 1, 2001, through April 30, 2001.

As of September 30, 2001, the permanent FLC program had a backlog of approximately 325,000 unprocessed applications. According to a DOL official we contacted in late May 2004, the last estimate of unprocessed applications was approximately 315,000.

For the FY 2001 applications filed in the eight states **in our sample**:

- 76 percent were filed from January 1, 2001, through April 30, 2001,
- 61 percent were filed in April 2001,
- 50 percent were filed in the last 10 days of April, and
- 28 percent were filed on April 30, the last day Section 245(i) applications could be filed.

(See page 1.)

For FLC applications filed nationwide from January 1, 2001, through April 30, 2001, that were not subsequently cancelled or withdrawn, we estimate:

- 84 percent of the aliens did not have legal status to **work** in the U.S;
- 72 percent of the aliens did not have a legal status **to be in the U.S**; and
- 67 percent of the aliens were **already working** for the petitioning employer at the time of application. 95 percent of the applications for these aliens provided dates of beginning employment with the petitioning employer which showed:
- 46 percent working 1 to 4 years prior to application;
- 22 percent working 5 to 9 years prior to application; and
- 6 percent working over 10 years prior to application.

(See page 3.)

We estimate that 69 percent of the 214,406 applications filed from January 1, 2001, through April 30, 2001, and not subsequently canceled or withdrawn, were either misrepresented, incomplete, or both. Individually, we estimate 54 percent of the applications were misrepresented, and 56 percent of the applications were incomplete.

This audit resulted in the OIG's Office of Labor Racketeering and Fraud Investigations (OLRFI) reviewing 540 applications for possible investigation.

- 207 were flagged by OLRFI analysts;
- 32 applications were flagged by the auditors: and
- 301 applications outside of the audit sample were provided by State Workforce Agency (SWA) and DOL Employment and Training Administration (ETA) regional office personnel.

(See page 14.)

Recommendations

We recommend the Assistant Secretary for Employment and Training:

- Require that the current backlog of applications are processed in accordance with applicable laws and regulations by:
  - Preparing a Notice of Finding (NOF) on incomplete applications, application packages containing conflicting information, and applications containing over restrictive job qualification requirements, and
  - Approving employers' applications only if the aliens have sufficient qualifying experience not earned with the petitioning employer.

- Verify an employer's current in-business status prior to certification and refer to the OIG's OLRFI any applications where the employer is determined not to be a *bona fide* employer.

ETA's Response

ETA generally agreed with the report findings but offered several comments.

ETA is establishing processing centers where the majority of permanent program backlog cases will be reviewed and adjudicated. The case management software that will be used in processing cases will verify an employer's current in-business status prior to certification.

ETA has always required, and will continue to require, foreign labor certification applications to be processed in compliance with all applicable statutes, regulations, and policies. ETA's Certifying Officers routinely issue NOFs specific to individual cases being adjudicated, as warranted. The question of whether an alien has earned experience with the petitioning employer is addressed in ETA policy and is routinely reviewed during the certification adjudication process.

Auditor's Conclusion

ETA's plan to use software in its backlog processing centers to determine *bona fide* employers prior to certification should resolve our recommendation regarding this matter when the system is operating.

We agree that ETA has policy regarding an alien's qualifying experience. And, while ETA may require that FLC applications be processed in compliance with statutes, regulations and policies, our audit results demonstrate that those statutes, regulations, and policies are being routinely disregarded.

Backlog center directors must ensure that staff complies with statutes, regulations, and ETA policies, especially in regard to qualifying earned experience with the petitioning employer.

Our recommendations remain unchanged.

Assistant Inspector General's Report

Emily Stover DeRocco
Assistant Secretary for
Employment and Training
U. S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

We audited applications filed under the Department of Labor's permanent Foreign Labor Certification (FLC) program for the period January 1, 2001, through April 30, 2001. During this period, Section 245(i) of the Immigration and Nationality Act (INA) allowed aliens who had applications for labor certifications filed on their behalf to remain in the United States without returning to their countries of origin to obtain work-based visas. Our objectives were to answer the following questions:

1. How was the FLC program workload affected by the Section 245(i) provision for the period January 1, 2001, through April 30, 2001?

2. What was the legal employment status and actual visa status of individuals applying for permanent foreign labor certification during the 4-month period covered by Section 245(i)?

3. What was the quality of FLC applications filed during this 4-month period as determined by the extent of incomplete and/or misrepresented applications?

We conducted our audit in accordance with *Government Auditing Standards* for performance audits. Our audit scope, methodology, and criteria are detailed in Appendix B.

FINDINGS AND RECOMMENDATIONS

Finding 1: Section 245(i) of the Immigration and Nationality Act (INA) resulted in dramatic increases in applications for permanent foreign labor certification creating a major backlog in processing such applications.

The Section 245(i) provision resulted in a 450 percent increase in applications from fiscal year (FY) 2000 (60,892 applications) to FY 2001 (335,553 applications). We estimated that nationwide approximately 75 percent of all FY 2001 FLC applications (252,822 of 335,553) were filed during this 4-month

period. We further estimated that 214,406 of these nationwide applications were not subsequently canceled or withdrawn.

For the FY 2001 permanent FLC applications filed in the states in our sample:

- 76 percent were filed from January 1, 2001, through April 30, 2001,
- 61 percent were filed in April 2001,
- 50 percent filed in the last 10 days of April, and
- 28 percent filed on April 30, the last day Section 245(i) applications could be filed.

The following chart illustrates the dramatic increase in applications for the sampled states from January 1, 2001, through April 30, 2001, particularly in April.

