

**AILA Notes from DOL OFLC Quarterly Stakeholder Meeting<sup>1</sup>**  
**PERM, H-1B and PWD Issues**  
**Chicago National Processing Center**  
*June 5, 2018*

**Attending from DOL Office of Foreign Labor Certification (OFLC):**

- William Thompson, Administrator, OFLC
- Bill Rabung, Director of Operations, OFLC
- Renata Adjibodou, Center Director, National Prevailing Wage Center
- Brandt Carter, Center Director, Atlanta National Processing Center, OFLC
- Brian Pasternak, Director of Programs, OFLC
- Shane Barbour, Center Director, Chicago National Processing Center, OFLC
- Janet Manos, Office of Policy, Chicago National Processing Center
- Geoff Colley, IT Services Director, OFLC (telephonically)
- Other OFLC staff from Technology and NPWC (some attending telephonically)

**Introductory Remarks from OFLC**

In May 2018, William Thompson completed his temporary assignment as Acting Deputy Assistant Secretary of Labor and is again serving on a full-time basis as Administrator of OFLC. John Pallasch has been nominated to serve as Assistant Secretary for the Employment and Training Administration but timing on confirmation is unknown. Mr. Pallasch is currently serving as an executive in the Kentucky Workforce system and was previously with DOL during the George W. Bush administration. In addition, Patrick Pizzella has been nominated to become Deputy Secretary for DOL, and Thomas Dowd has been named as Deputy Assistant Secretary for ETA, which is a career position rather than a political appointment. Mr. Dowd would report to Mr. Pizzella once Mr. Pizzella is confirmed. Rosemary Lehasky continues to serve as Deputy Secretary for ETA.

OFLC continues to face an increased workload. On May 25, 2018, DHS announced that it would authorize an additional 15,000 H-2Bs for the current fiscal year. On May 31, 2018, OFLC posted details of the process for applying for those H-2Bs. This will result in an increase in workload for OFLC, and this increased workload is likely to affect other OFLC programs such as prevailing wage determinations and PERM.

OFLC is also continuing to move forward with its efforts to provide a revised ETA Form 9035 Labor Condition Application. On May 24, 2018, the revised LCA was provided in the Federal Register with a new 30-day comment period so that the Office of Management and Budget (“OMB”) can receive comments on the revised form. As there is currently an open comment period, OFLC is not able to make further comments on the

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<sup>1</sup> These notes from the June 5, 2018 DOL OFLC Quarterly Stakeholder Meeting are a compilation of notes taken by members of AILA’s DOL Liaison Committee during the meeting and are not an official record of the meeting, nor have they been endorsed or approved by DOL.

revision to the LCA. OFLC is still targeting a rollout of late summer 2018 for the new form and is still planning a phase-in period where the current version of the form will still be accepted, as discussed in the March DOL Stakeholder meeting.

DOL, Department of Agriculture, Department of State, and DHS are having initial conversations about potential modernization of the H-2A program. To the extent changes are made to the program, DOL will go through the normal regulatory process to propose and implement those changes. DOL is unable to speculate on what, if any, changes may occur.

As noted in previous stakeholder meetings, DOL received a one-time \$20 million appropriation to utilize in H-2 processing and will be able to continue to use these resources through the January 2019 filing period. At that time, however, the funds will have been exhausted and without further appropriations, OFLC will have a major reduction in resources. This will be an operating budget reduction of 17% of OFLC's overall budget and will have a substantial impact on all programs. Total applications of all types received by OFLC was approximately 887,000 in FY2017, 917,000 in FY2018, and 1.07 million in FY2019. Current processing times will be difficult to maintain once the \$20 million of one-time funding is exhausted. The proposal for DOL to gain statutory authority remains in the President's budget proposal, but even if this authority is obtained there is still likely to be a period of at least a couple of years to establish, implement, and collect fees. Given this, processing times are likely to be affected, particularly in FY2020.

The ETA Form 9141 Prevailing Wage Determination Request is due to expire in May 2019. DOL does intend to make substantive revisions to that form through the regulatory process but cannot comment further on what changes may be made.

