

## agency ALERT / By Matthew I. Hirsch

# DOL Backlog Reduction: Moving Toward Revolutionizing Labor Certification

Most of the information presented herein is based on discussions with officials at the DOL backlog reduction centers and specific published sources: the DOL Requests for Proposal; the TMS draft training manual; DOL memos; AILA/DOL Liaison Committee minutes; a DOL Liaison Committee site visit; published regulations; the TMS simulation study; the PriceWaterhouse report; statements made by Philadelphia BRC Director Steve Stefanko in local liaison meetings in spring 2004; and reasonable inferences drawn therefrom.

**E**MLOYERS AND IMMIGRATION ATTORNEYS are on the brink of a dramatic revolution in the labor certification system with the advent of new backlog reduction centers (BRCs) and now the Program Electronic Review Management System (PERM). The resources, facilities, and personnel already are in place to implement radical changes to the existing system. More so than any other change in the past 10 years, these changes will have a significant impact on our analysis of employment-based immigration options and strategies.

The Department of Labor (DOL) has implemented a workable plan to reduce the national backlog of approximately 300,000 applications for labor certification. By expressly providing for the use of centralized processing centers to perform the functions of both the state workforce agencies (SWAs) and the regional offices, DOL hopes "to achieve efficiencies and economies of scale," and, at the same time, achieve a greater consistency in the processing of these applications and in the legal standards applied to these applications.

### The Origins of Backlog Reduction

The Department of Labor's backlog reduction initiative originated with a study prepared for the Employment and Training Administration (ETA) by PriceWaterhouseCoopers. That 75-page report, entitled "Management Review of the Permanent Labor Certification Process,"<sup>1</sup> was issued in January 2002. At that time, it was marked "Not for Circulation."

At the time the report was being prepared, DOL was just beginning to experience the overwhelming impact of the sunset date for INA §245(i) on SWAs

and the labor certification process. The stated aim of the report was to conduct a high-level management review and recommend short-term program improvements aimed at reducing a nationwide backlog of 325,000 applications for alien employment certification. By the time the report was commissioned and issued, the ETA had counted a backlog of 301,400 applications at the SWAs and another 24,200 applications in process at the regional certifying offices. The report estimated that under the existing system, it would take \$88.3 million and an additional staff of 1,000 analysts to complete the processing of applications within a one-year timeframe.

### Recommendations

After reviewing the current system, meeting with certifying officers and SWA case analysts, and assessing a number of alternatives, the consultant recommended developing a re-engineered process for permanent labor certification that would include—as its main features—centralizing the labor certification process to improve efficiencies and generate cost savings; using

contractors for nearly all intake, processing, and review; increased standardization of application processing; and the use of newly created automated information systems for data storage and processing. Thus, from this management review, backlog reduction was born.

As part of the process, DOL also commissioned a simulation study by Technology & Management Services, Inc. (TMS),<sup>2</sup> which looked at the then-existing process for handling applications and offered a number of recommendations for improving data entry; reducing errors; eliminating manual processes; increasing the use of automated systems; enhancing quality control; and for otherwise streamlining the workflow. As part of its contract with the ETA, TMS also prepared and delivered a "draft training manual,"<sup>3</sup> which, when finalized, was intended to introduce contractor employees to the labor certification process and to train them on all of the substantive requirements and procedural details of that process.

Based on the analysis and recommendations of the PriceWaterhouse report and the TMS simulation study, DOL prepared a request for proposal (RFP) for backlog elimination processing centers.<sup>4</sup> By September 2003, the agency was soliciting proposals to select a contractor to provide operations support for the Division of Foreign Labor Certification. According to the RFP, DOL was seeking an "efficient, highly productive, and cost

effective facility and organization for the processing of permanent labor certification applications beginning with receipt to certification or denial of the application by an onsite federal official.” The RFP required the establishment and staffing of two national processing centers and a proposed budget of about \$18 million over a two-year period.