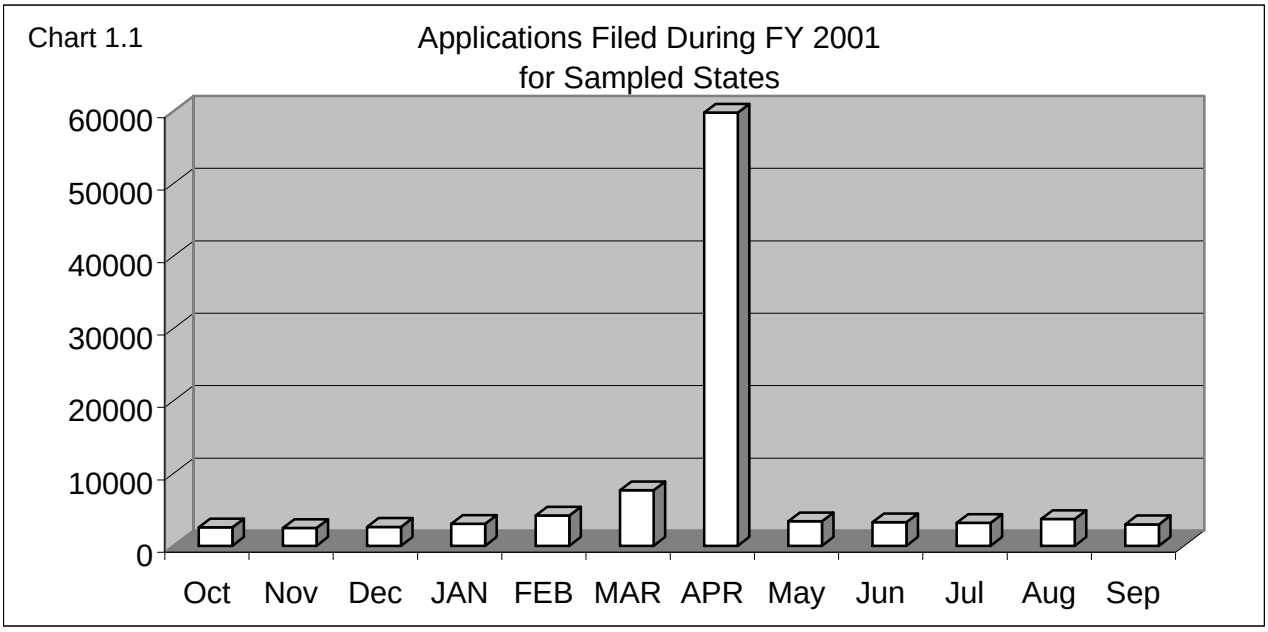
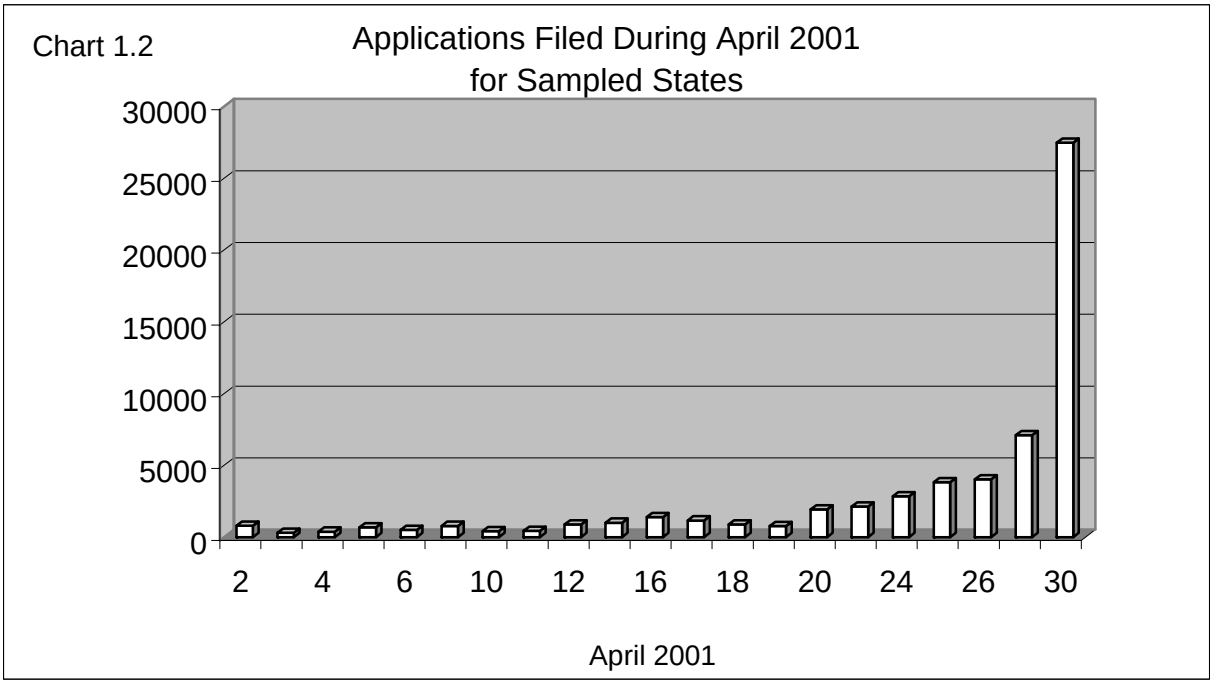


Chart 1.2 shows that with the number of applications filed on the April 30 deadline date -- 28 percent of FY 2001 applications -- employers, aliens, and/or attorneys were frantic to file before the deadline, which could be another factor in the number of poor quality applications (see finding 3).



We concluded that Section 245(i) resulted in a massive surge in applications that overwhelmed the State Workforce Agencies (SWA) and the Employment and Training Administration (ETA) creating a backlog of approximately 325,000 unprocessed permanent labor certification applications at the end of FY 2001. According to a DOL official contacted in late May 2004, at last count, approximately 315,000 applications were still unprocessed.