Although the OFLC website reflects certain longstanding policy memoranda as "cancelled," including the 1994 Barbara Famer memo<sup>2</sup> and GAL 2-98<sup>3</sup>, there have been no changes regarding policy from those memoranda. OFLC will continue to utilize the guidance in these memoranda as they have done for the past several years. The website designation is simply a routine technology process and was not intended as any indication of a policy change. OFLC will not be making an official statement regarding this confirmation, given the administrative aspect of the designation.

### **Stakeholder Questions**

- 1. System Updates.** Does OFLC have any plans for significant upgrades or outages to the iCERT or PERM systems during the next quarter?

**DOL Response:** There are no major system changes planned, but OFLC has been continuing to release updates to both iCert and the PERM CMS to enhance the user

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<sup>2</sup> Policy Guidance on Alien Labor Certification Issues, Field Memorandum No. 48-04, available at [https://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=289](https://wdr.doleta.gov/directives/corr_doc.cfm?docn=289).

<sup>3</sup> Prevailing Wage Policy for Nonagricultural Immigration Programs, General Administration Letter No. 2-98, available at [http://www.flcdatacenter.com/download/npwhc\\_guidance\\_revised\\_11\\_2009.pdf](http://www.flcdatacenter.com/download/npwhc_guidance_revised_11_2009.pdf).

experience with those systems. Some of these system changes also improve efficiency for OFLC analysts processing cases. To the extent there are outages, they will be announced in advance, if known, and are usually done after 8 p.m. Eastern time. Note that OES Wage Updates are scheduled to be implemented on July 1, 2018, which will involve taking the OES wage site down for several hours to import the new wage data the evening of June 30, 2018.

- 2. 2018 SOC Implementation.** During the March 2018 stakeholder meeting, we discussed the BLS 2018 SOC process and OFLC indicated that it is actively in discussions with O\*NET regarding the process of implementing the SOC 2018 revisions. Can you please update us on the nature and frequency of these conversations? In these conversations, has OFLC established any new procedures, processes, or timelines regarding the 2018 SOC implementation.

**DOL Response:** OFLC meets with O\*NET as needed relating to SOC changes but does not maintain a specific scheduled series of meetings. As new data becomes available from the SOC 2018 revision, those will be implemented into the OES wage database and will be utilized in issuing prevailing wage determinations. Note, however, that it takes BLS several years to gather sufficient wage data for new occupations created by an SOC revision, and it will likely be FY2020 before there is wage data available on OES for some of the new occupations created by the SOC 2018 revision. Until there is wage data, OFLC will continue to use existing occupational categories in processing prevailing wage determination requests. OFLC does not intend to make occupational changes on a piecemeal basis. Instead, to the extent that wage data becomes available for new occupations, those will be added each July 1<sup>st</sup>, when OES annual wage updates are normally implemented. Occupations won't be replaced or deleted from the OES wage database one-by-one during the course of the years.

### **H-1B: Labor Condition Application**

- 3. Independent Authoritative Prevailing Wage Sources.** Recently, USCIS has started to issue requests for evidence on H-1B petitions which question the validity of the independent authoritative prevailing wage source that was used in obtaining approval of a Labor Condition Application from the DOL, and is denying H-1B petitions based on inadequate alternative prevailing wage survey data. Has USCIS had any interactions or discussions with DOL on the topic of independent authoritative prevailing wage sources?

**DOL Response:** DOL has had some interaction with USCIS on prevailing wage issues, but there is no formal engagement. When USCIS reaches out to DOL with questions about wage or other issues, DOL responds to those questions. DOL is aware of the adjudications relating to independent authoritative prevailing wage sources but is not involved in USCIS adjudications.

## **PERM: Processing, Audits, and Denials**

4. **PERM Attachments.** We have received reports that some certified PERMs do not include the necessary attachments (if job descriptions extend beyond the character limit to be included on the form itself). The attachments are also not accessible in the online system, even though the system-generated “see attachment” text appears for each case in section H.11. (A-17250-84562, A-17234-78757, and A-17234-78860).
- a. Has this issue been corrected in the CMS?
  - b. Can you describe the process by which employers can obtain a corrected/completed version of the PERM?

