



August 26, 2011

The Honorable Hilda Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington, DC 20210

RE: Interim Solutions to Prevailing Wage Determination Suspension

Dear Madame Secretary:

ACIP, CUPHR and SHRM write this letter to request your assistance in correcting a recent problem with the processing of prevailing wage determinations (PWDs) within the Office of Foreign Labor Certification (OFLC) at the Department of Labor (DOL). In July, OFLC suspended processing PWDs of all cases not affected by the court order set forth in *CATA v. Solis*, 2010 WL 3431761 (E.D. Pa. August 30, 2010). The unintended consequence of this action is that some American employers may be unable to obtain permanent residence for foreign national employees in whom they have invested significant resources. We believe DOL must balance its statutory obligation to provide PWDs in a timely manner for all American employers with the court order. Below, we propose two interim solutions that will not require waiver of any regulatory obligations and will allow DOL to continue to perform its duties as required by the statute.

ACIP, CUPAHR and SHRM Background

The American Council on International Personnel (ACIP) is a not-for-profit trade association comprised of over 200 corporations, universities and research institutions with an interest in the movement of personnel across national borders. Each of our members employs at least 500 employees worldwide, and in total, ACIP members employ millions of U.S. citizens and foreign nationals in all industries throughout the United States. ACIP sponsors seminars and produces publications aimed at educating human resource and legal professionals on compliance with immigration and employment verification laws, while working with Congress and the Executive Branch to facilitate the movement of international personnel.

The College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 13,000 HR professionals at over 1,700 colleges and universities across the country, including close to

90 percent of all U.S. doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and almost 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource professionals and advances the interests of the human resource profession. Founded in 1948, the Society has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

CATA v. Solis

In *CATA v. Solis*, the U.S. District Court for the Eastern District of Pennsylvania ordered DOL to "promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the APA...." In accordance with the court order, DOL published a new H-2B wage rule on January 19, 2011 which included a new wage methodology to apply to all H-2B work performed on or after January 1, 2012. The court subsequently ordered DOL to move up the effective date of the rule. DOL issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which changed the effective date from January 1, 2012 to September 30, 2011 for all H-2B work performed on or after that date. Consequently, OFLC must reissue approximately 4,000 H-2B prevailing wage determinations to reflect the new effective date of the rule. In July, OFLC stated that it had suspended processing of all other PWDs until it was able to reissue all of the affected H-2B PWDs. In addition to H-2B nonimmigrant petitions, OFLC issues PWDs for the permanent labor certification program and for H-1B, E-3 and H-1B1 nonimmigrant petitions.

Impact on Employers

Each of our organizations has many members whose business operations have been detrimentally impacted by the PWD suspension. In the permanent labor certification context, obtaining a PWD is mandatory and thus the suspension of PWD issuance has completely prevented employers from being able to test the labor market and to determine whether U.S. workers are able, qualified, willing and available for a position, as required by statute (INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A)).

Many other negative results flow from employers' inability to obtain a PWD from OFLC, including the following:

- Dependent children who will soon be 21 years old may be unable to obtain immigrant status with their foreign national parents;
- Employers may be unable to extend foreign workers' H-1B status, resulting in significant loss of productivity and potential expense in sending those workers abroad for a period of time;

- Employers of H-1B, E-3 and H-1B1 nonimmigrants who are unable to obtain a PWD from OFLC lose the “safe harbor” that accompanies a DOL-issued PWD;
- Under a special permanent labor certification process, many colleges and universities are unable to file permanent labor certification applications within the 18-month window following appointment of a faculty member;
- Employers who have conducted all of the required recruitment for the permanent labor certification program may be unable to file the application within the required 180-day period following the first recruitment step; and
- Foreign nationals are unable to “lock in” a green card priority date, which is assigned upon filing of a permanent labor certification application, for visa allocation purposes.

We understand that DOL must allocate resources to meet the *CATA v. Solis* court order, but we also believe that DOL must continue to meet its statutory obligation to process PWDs for other American employers as well. We believe these competing interests can be balanced and we recommend two reasonable and simple interim solutions below.

Recommended Solutions

We recommend the following two solutions that would enable DOL to meet its statutory and legal obligations to all employers. These solutions do not require waiver of DOL’s regulatory requirements or additional DOL staff resources.