Finding 2: Most applicants did not have legal employment status and were already employed by the petitioning employer.

For the estimated 214,406 FLC applications filed nationwide during the covered period that were not subsequently canceled or withdrawn, we estimated:

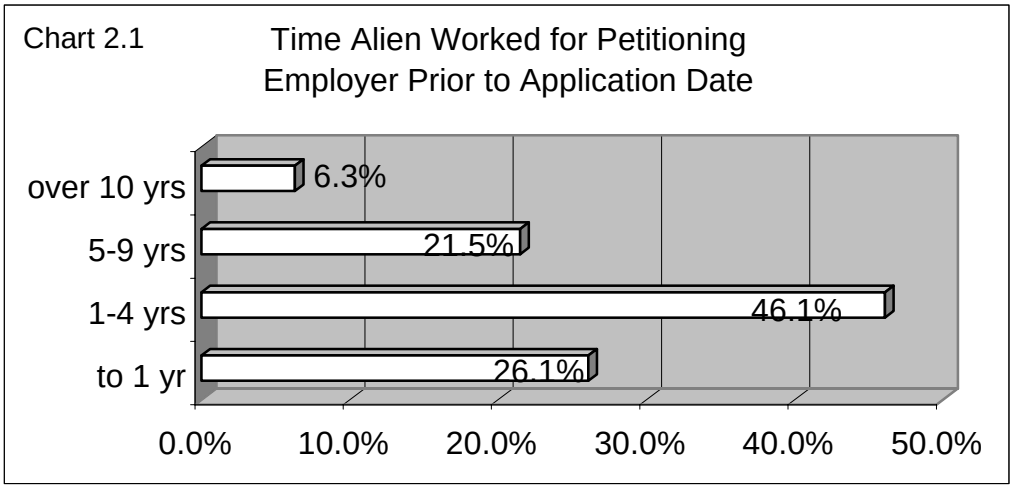
- 180,217 (84 percent) of the aliens did not have legal status to work in the U.S;
- 154,407 (72 percent) of the aliens did not have a legal status to be in the U.S;
- 143,680 (67 percent)[1] of the aliens were already working for the petitioning employer at the time of application. 136,332 (95 percent) of those aliens provided dates of beginning employment with the petitioning employer that showed:

[1] The 67 percent of aliens working with the petitioning employer prior to application date may be understated, due to many applications missing the aliens' work history.

- Almost 28 percent worked for 5 or more years prior to application.
- Over 46 percent worked for 1 to 4 years prior to date of application.

With so much employment history with the petitioning employers, there may be a disincentive for employers to replace the aliens with qualified U.S. workers who may apply for the positions, in which case the openings are not *bona fide*.

Chart 2.1, below, shows how long these 136,332 aliens worked for the petitioning employer prior to the FLC application date.



In addition to the substantial length of time aliens have been working for the petitioning employer, the number working without legal status has increased. The comparison in the chart below clearly shows that Section 245(i) opened the door for illegal aliens and aliens with no legal right to work in the U.S. to apply for permanent work visas. The legal and work status of aliens who filed FLC applications during the INA Section 245(i) period are in stark contrast to the legal and work status of aliens we reported in a prior OIG audit report.[2]

[2] Report Number 06-96-002-03-321, "The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs to Be Fixed" (issued June 29, 1996)

Alien Status	% of Applicants Per 1996 OIG Report	% of Section 245 (i) Applicants Per This Audit
Already working for petitioning employer at application date (of all aliens)	74%	67%
Alien did not have legal status to work in U.S. at application date (of aliens already working with petitioning employer)	16%	78%
Alien did not have legal status to be in U.S. at application date (of all aliens)	10%	72%

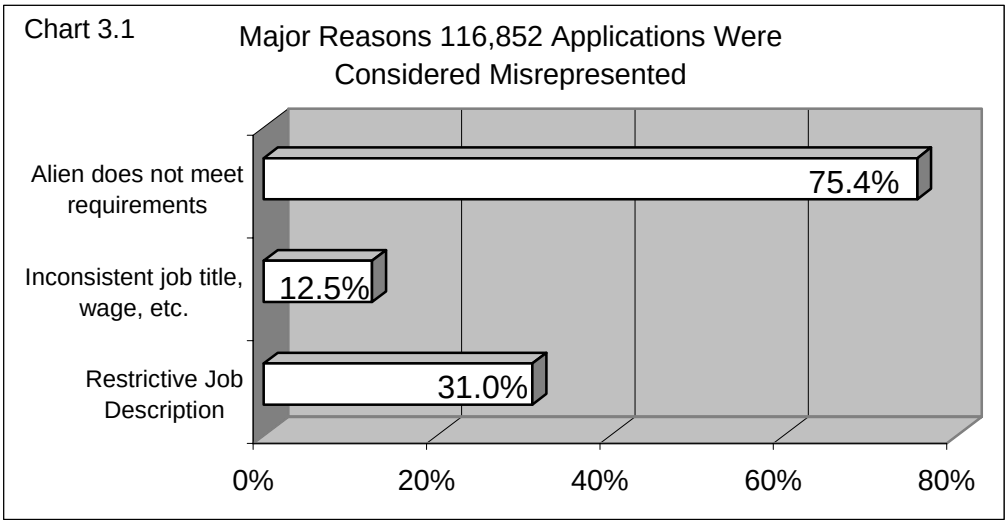
The purpose of the permanent FLC program is to provide employers with access to foreign workers to fill *bona fide* job openings when there are not sufficient U.S. workers who are able, willing, qualified, and available to fill the job opening in the area of intended employment. Therefore, the intent is for the program to be employer driven to meet the employers' needs, not to provide legal status to aliens in the U.S. without legal status. We concluded that Section 245(i) changed the system, at least from January 1, 2001, through April 30, 2001, to an alien driven system; i.e., employers were not seeking foreign workers to fill jobs for which they could not find U.S. workers, illegal aliens were attempting to get legal resident alien status.