**DOL Response:** OFLC is reviewing the examples provided to determine if there is a system issue and has already addressed those specific cases. The Technical Help Desk is available to correct problems with forms that are caused by a malfunction of the CMS. Stakeholders are reminded that once an application is submitted, the attorney or employer should immediately review the PDF version of the ETA Form 9089 that is available in the system and should print out this form to check for formatting problems or missing information. If the system caused a problem, the Technical Help Desk can assist with making a correction. While there has been something of a slowdown in response times from the Technical Help Desk due to an increase in inquiries relating to password resets, you should still receive a response within a few days at most.

5. **PERM Audit Rate.** Members have recently begun reporting what appears to be an increase in the PERM audit rate. Has there been a decision to increase the percentage of cases selected for audit? If so, does OFLC anticipate that processing times for audited cases will increase?

**DOL Response:** There has not been a policy decision to increase the audit rate, but due to the shifting of staff for the most recent round of H-2 processing, staff was not reviewing newly filed PERM cases to select PERMs for audits. Now that staff has shifted back to PERM processing, those cases are being reviewed and audits are being issued on some cases at the same time newly filed cases are being reviewed, so this may cause it to appear that there is an increase in the audit rate.

When an audit is issued, stakeholders are reminded that only the items requested in the audit need to be provided. Attorneys and employers are also strongly encouraged to utilize the upload functionality in the PERM CMS to respond to audits rather than e-mailing audit responses or sending them via mail or courier. Using the CMS upload feature increases processing efficiency and provides an instant confirmation that the audit response has been received.

To the extent that an audit requests documentation that the attorney or employer believes is inappropriate or impossible to provide, the response should be as complete as possible and an explanation should be included as to why the

additional documents are not required or are not possible to obtain.

**AILA NOTE:** Responses to an informal survey conducted by AILA's DOL Liaison Committee indicate that the audit rate has increased dramatically, with many members reporting a significant increase in the number of audits received in the last three months as compared to prior three-month periods. This would not appear to be fully explained by the workload shift described by OFLC. AILA also encourages members to report any inappropriate audit requests to [AILA's DOL Liaison Committee](#), such as audits requesting a full list of stockholders for publicly traded companies or other requests for what appears to be excessive documentation. AILA further strongly encourages all members to upload audit responses using the CMS, because as noted in the introductory notes, the efficiency for OFLC of using the CMS will help keep processing times as low as possible.

- 6. Account Password Expiration Warning Alerts.** At the March 2018 stakeholder meeting, OFLC indicated that employers and attorneys would be receiving "Account Password Expiration Warning" alerts if the passwords were more than 90 days old and that the accounts would be disabled.
- a. While the alerts include the password, would it be possible for the alerts to include the name of the employer to assist users in knowing which particular account is in question?
  - b. Can you confirm whether the 90-day clock starts from creation of the password or from the last use? In either situation, would it be possible to have the clock extended beyond 90 days? This is recommended because it is common for an employer to have a password created before the prevailing wage determination is obtained and before the recruitment has been completed, the duration of which could easily extend beyond 90 days.

**DOL Response:** The password reset requirement is mandated by federal government technology standards and is not within the control of OFLC. The 90-day clock starts from the date the password was last modified, not from the date of last use. In the course of its system reviews and maintenance, OFLC noted that certain password reset requirements were not being enforced by the system. This has been corrected and this is resulting in the increased number of e-mails regarding password resets. OFLC will look into adding employer name information to the reset e-mails to assist attorneys and employers with this process. OFLC is also adding staff to the Technical Help Desk to provide more timely assistance.

- 7. PERM Advertisement Rates.** In response to requests for price reductions for newspaper advertisements for PERM applications, some newspapers have stated that PERM application advertisement rates are "filed" with the DOL and cannot be modified. We are not aware of any DOL regulation or other form of guidance that would mandate a particular price for PERM advertisements.
- a. Has DOL issued any such guidance?
  - b. Does it receive information from newspapers regarding prices for PERM

- advertisements?
- c. If not, is this a state-level SWA mandate?