1. Automatic Extension of Existing PWDs Issued by the NPWC

A prevailing wage issued by the national prevailing wage center (NPWC) "must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date." 20 CFR § 656.40(c); see also 20 CFR § 655.731 (a)(2)(ii)(A). DOL routinely issues PWDs for a validity period ending June 30th of each year with a maximum period of 1 year. ACIP recommends that DOL extend the validity of all PWDs issued April 1, 2011 or later for an additional 120 to 180 days. With this solution in place, a PWD issued on April 1, 2011 that was originally valid until June 30, 2011, would be automatically extended through December 27, 2011. The total validity period would remain well under the one-year regulatory limit but would enable employers to continue filing applications. An automatic extension would not require DOL to waive any regulatory requirements, provided that the extended end date did not exceed one year from the original issuance date.

For the permanent labor certification program, employers could list the extended validity period in Section F of the Form ETA 9089 and document the audit file to show the extended validity of the PWD. In the nonimmigrant context, employers could put an addendum in the H-1B, E-3 or H-1B1 public access file. While this solution would not provide relief for all affected employers, it would ease the difficulty many employers are currently facing. This solution would also require no additional resources at DOL and could be announced to employers without APA notice and comment.

2. Allow Employers to Begin Recruitment with Reasonable PWDs

In the permanent labor certification context, the DOL could also allow employers to make their own reasonable PWDs and recruit based on that determination without waiving regulatory requirements. The regulations require an employer to "request" a PWD from the NPWC. See 20 CFR § 656.40(a). The regulations state the following: "To use a prevailing wage rate provided by the NPWC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 of this part within the validity period specified by the NPWC." While the regulations require an employer to "request" a PWD from the NPWC, they do not specifically require an employer to use a PWD issued by the NPWC in filing the application. In practice, DOL will only accept a PWD issued by the NPWC, but such a requirement does not explicitly appear in the regulations. DOL could allow the employer to conduct recruitment with its own reasonable PWD -- described in detail below -- without waiving any regulatory requirements.

This solution would provide substantial relief to employers and would effectively allow the permanent labor certification process to proceed despite this suspension. Additional DOL resources would not be necessary to implement this solution, only notice to and training of existing DOL staff to conduct the simple analysis below to determine whether an employer's PWD was reasonable.

Step 1: Allow employers to make their own PWDs and document those in the audit file during this time while DOL has suspended issuing PWDs on non-H2B cases. Employers must still submit a prevailing wage request to the NPWC. The employer is required to begin recruitment or file the Form ETA 9089 after it makes the PWD, in the same way it would with the NPWC PWD. Filing the Form ETA 9089 could be accomplished by putting a specific notation in Section F.

Step 2: Once the DOL PWD is issued, the employer will add the NPWC PWD in the audit file and is required to pay that salary upon grant of permanent residence, subject to Step 3.

Step 3: In reviewing an audit response, DOL can determine whether the employer's PWD was "reasonable" using the following analysis:

1. If DOL's PWD is lower than the employer's PWD, the difference will be considered harmless, no further inquiry required.
2. If DOL's PWD is higher, then DOL conducts the following analysis to determine if the employer's PWD was reasonable:
 - a) Prior PWD -- If an employer relies on a prior PWD for the same position with the same requirements to find the OES wage (may require crosswalk to new SOC codes), then the employer's PWD will be deemed reasonable. No further inquiry required.
 - b) Where the employer does not rely on a prior PWD, there are two components:

- i) Wage level -- if an employer is within 1 wage level of DOL's PWD, then the level will be considered reasonable.
- ii) SOC code -- the employer's selection of an SOC code will be presumed to be reasonable, DOL would need to show that the SOC Code was entirely inappropriate based on the job description. If DOL finds that the SOC Code selection was inappropriate, then the employer's selection would still be determined to be harmless if the employer's PWD is within 15% of the PWD issued by DOL.

We appreciate the opportunity to offer these simple and reasonable solutions to the current PWD problem and would welcome the opportunity to discuss our recommendations further. We look forward to a resolution of this important matter.

Sincerely,



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Executive Director
ACIP



Joshua A. Ulman
Chief Government Relations Officer
CUPAHR



Michael P. Aitken
Director, Government Affairs
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cc: Jane Oates, Assistant Secretary, Employment & Training Administration, DOL
M. Patricia Smith, Solicitor General, DOL
William (Bill) Carlson, Administrator, Office of Foreign Labor Certification, DOL