Finding 3: Applications filed during the Section 245(i) period were of poor quality as demonstrated by the number of applications that were misrepresented, incomplete, or both.

We estimate that 69 percent of the applications filed during the covered period were misrepresented and/or incomplete. Individually, we estimated that 54 percent of the applications were misrepresented, and 56 percent were incomplete. Most applications selected in our review were pre-adjudication; i.e., the CO had not made a determination regarding the application. In the following discussion we do not distinguish between those already adjudicated and those still pending at the state or Regional Office because the problems identified are present in both groups.

A. Misrepresented applications account for 116,852 of the 214,406 applications filed, or 54 percent.

The following chart displays the three major reasons why we determined the applications are misrepresented. Each type of misrepresentation is based on the total of the applications reviewed, and is not intended to represent 100 percent.



1. Alien does not meet the job requirements.

Aliens do not meet the job requirements for two reasons. The first, and main, reason is that the alien earned most, or all, of the required experience as the incumbent in the offered position. Title 20 Code of Federal Regulations (20 CFR), Part 656.21(b)(5) provides:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

This provision is further explained in ETA's TAG 656, page 52 as follows:

> When an employer has employed or currently employs the alien in the occupation for which certification is sought, the application for alien employment certification for the alien cannot include as a job requirement experience gained by the alien in the occupation while working for the employer. **This is a valid exclusion since that experience was not required for the job when the alien was hired**. . . . [Emphasis added.]

The second reason an alien is not qualified for the job is if he/she does not have the education, training, experience, or other special requirements established by the petitioning employer.

Since the alien has already occupied the position, sometimes for several years, it is unlikely the petitioning employer will wholeheartedly seek and recruit qualified, willing, and able U.S. workers. Therefore, no *bona fide* job opening exists. For all applications reviewed in this audit, **no U.S. workers were hired for the positions being offered.**

U.S. workers may not be rejected for a job opportunity offered to an alien except for lawful job-related reasons. An employer may not reject U.S. workers who may be "over qualified" but are willing to accept the job at the wage and conditions offered. According to 20 CFR 656.20(c):

Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that: . . .
(8) The job opportunity has been and is clearly open to any qualified U.S. worker.

ETA's TAG, page 36, concerning the regulation states:

> The employer's recruitment efforts prior to the filing of an application and the employer's willingness to consider U.S. workers for the job opportunity after filing the application are indications of whether the job was and is clearly open to U.S. workers . . . the employer must be willing to conduct required recruitment after filing the application and be willing to interview and consider U.S. workers for the job opportunity even if the alien is currently employed in the job.

We know that in at least one instance, when an employer was questioned for disregarding qualified U.S. workers who applied for FLC petitioned job openings, the employer intentionally withdrew all four FLC applications that he had filed.

2. Inconsistencies exist between the application and related documents.

Inconsistent job title, job description, hours of work, and wage rate among the application, state job order, transmittal form, and advertisements raise questions regarding the applications' validity.

3. Employers tailored job descriptions

Employers tailored job descriptions to the position the alien currently holds and to the alien's current abilities, regardless if these abilities were acquired while working for the petitioning employer. Applications from otherwise qualified U.S. workers are disregarded because the employer tailored the job description to distinguish the alien.

4. Other reasons

We also considered applications to be misrepresented if the employer refused to offer 95 percent of prevailing wage (as required by 20 CFR 656.40(a)(2)(i)), or if the alien and employer, or alien and attorney/agent, had some sort of pre-existing relationship; e.g., it appears the alien and employer are relatives, the alien and attorney share an address, or the alien and employer were one in the same (as in two instances in our sample).

Misrepresented applications deny U.S. workers the opportunity to compete for positions related to the petitioned jobs. The permanent FLC program is based on the premise that employers will hire a foreign worker only when no qualified U.S. workers are available and willing to accept the job at the prevailing wage for that occupation in the area of intended employment. The program is intended to ensure that employment of foreign workers on a permanent basis will not adversely affect the wages and working conditions of U.S. workers that are similarly employed. When an application is submitted for an alien worker who is already occupying the offered position, it is unlikely the employer is going to honestly test the labor market in order to find a qualified and available U.S. worker.

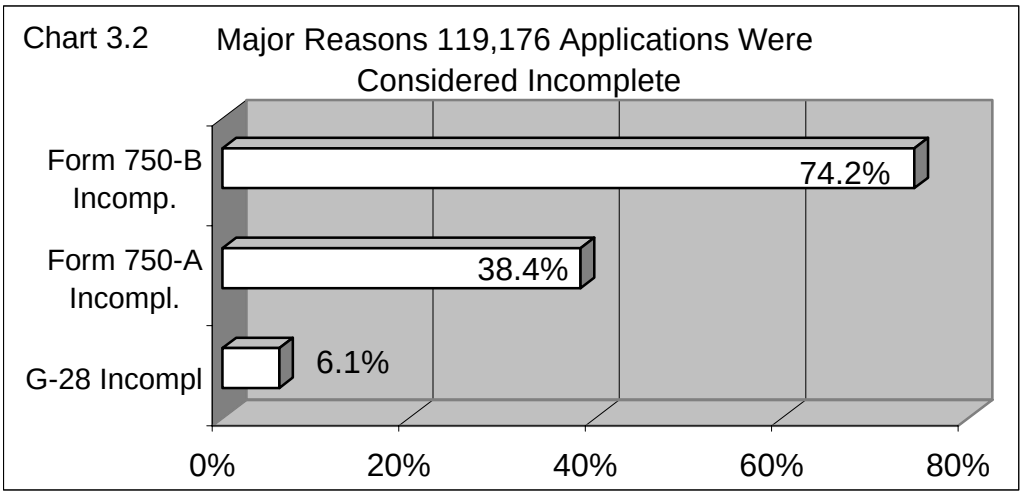
B. Incomplete applications account for 119,176 of the estimated 214,406 applications filed, or 56 percent.