**DOL Response:** DOL has not issued any such guidance to newspapers, not does it gather information regarding prices for PERM advertisement. DOL is not aware of any state-specific mandates on these issues, but stakeholders in particular states affected by this issue may wish to reach out to the state SWA for additional guidance.

- 8. Employee Referral Programs.** BALCA recently issued a series of decisions overturning PERM denials issued on the basis of what the Certifying Officer (CO) concluded were insufficient employee referral programs. *See Matter of Gap Inc.*, 2017-PER-00108 (April 20, 2018), *Matter of FMR LLC*, 2016-PER-00647, 2016-PER-00645, 2016-PER-00484, 2016-PER-00305 (April 20, 2018), *Matter of Warner Bros. Home Entertainment Inc.*, 2016-PER-00367 (April 20, 2018). In light of these decisions, please confirm that OFLC is following its FAQ and these BALCA decisions on assessing employee referral programs, and that an employee referral program is sufficient as long as it (1) offers incentives, (2) is in effect during the recruitment period, and (3) notifies employees of the job opportunity. Please also confirm that an employee referral program need not have existed for any particular amount of time prior to the recruitment period to be sufficient under the regulations.

**DOL Response:** OFLC reviews and considers all BALCA decisions and considers whether adjudication policy changes are warranted in light of those decisions. It is OFLC's policy to accept an employee referral program as long as it (1) offers incentives, (2) is in effect during the recruitment period, and (3) notifies employees of the job opportunity. There are no requirements beyond these three mandatory elements.

- 9. Local Newspaper Advertisements.** BALCA has recently issued a number of decisions on the topic of local newspaper advertisements, and has confirmed that the local newspaper advertisement need only be placed in an "appropriate" newspaper and not necessarily the newspaper that would most likely bring the most responses from available U.S. workers. *See Matter of System Soft Technologies LLC*, 2013-PER-01328, 2013-PER-01086 (April 24, 2018), *Matter of Lennox International Inc. & All Subsidiaries & Affiliates*, 2013-PER-00884 (April 24, 2018). Please confirm that OFLC is following these decisions, and please describe how OFLC determines whether a local newspaper is an "appropriate" newspaper.

**DOL Response:** OFLC reviews and considers all BALCA decisions and considers whether adjudication policy changes are warranted in light of those decisions. Consistent with the decisions noted and the regulatory language, OFLC will evaluate a local newspaper to determine if it is appropriate for the job opportunity. The regulations do not require that the local newspaper be one that would most likely bring the most responses from available U.S. workers.

**10. Duplicate Application Warnings.** Stakeholders have noticed in completing ETA Form 9089 that there now is an alert warning that an employer may have an application already pending with OFLC and that duplicate applications will be denied.

- a. Can you inform us as to what fields are compared in the generation of such an alert?
- b. If the system does believe that duplicate applications are pending, will OFLC issue an audit rather than a denial to allow the employer an opportunity to clarify whether there are indeed duplicates?
- c. If an employer receives such an alert, is there a process by which the employer could provide information to have this clarified prior to submitting (or even after) the ETA Form 9089 to maintain efficiency and avoid using additional resources? For instance, immediately after filing the application could the employer use the upload feature of the CMS to provide clarification?

**DOL Response:** The warning is an enhancement to the CMS simply to provide filers with notification that the system is flagging an existing duplicate application. The application will not be denied based on the alert warning, but instead OFLC will continue to follow its normal policy of issuing an e-mail or RFI to the employer and attorney allowing them to explain why the applications are not duplicates or alternatively providing the option of withdrawing one of the applications.

Note that if a denied PERM application has been appealed and is pending with BALCA, a new filing for the same position and the same beneficiary by the same employer will be denied without issuance of an RFI or other notification. The appeal must be withdrawn before the new filing can be submitted. If the system has not updated to show the withdrawal, it is helpful to immediately upload to the CMS documentation showing the withdrawal request was made before the filing of the new application.