The application for permanent foreign labor certification includes two forms:

- Application Form 750-B, Statement of Qualifications of Alien, and
- Application Form 750-A, Offer of Employment.

If counsel represents the alien and/or employer, a Form G-28, Notice of Entry of Appearance as Attorney, is also required.

The following chart displays which of the applicable forms were incomplete.



Applications are incomplete due to missing pieces of information, no signatures and/or dates, or attorney form being incomplete.

According to 20 CFR 656.24(b) and (b)(1)

> Labor certification determinations . . . (b) The regional or national Certifying Officer, as appropriate, shall make a determination either to grant the labor certification or to issue a Notice of Findings on the basis of whether or not: (1) The employer has met the requirements of this part. However, where the Certifying Officer determines that the employer has committed harmless error, the Certifying Officer nevertheless may grant the labor certification, Provided, That the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. **Where the Certifying Officer makes such a determination, the Certifying Officer shall document it in the application file.** [Emphasis added.]

We did not find any certified application in our sample that the CO documented as "employer committed harmless error." Thus, in our review, if information was missing from the application we considered it incomplete.

Applications were considered incomplete because the application was missing one or more of the required data elements, such as:

- Part-B (Statement of Qualifications of Alien)
  - Name of alien,
  - Date of birth, birthplace, present Nationality or Citizenship,
  - Occupation in which alien is seeking employment,

- Names and addresses of schools, field of study, and related dates and degrees for educational achievements, (if education is a requirement of the job offer),
- Additional skills or unique skills alien currently possesses, including licenses,
- Complete detailed work history, including employer name, employment dates, kind of business, detailed job duties performed, hours worked,
- Alien's signature and date application was completed,
- Additional signature of alien and date if alien designated an agent for representation, and
- Address of agent if alien is represented.

- Part-A (Offer of Employment)
  - Employer telephone number, nature of business, name of job offered, work hours, and pay,
  - Full job description, duties, required education, training, experience, and other special requirements,
  - Employer signature, title, and date application was completed,
  - Additional signature of employer and date if employer designated an agent for representation, and
  - Address of agent if employer is represented.

- G-28 (Notice of Entry of Appearance as Attorney or Representative)
  - Employer or alien name and address,
  - Name, address, and telephone number of attorney, or
  - Signature or date form completed by attorney.

The employer must sign Part-A, and by virtue of his signature certifies and declares under penalty of perjury that:

- Enough funds are available to pay the wage or salary offered the alien,
- The wage offered equals or exceeds the prevailing wage . . . and that the wage paid to the alien will equal or exceed the prevailing wage which is applicable at the time the alien begins work, and
- The job opportunity has been and is clearly open to any qualified U.S. worker.

The alien must sign Part-B, and by doing so declares that under penalty of perjury the application is true and correct.

C. Pressure to process applications led to less thorough reviews of applications.

At the time we interviewed Regional ETA COs, they stated they were under constant pressure to reduce the backlog of applications. When the backlog took

a tremendous leap during the 245(i) period, to reduce the backlog buildup, COs began applying some different standards when certifying an application, such as:

- They use the "harmless error" criteria and certify the application. For example:
  - Missing signatures are not considered a major problem.
  - Missing dates are considered minor.
  - A form G-28 for alien representation is not necessary; they accept as long as a form G-28 for employer representation is available.
- They are more lenient on cook applications because few U.S. workers ever apply.
- They avoid sending out a Notice of Findings (NOF) if at all possible because it slows up the process and the application will usually be certified eventually.
- They allow work experience credit up to 3 years for aliens having a master's degree regardless of the employer's minimum requirements,
- They encourage employers to use the reduction in recruitment (RIR) method to process applications since this method places more demands on the employer and less on the state and CO.

Additionally, COs stated it is not necessary for the alien to complete the last 3 years of work history the application requires. As long as the application shows experience that meets the minimum requirements for the job offered, the application is approved. COs also told auditors ETA is not responsible for verifying the alien's qualifications, and they rely on the Bureau of Citizenship and Immigration Services (BCIS) to check the alien's documentation.

The COs must also give priority to applications for the temporary H2A and H2B programs and process them within a short timeframe pursuant to Federal regulations. This priority requires staff to work on temporary applications rather than permanent applications. In one regional office, at April 2004 the current backlog of permanent applications was over 7,700, and only one staff was available to work part-time on the cases. Per the CO, "the backlog is growing, not being reduced."

While understanding the constraints placed on the COs to certify applications, we still reviewed the sample of applications according to published regulations. We found certified applications that were incomplete and/or misrepresented. In most cases the CO agreed that further action should have been taken on the files prior to certification. Most would have required an NOF being sent to the employer for additional information. An NOF is one of the few methods available to request additional documentation for an application prior to denial.

Of the 151 applications in our sample on which the COs had made a determination, only 4 applications were denied. All four denials resulted from the

employer not responding to an NOF. We called each of the employers involved, and learned that all four aliens had worked for the petitioning employer prior to application. One alien continues to work for the employer and the other three have found different jobs.

For the employer where the alien continues to work, ETA sent the employer an NOF with the intention to deny because the employer unlawfully rejected U.S. workers. The employer received a total of 21 referrals responding to the job opening; ETA found 2 of the referrals were found rejected for other than lawful, job-related reasons. ETA ultimately denied the application because the employer did not respond to the NOF. We contacted this employer and learned that the alien was currently working for the petitioning employer, and has since July 10, 1997.

We followed up with the SWAs to determine the business status of the petitioning employers for the 318 applications in our sample that ETA already certified (147) or were still pending review by the SWA or ETA (171).

Of the 147 certified applications, 9 employers were no longer in business at the time of our audit. Six of these employers processed their applications using the RIR method, which is the least cumbersome and CO-preferred method. Of these nine applications:

- Three applications were certified after the employer went out of business.
- Six employers went out of business after the application was certified.

For 36 of the 171 applications pending review (21 percent), the employer is no longer in business. However, these applications could still be certified because the COs do not verify the employer's status prior to certifying applications. It would seem appropriate for the CO to verify the employer is still in business just prior to certification, especially since most applications have been in process for several years, and the economy of the country has changed.

ETA's Technical Assistance Guidance (TAG) NO. 656, page 137, Section H, "Applications Inappropriate for Labor Certification," provides:

> Applications for alien employment certification in certain instances are inappropriate for labor certification....The employer has no location in the United States.

The regulations define an "employer" as a person, association, firm, or a corporation which has a location within the United States to which U.S. workers may be referred for employment and which proposes to employ a full-time worker at a place within the United States.

TAG 656, page A-13, defines job opportunity as:

> A job opening for employment at a place in the United States to which U.S. workers can be referred.

Therefore, if the employer has no location in the U.S. to which U.S. workers can be referred there is no job opportunity and it would be inappropriate for an employer to submit an FLC application on behalf of an alien. Furthermore, it would be inappropriate for a CO to certify such an application.

ETA officials informed the OIG that ETA's Office of Foreign Labor Certification is implementing a new organizational structure and processes for the backlogged applications. They are aware of the poor quality of backlogged applications waiting to be processed.

ETA is establishing backlog elimination centers in Dallas and Philadelphia. Once operational these centers will change the processing of the applications to a center-based type of case processing. Permanent cases backlogged at the states will be transferred to the two Federal backlog reduction centers for processing. The contract for operating the centers has been awarded and the centers are being made operational.

ETA informed the OIG that its software system for processing backlogged applications will do an employer validity check to ensure businesses are *bona fide* and will identify incomplete applications and initiate a NOF to the employer.

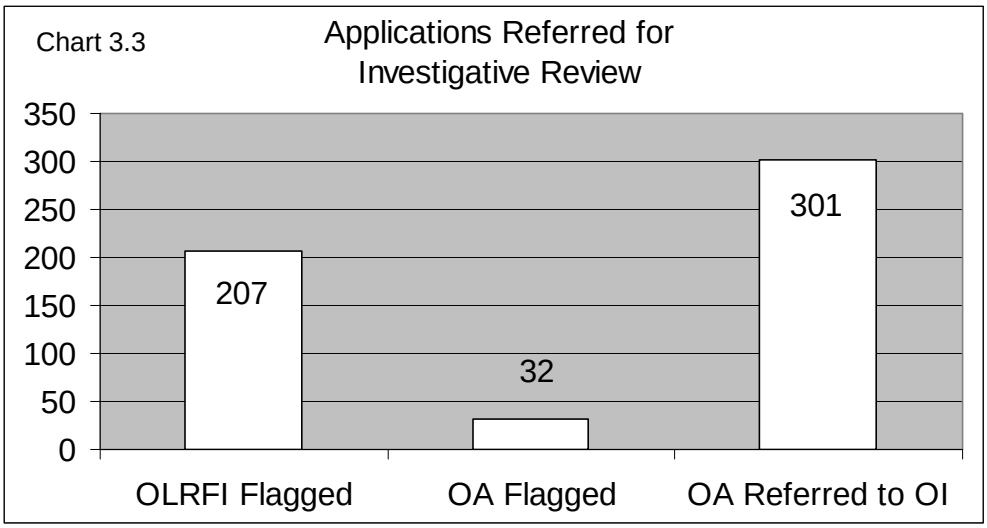
D. Other evidence of possible misuse of the FLC system was the number of questionable applications identified.

Applications sampled for review were forwarded to OLRFI to determine if there were any indicators of misuse of the system. If information making the application questionable was discovered, the application was "flagged" and audit staff did not contact the employer or attorney involved.

SWA and ETA staff were asked during the entrance conference to provide auditors with copies of questionable applications. Auditors were provided with additional questionable applications outside of our audit sample, which were forwarded to OLRFI for further investigation.

This audit resulted in 540 applications forwarded to OLRFI for investigative review. Chart 3.3, below, shows the number of applications that were "flagged" for further investigative work. The chart also shows that SWA and ETA

personnel referred an additional 301 questionable applications outside our sample to the auditors for referral to OLRFI.



With the number of applications containing questionable information, and the number of applications that SWA and ETA staff believed were questionable, continued scrutiny of applications to ensure their merit must be maintained.

Recommendations

We recommend the Assistant Secretary for Employment and Training:

- Require that the current backlog of applications are processed in accordance with applicable laws and regulations by:
  - Preparing NOFs on incomplete applications, application packages containing conflicting information, and applications containing over restrictive job qualification requirements, and
  - Approving employers' applications only if the aliens have sufficient qualifying experience not earned with the petitioning employer.

- Verify an employer's current in-business status prior to certification and refer to the OIG's OLRFI any applications where the employer is determined not to be a *bona fide* employer.

ETA's Response to Draft Report

ETA generally agreed with the draft report findings but offered the following comments:

> ETA is attempting to eliminate the backlog caused by the reinstatement of Section 245(i) of the INA but needs additional resources, which have been partially appropriated, to fully eliminate the entire backlog. ETA is establishing processing centers where the majority of permanent program backlog cases will be reviewed and adjudicated. The case management software that will be used in processing cases will verify an employer's current in-business status prior to certification.