**11. Business Existence Verification Process.** During the March 2018 stakeholder meeting, it was mentioned that stakeholders have been experiencing continuing difficulty with the business existence verification process when an employer tries to create a PERM account. We continue to receive reports from our members of long delays in the process, and often, denials of registration. We understand that OFLC is receiving a lot of requests and therefore we have asked our members to start the registration process as soon as possible.

- a. To save employers the frustration of denials and potentially having to register multiple times, and to save on your resources, what tips can you provide employers with respect to completing the business existence verification process? Are there problem areas that keep occurring? <sup>[1]</sup><sub>[SEP]</sub>
- b. Is there anything that an employer could do proactively to avoid processing delays or denials?
- c. We were told that waiting at least 30 days for a response is normal. Do you

expect such wait times to decrease at all?

- d. Please confirm that if your office is not able to verify business existence on a mailed-in application, your office will issue an audit with a specific document request so that the employer can respond with the necessary documents.

**DOL Response:** OFLC recognizes that business existence verification remains a major concern for stakeholders and is focused on improving this process. OFLC receives approximately 600 to 700 new employer registrations each week, and attempts to verify those registrations against its existing records. Where business existence verification documentation is requested, OFLC will compare the information provided by the employer in the registration to the underlying documents provided. It is important that the company name, address, FEIN and other information matches the documentation provided to have the registration approved.

Please note that although the business existence verification e-mail comes from the [plc.help@dol.gov](mailto:plc.help@dol.gov) e-mail address, all documents relating to business existence should always be sent to [BE-RFI.Atlanta@dol.gov](mailto:BE-RFI.Atlanta@dol.gov) . If you simply reply to the [plc.help@dol.gov](mailto:plc.help@dol.gov) e-mail address, that Help Desk needs to forward the information to the business existence team and this delays the process.

The longest pending business existence verification request that was pending as of June 5, 2018 was submitted in mid-April 2018. These are generally resolved within 30 days. Submitting a new registration while an existing registration is in process causes delays to the process, so a new registration attempt should not be made simply because an existing registration request is pending.

The majority of Congressional inquiries on individual cases received by OFLC relate to business existence verification issues. However, even with a Congressional inquiry, the process remains the same. The employer needs to submit the required documents and OFLC needs to conduct its review, so submitting a Congressional inquiry on a pending business existence verification simply diverts resources from the business existence verification team and does not change what is required nor does it affect the outcome of a registration request.

If business existence verification cannot be completed in time to meet a filing deadline, employers have the option to submit the application via mail. It is possible, but not mandatory, that the case will be audited or that an RFI will be issued seeking business existence verification. As always, employer are encouraged to begin the PERM account registration process well before any filing deadlines to ensure sufficient time for business existence to be completed.

**AILA Note:** In the discussion during the Stakeholder Meeting, AILA asked whether OFLC would consider modifying its process to allow attorneys to register

their clients directly on the system, rather than mandating that employers create the registration themselves. AILA pointed out that this could ensure more accurate completion of the registration information and reduce business existence verification issues. OFLC agreed to consider this request but could not provide a definitive answer at this time.

**12. Requests for Reconsideration (RFR) Based on Government Error.** OFLC has previously indicated that there is no RFR Government Error Queue. However, is there a way to get the attention of the CO when there is a clear government error so that a PERM approval is not delayed in the RFR queue? For example, AILA received a report that a member responded to an audit through the CMS system and the PERM application was denied for failure to respond to the audit. The member could show that the response was properly uploaded in the system. While we understand that the RFR queue is only a few months, this can make a major difference for time critical cases, such as those where an approved I-140 petition is needed to allow for extension of an employee’s H-1B status.

**DOL Response:** OFLC endeavors to keep the RFR queue as short as possible, and reconsideration requests are normally reviewed within 3 months. Because of limitations on resources, OFLC is not able to provide a mechanism to expedite this review process.