ETA further stated:

> ETA has always required, and will continue to require, foreign labor certification applications to be processed in compliance with all applicable statutes, regulations, and policies. The utilization of NOFs is specific to the substance of the individual case being adjudicated; these are routinely issued, as warranted, by the ETA Certifying Officers. The question of whether an alien has earned experience with the petitioning employer is addressed in ETA policy and is routinely reviewed during the certification adjudication process.

Auditor's Conclusion

ETA's plan to use software in its backlog processing centers to determine *bona fide* employers prior to certification should resolve our recommendation regarding this matter when the system is operating.

We agree that ETA has policy in TAG 656, previously cited in this report, regarding an alien's qualifying experience. And, while ETA may require that FLC applications be processed in compliance with statutes, regulations and policies, including TAG 656, our audit results demonstrate that those statutes, regulations, and policies are being routinely disregarded.

Backlog center directors must ensure that staff complies with statutes, regulations, and ETA policies (e.g. TAG 656), especially in regard to qualifying earned experience with the petitioning employer.

Our recommendations remain unchanged.

Elliot P. Lewis
May 21, 2004

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APPENDICES

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Appendix A

BACKGROUND

The purpose of the permanent FLC program is to provide employers with access to foreign workers to fill *bona fide* job openings when there are not sufficient U.S. workers who are able, willing, qualified, and available to fill the job opening in the area of intended employment. The program is designed to ensure that the admission of alien workers does not adversely affect the job opportunities, wages, and working conditions of American workers or legal resident aliens.

ETA has responsibility under the permanent FLC certification program for approving (certifying) or denying applications for aliens to work in the U.S.

According to 20 CFR 656.2 (c) (1):

> The Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> (i) There are not sufficient United States workers, who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor.

20 CFR 656.20(c)(2) states:

The wage offered equals or exceeds the prevailing wage determined pursuant to Sec. 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.

In most instances, before a U.S. employer can submit an immigration petition to the BCIS, the employer must obtain an approved "Application for Alien Employment Certification" (Form ETA 750) from the DOL's ETA. The DOL must certify to the BCIS that no qualified U.S. workers are available and willing to accept the job at the prevailing wage for that occupation in the area of intended employment.

The DOL, in concert with the local SWA, processes the ETA 750 applications. The date the application is filed with the SWA is the application's "priority date." After DOL approves the ETA 750, the employer submits the approved ETA 750 to the BCIS service center with an "Immigrant Petition for Alien Worker" (Form I-140). The priority date is the date the BCIS and Department of State use for processing petitions and visa applications, respectively.

Currently, employers mainly use two methods to request approval of the permanent alien labor certification: the DOL/SWA "basic," or traditional, process; and, the "reduction in recruitment" (RIR) process. Regardless of the method followed, **the employer must comply with the qualifying criteria:**

- the employer must hire the foreign worker as a full-time employee;
- the job opening must be *bona fide*;
- the job requirements must adhere to what is customarily required for the occupation in the U.S. and may not be tailored to the worker's qualifications;
- the employer must document that the job opportunity has been and is being described without unduly restrictive job requirements, unless adequately documented as arising from business necessity; and
- the employer must pay at least the prevailing wage for the occupation in the area of intended employment.

The length of time required to process permanent labor certification applications varies from about 1 year using the RIR process to 3 years or more under the normal process.

Not surprisingly, the permanent program had a backlog of about 325,000 unprocessed applications for foreign labor certification as of September 30, 2001. A major factor contributing to this backlog was the restoration of Section 245(i) of the INA. Section 245(i) allowed aliens who had an application for labor certification filed on their behalf from January 1, 2001, through April of 2001, to remain in the U.S. without having to return to their countries of origin in order to obtain work-based visas. This resulted in a large influx of applications that were often found to be of poor quality and requiring considerably more staff time to process.

The current process for approving these applications involves reviews at the SWA and ETA regional office levels. ETA has published proposed rules[3] that will streamline the process for filing and processing of labor certification applications for the permanent employment of aliens in the U.S., specifically to implement the new Program Electronic Review Management (PERM) system.

Given that the foreign labor certification program is one of the few avenues available for immigrants who want to enter the U.S. legally, and the large

[3] 67 Federal Register 30466 (May 6, 2002)

amounts of money unscrupulous agents or recruiters can earn from aliens seeking entry into the country, there is a strong incentive to commit fraud or abuse, which can have adverse affects on American wages and working conditions.

During FY 2003, OLRFI obtained 168 indictments and 78 convictions related to fraud in the FLC program.

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Appendix B

SCOPE, METHODOLOGY AND CRITERIA

Scope and Methodology

We conducted our audit in accordance with Government Auditing Standards, issued by the Comptroller General of the United States, and included such tests as we considered necessary to satisfy the objectives of the audit. Fieldwork was conducted from June 9, 2003 through May 21, 2004.

Our audit was limited to FLC applications filed from January 1, 2001, through April 30, 2001, the period covered by Section 245(i) of the INA.

Our audit started with the universe of all permanent FLC applications (335,553) filed nationally during FY 2001 (October 1, 2000, through September 30, 2001) as provided by ETA based on state-reported information.

We used a two-stage stratified cluster sampling methodology for the audit:

We first stratified the states into four groups -- high; medium; low; very low -- based on the number of FY 2001 applications reported filed in each state. Then we scientifically selected eight states – two from each stratum -- for audit.

Using electronic data files obtained from the eight sampled states, we identified each state's universe of applications filed during the INA 245(i) period (January 1, 2001, through April 30, 2001). We then selected for audit a random sample of applications filed during the INA 245(i) period from each sampled state.

In pulling the sampled applications, we identified many applications that were either cancelled or withdrawn. We randomly replaced those cancelled and withdrawn applications with applications that were either still pending review, or certified. During our audit analyses, we also identified some special handling applications, one application outside our audit scope, one application file that was lost, and other applications that were canceled after our audit began. We did not replace those applications.