**13. Original Certified ETA Form 9089 Not Received in the Mail.** Some AILA members have recently been reporting that they are not receiving the original certified ETA Form 9089 in the mail after receiving the certification e-mail. In some cases, the original certified ETA Form 9089 is being sent to the employer rather than the attorney of record; or, the original certified ETA Form 9089 is being sent to incorrect law firms. A sampling of 10 cases where this has occurred include the following:

ETA Case Number	Date of Certification
A-17318-10267	Certified 04/27/2018
A-17341-18654	Certified 04/25/2018
A-17286-98365	Certified 04/18/2018
A-17303-04406	Certified 04/16/2018

A-17311-08019	Certified 04/06/2018
A-17334-16045	Certified 04/5/2018
A-17334-15624	Certified 04/5/2018
A-17286-98501	Certified 03/26/2018
A-17292-00435	Certified 03/26/2018
A-17293-01146	Certified 03/8/2018

- a. Is there an issue in the mail room causing address issues?
- b. When an original certified ETA Form 9089 is not received by an employer or an employer's representative, a copy of the ETA Form 9089 must be filed with the Form I-140 Immigrant Petition, USCIS then requests a copy of the certified ETA Form 9089 PERM from DOL. How long does it take DOL to comply with a request from USCIS for a copy of a certified ETA Form 9089?
- c. In general, how many such requests does DOL receive per year from USCIS?

**DOL Response:** There was a mailroom error that caused certain PERM applications to be sent to the wrong address. In some instances, the original certified PERM application was sent to the employer rather than to the attorney of record, and in some instances the original was not sent. OFLC will review the examples provided by AILA to determine whether they were affected by this mailroom error. If the original PERM was not sent to either the employer or the attorney of record, OFLC will re-issue an original certified PERM application. Attorneys or employers who have not received the original certified PERM should e-mail the main Help Desk at [plc.atlanta@dol.gov](mailto:plc.atlanta@dol.gov).

If the I-140 immigrant petition is filed with the box checked instructing USCIS to request a duplicate original PERM from DOL, USCIS will make the request when processing the I-140 and DOL will provide the duplicate original directly to USCIS. OFLC agreed to look into changing the transmission of this document so that the employer and attorney-of-record are notified when the duplicate PERM is sent to USCIS.

**AILA Note:** AILA's DOL Liaison Committee has forwarded to OFLC all case examples submitted through AILA's Call for Examples (*see* AILA Doc. No. 18042406). OFLC has agreed to review those cases to determine where the original PERM was mailed. DOL Liaison Committee will post an update to

members once we receive a response from OFLC on these cases.

**14. Cover Letter for Certified ETA Form 9089.** When OFLC certifies an ETA Form 9089, it sends the certified original form to the attorney of record with a cover letter indicating that the certified ETA Form 9089 is enclosed. However, OFLC also sends an identical letter to the sponsoring employer listed on the form, i.e., the employer's letter *also* indicates that the certified ETA Form 9089 is enclosed, even though it is not. This leads to confusion among employers who are concerned that the certified ETA Form 9089 has been omitted or lost. Would it be possible for OFLC to modify the language in its employer cover letter to indicate that the certified ETA Form 9089 is either enclosed or, where the employer is represented by counsel, has been sent to the counsel indicated on the ETA Form 9089?

**DOL Response:** OFLC recognizes the concern that this can be confusing, and will look into whether this can be changed. The letter is auto-generated so it may not be possible to correct this without a larger system change, but OFLC will review whether a change is possible with the existing system.

**15. Cut Off Text in Sections of 9089.** The Permanent Online System User Guide indicates that users should limit the characters in section H.14 to 4,000 characters. However, practitioners have been noticing lately instances where the text in section H.14 does not roll into an addendum, but rather cuts off text rendering the printed version unreadable for the cut off text. This is problematic when attorneys file the Form I-140 petition with USCIS as part of the text is cut off. Can OFLC confirm that as long as attorneys are honoring the 4,000 character limit, the system will roll any text that is omitted from section H.14 into an <sup>[1]</sup><sub>SEP</sub> addendum so that all stated requirements are legible on the certified ETA Form 9089? If attorneys are receiving a certified ETA Form 9089 that has cut off text in section H.14, what is the best way to obtain a corrected ETA Form 9089?