The result of our sampling plan is as follows:

	STATE FLC APPLICATIONS			
			SAMPLE SIZE	
STATE	FY 2001 POPULATION	SEC 245(i) POPULATION	Orig	Rev
California	73,094	55,531	110	107
Massachusetts	13,198	10,556	45	46
Michigan	5,642	3,176	30	29
District of Columbia	3,543	3,094	30	28
Wisconsin	1,948	1,239	30	25
Kansas	322	263	30	29
Delaware	1,042	805	30	30
New Mexico	584	471	30	28
Totals	99,373	75,135	335	322

The following universes of applications are referred to in this report:

ETA-reported national universe of FY 2001 FLC applications 335,553

Estimated national universe of FLC applications filed during the period January 1, 2001, through April 30, 2001, based on 100 percent computer analysis of FY 2001 applications for eight sampled states 252,822

Estimated national universe of FLC Applications filed during the period January 1, 2001, through April 30, 2001, that were neither cancelled nor withdrawn, based on the results of audit analysis of sampled FLC applications.[4] 214,406

Application files were obtained from either the SWA or the ETA Regional Office, depending on their stage of processing. The application and related documents were analyzed to determine:

- If the application was incomplete (i.e., any essential data elements missing);
- If the application was misrepresented, e.g.;
  - If the alien did not meet the employer's minimum requirements for the job offer,
  - Whether the job requirements appeared to be overly restrictive and tailored to the alien, and
  - If inconsistencies exist between application and related documents;

[4] This is the population used to estimate the audit results in this report.

- If there were comments from SWA or ETA staff pointing to potential problems with the application that were not resolved properly.

We also analyzed the application files to determine the aliens legal status and employment status at time of application.

The application information and related data was then:

- entered into an Access database,
- edited and validated,
- summarized and analyzed using Statistical Analysis Software (SAS), and
- Statistical estimations were made using Survey Data Analysis software (SUDAAN).

The focus of the audit was the impact of the Section 245(i) provision on the FLC program's workload, the aliens' statuses at time of application, and the quality of the applications as submitted. Many applications had not undergone the SWA or ETA review at the time of our audit, however, for certified applications the audit tests determined the effectiveness of the internal controls designed to ensure FLC applications are complete and accurate.

Estimation Methodology

The point estimate (projections) and sampling errors have been calculated using Taylor's linearization methodology using two-stage stratified cluster without replacement design.

Criteria

Immigration and Nationality Act, Section 245(i)

ETA's Technical Assistance Guidance (TAG) NO. 656

Title 20 Code of Federal Regulations (20 CFR), Part 656.21(b)(5):

20 CFR 656.20(c)

20CFR 656.40(a)(2)(i):

FLC Application Form 750-A, Offer of Employment.

FLC Application Form 750-B, Statement of Qualifications of Alien

FLC Form G-28, Notice of Entry of Appearance as Attorney

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Appendix C

ACRONYMS AND ABBREVIATIONS

BCIS	Bureau of Citizenship and Immigration Services
CFR	Code of Federal Regulations
CO	Certifying Officer
DOL	United States Department of Labor
ETA	Employment and Training Administration
FLC	Foreign Labor Certification
FY	Fiscal Year
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
NOF	Notice of Finding
OA	Office of Audit
OIG	Office of Inspector General
OLRFI	Office of Labor Racketeering and Fraud Investigations
PERM	Program Electronic Review Management
RIR	Reduction in Recruitment
RO	Regional Office
SWA	State Workforce Agency
TAG	Technical Assistance Guidance
U.S.	United States

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Appendix D

RESPONSE TO DRAFT REPORT

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U.S. Department of Labor

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

SEP 15 2004

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

FROM: EMILY STOVER DeROCCO
Assistant Secretary for Employment
and Training

SUBJECT: OIG Audit of ETA Foreign Labor
Certification Program – Section
245(i) Review

Thank you for the recent draft report of the Office of Inspector General (OIG) titled, "Restoring Section 245(i) of the Immigration and Nationality Act Created a Flood of Poor Quality Foreign Labor Certification Applications Predominantly for Aliens without Legal Work Status." The Employment and Training Administration appreciates the opportunity to comment on the draft report and generally agrees with the report's findings and offers several comments.

ETA concurs with the finding that reinstatement of Section 245(i) of the Immigration and Nationality Act (INA) resulted in dramatic increases in applications for permanent labor certification creating a major backlog in the processing of applications. We note that ETA has attempted to eliminate the large backlog through administrative means available to the agency; however, additional resources are necessary and have been partially appropriated in order to fully eliminate the entire backlog.

With respect to the two (2) recommendations as a result of your audit, ETA offers the following information.

First, you recommend ETA process the current backlog of applications in accordance with applicable laws and regulations and utilize Notice of Findings (NOFs) and approve applications only if the alien has sufficient qualifying experience not earned with the petitioning employer.

ETA has always required, and will continue to require, foreign labor certification applications to be processed in compliance with all applicable statutes, regulations, and policies. The utilization of NOFs is specific to the substance of the individual case being adjudicated; these are routinely issued, as warranted, by ETA Certifying Officers. The question of whether an alien has earned experience with the petitioning employer is addressed in ETA policy and is routinely reviewed during the certification adjudication process.

Second, you recommend ETA verify an employer's current in-business status prior to certification and refer to OIG Office of Labor Racketeering and Fraud Investigations any applications where the employer is determined not to be a *bona fide* employer.

ETA is in the process of establishing central processing centers where the majority of the permanent program backlog cases referenced in your report will be reviewed and adjudicated. We agree with your recommendation and have already built this verification process into the case management software we intend to utilize in processing cases.

We look forward to continuing our productive relationship. Please feel free to contact me if you have any questions regarding our response.