**DOL Response:** OFLC will review whether the system can be modified to ensure that additional text automatically rolls onto an addendum for all parts of the ETA Form 9089. Please see the response to Question #4 above regarding situations where the Technical Help Desk can assist with this kind of issue.

### **Prevailing Wage Questions**

**16.** OFLC frequently determines that a Clinical faculty position is a combination of occupations between Health Specialties Teacher, Postsecondary (25-1071) and the relevant medical area (e.g. Dentistry, Surgery, Vet. Medicine). (e.g.: P-100-16306-689085, P-100-17199-547991) However, the O\*Net Online “work activities” description includes “Assisting and Caring for Others — Providing personal assistance, medical attention, emotional support, or other personal care to others such as coworkers, customers, or patients.” Furthermore, the “knowledge” section includes “Medicine and Dentistry — Knowledge of the information and techniques needed to diagnose and treat human injuries, diseases, and deformities. This

includes symptoms, treatment alternatives, drug properties and interactions, and preventive health-care measures.” Finally, the sample of reported job titles include, among others, “Clinical Professor.” The Health Specialties Teacher, Postsecondary occupation appears to contemplate all relevant duties for these clinical faculty positions; these positions are not true combinations of occupations.

Why does OFLC generally consider these positions combinations of occupations?

**DOL Response:** Where there are significant portions of the job description that overlap more than one occupational category, the NPWC will find that to be a combination of occupations for prevailing wage purposes. The wage analyst reviews the job duties provided and compares those duties to the standard description within O\*NET, and if the job description combines major duties from more than one occupation it will be viewed as a combination of occupations.

**17. Usage of 3rd party/employer-provided surveys.** The criteria that employer-provided surveys must meet are described in the 2009 Guidance. At previous DOL Stakeholder Meetings, it has been discussed that the OFLC has been declining to accept surveys if the survey is industry specific, unless it is documented that the surveyed occupation is industry specific. In 2015, BALCA confirmed that this “cross industry” requirement does not apply to industries covered by ACWIA.

Can you discuss how the OFLC is implementing the University of Michigan (2015-PWD-00006) decision?

**DOL Response:** OFLC is aware of the decision in *Matter of University of Michigan*, but has not made any changes to its prevailing wage determination processing in light of that decision at this time.

**18. Prevailing Wage Analysts Choosing Between Similar Occupations.** A number of occupations in the OES Wage Survey have at least a partial overlap in terms of job duty descriptions. For instance, the occupation of 15-1121 Computer Systems Analyst (“implement and improve computer systems... [and] analyze user requirements, procedures, and problems...”) shares description similarities with 15-1133 Software Developers, Systems (“Research, design, develop, and test operating systems-level software... [and] analyze software requirements...”). Could you describe the process used by a Prevailing Wage Analyst to choose between similar occupations? Is there information that the employer can provide with the ETA Form 9141 if it believes a particular occupational classification is not the appropriate classification rather than waiting to file a Request for Redetermination?

Similarly, often sections H.4-B (Major Field of Study) and section K-5 (Job Title) often cut off the text. Is the best remedy to enter “see H.14” into H.4-B, and, “see K.9” into Section K- 5, to ensure the complete requirements are displayed in the certified ETA Form 9089?

**DOL Response:** The wage analyst begins the process by reviewing the job

description provided by the employer and comparing it to occupational descriptions provided in O\*NET. If more than one occupation from O\*NET captures a majority of the described job duties, the wage analyst will review the potential occupational classifications to choose the best match based upon the totality of the information presented. If the employer disagrees with the occupational category determined in the prevailing wage determination, the employer has the option of filing a Request for Redetermination.

- 19. Requests for Redetermination based on Occupational Category Assigned.** Has the NPWC seen a significant increase in Requests for Redetermination relating solely to the occupational category assigned to a prevailing wage determination rather than the wage level assigned?

**DOL Response:** The NPWC has seen a small uptick in Requests for Redetermination focused solely on the occupational category. Overall, however, Request for Redetermination volume is very low and appears to be decreasing.

- 20. Increase in Prevailing Wage Determination Requests.** Has the NPWC seen any significant increase in prevailing wage determination requests relating to H-1B petitions? In particular, has there been an increase in requests for prevailing wage determinations where the employer is relying on a private wage survey?

**DOL Response:** Prevailing wage determination requests for H-1B petitions have increased by 40% compared to the same time last year, but still total volume very low. There has not been a noticeable uptick in prevailing wage determination requests for H-1Bs that specifically reference a private wage survey.

- 21. Job Zones vs. Specific Vocational Preparation (SVP) Ranges and Effect on Prevailing Wage Determinations.** In October 2015, and again in December 2017, AILA raised a question about the interpretation of the SVP level for an occupation assigned "Job Zone 4." The interpretation of an SVP of 7 < 8 is important in the prevailing wage determination context, as well as for determining whether the job requirements are "normal" for purposes of business necessity. At that time, DOL specified that it would review the existing interpretation to understand the rationale behind the current policy interpretation.<sup>[1]</sup> Specifically, the question and answer from the October 20, 2015, OFLC stakeholder meeting follows:

*Question: We understand from the FAQ posted at <https://www.onetcenter.org/questions/19.html> that "Job Zones were developed to transition from SVP, as shown in the DOT, to measures of experience, education, and job training included in the O\*NET database." In determining whether requirements are normal for an occupation, we understand the NPWC reviews, among other factors, the Job Zone for the occupation to determine whether the years of experience required for the position will increase the prevailing wage but it is not clear what weight, if any, analysts continue to provide to the underlying SVP. The SVP provided ranges and thus more flexibility regarding what would be*

*considered normal than the measures of experience, education, and job training included in the O\*NET database. For example, an SVP level designated “7 < 8” would include 2-10 years of SVP, while the Job Zone in many cases simply chose the lowest set of requirements and would place this in Job Zone 4. This results in a higher prevailing wage determination whenever more experience than just the very bottom end of the range, in this example 2 years, would dictate. For many decades, employers relied on the SVP levels set forth in the Dictionary of Occupational Titles (DOT) until 2003 when 12,000 DOT job codes were aggregated into 1,222 O\*NET “occupational units,” or OUs. In the process, the SVP level for many of the individual occupations incorporated in the new OUs was downgraded due to (1) the averaging of the SVP for a group of DOT occupations which made up the OU and (2) the assignment of a generic job zone to the O\*NET OU. (See attached example of Mechanical Engineer, including ten related occupations, all SVP 8 in the DOT, subsequently cross-walked to an O\*NET classification as Job Zone 4 resulting in SVP 7. See also the detailed explanation of the conversion of DOT SVP to the O\*NET in “Stratifying Occupational Units by Specific Vocational Preparation (SVP)” by F. Oswald et al, at [http://www.onetcenter.org/dl\\_files/SVP.pdf](http://www.onetcenter.org/dl_files/SVP.pdf)). Could you clarify what weight analysts apply to the underlying SVP range in determining whether requirements are normal* <sup>[SEP]</sup>

*DOL Response: NPWC indicated that SVP characterizations were used with the Dictionary of Occupational Title (DOT) which has not been updated since 1994, and that they are governed by the O\*Net Job Zones. Points are assigned consistent with the 2009 Prevailing Wage Guidance memo for job duties or requirements that exceed the norm. However, NPWC will review the “7 < 8” translation of the SVP into Job Zones to better understand the underlying reasoning and whether that should affect whether requirements are considered normal for a given occupation.*

Please provide an update on NPWC’s review of this issue, as prevailing wage determinations appear to continue to add a point to the wage level whenever experience requirements are anywhere above the very bottom of the range.

**DOL Response:** The NPWC has reviewed this issue and has elected not to make any change to its policy at this time.