#### **Awarding Contracts**

Within the next several months, after a series of amendments to the RFP, proposals from private contractors were received and reviewed. By June 2004, the pieces of the backlog reduction were in place. Team Exceed—a joint venture of Exceed Corporation, a Maryland-based government contractor, and DTI Corporation—received the contracts for establishing and operating the BRCs. Team Exceed has many relationships with the federal government including other contracts with DOL and with the Departments of Housing and Urban Development and Interior, among others.

An important factor underlying DOL's efforts at backlog reduction is its implementation of PERM. PERM will replace the traditional labor certification process under now existing regulations (20 CFR §656.20) with a new, Web-based automated system that relies primarily on employer attestation and the deterrence of post-filing audit. With PERM in place, DOL will no longer accept cases filed in the traditional manner. DOL does not intend to fund and staff two separate and distinct systems, with two distinct sets of procedures. Therefore, in order for PERM to supplant the existing system, DOL must make it a priority to eliminate the current backlog of traditional cases. Without backlog reduction, PERM cannot succeed.

#### **Implementing the Plan**

The interim regulation authorizing the implementation of the backlog reduction plan (69 Fed. Reg. 43715-719 (July 21, 2004) (AILA InfoNet Doc. No. 04072062) provided for a 30-day notice period and an

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effective date of August 20, 2004. The regulation has been implemented, directors of the BRCs have been hired, facilities have been leased, contractor teams are in place, and—since October 2004—the backlog reduction plan has been moving forward.

The regulation amends existing rules to supplement 20 CFR Part 656 with a new §656.24a that provides as follows:

(a) To facilitate processing of applications and elimination of backlogs, the National Certifying Officer (Chief, Division of Foreign Labor Certification) may direct a SWA or an ETA Regional Office to transfer to a non-State centralized processing site some or all pending applications filed under part 656. The Chief will issue a directive to the SWAs and ETA Regional Offices stating how pending applications are to be identified for centralized processing and where they are to be transferred. For each transferred application, the centralized processing site will perform all required functions of the SWA (as described in Sec. 656.21) and the Regional Certifying Officer (as described in Sec. 656.21 and Sec. 656.24).

As of the launch of the BRCs, DOL counted over 300,000 pending applications nationwide at the state and federal level; roughly 80 percent of which were situated at the SWAs, with the remaining 20 percent situated at nine regional certifying offices. Moreover, DOL reports that 87 percent of all backlog cases hail from nine states: California, Texas, New York, Florida, Virginia, New Jersey, Connecticut, Massachusetts, and Georgia.

To process the backlog as mandated by the RFP, two backlog reduction centers have been established and staffed—one in Dallas and one in Philadelphia. The directors of the BRCs are Steve Stefanko in Philadelphia and John Bartlett in Dallas. Both have been regional certifying officers with long histories with DOL and know the system inside and out. On November 19, 2004, DOL published a notice in the *Federal Register* with the addresses and contact numbers for the two centers. (AILA InfoNet Doc. No. 04112963).

The BRCs have been staffed by 100 newly hired contractor employees at each site. According to BRC officials, none of the newly hired contractors brings any prior experience with or understanding of labor certification. A few come from other government agencies or government contractors; most come from private industry. Their diversity of background and the industry-specific knowledge they bring to the job is likely to shape their view of the labor certification process in general, as well as the particular applications and occupations they are called upon to consider.

In addition to its other staff, each BRC has one site manager who reports to the center's director—as well as one deputy site manager and five team leaders, all of whom are employed by Team Exceed. Each BRC has roughly nine permanent or term DOL staff, most of whom have transferred over from the Philadelphia and Dallas certifying offices. These DOL employees will continue to be involved in traditional certifying officer (CO) functions such as processing of applications for temporary labor certifications for H-2A and H-2B nonimmigrants. In addition, DOL employees will continue to be responsible for final determinations on applications and will be involved in quality control and ongoing training of contractor staff.

#### **Backlog Reduction Begins**

The first task of the BRCs was the relocation of files from the certifying offices in Philadelphia and Dallas to the new →

facilities. Beginning in late-summer 2004, virtually all routine processing at these two regional certifying offices (RCOs) came to a halt. For the next several weeks, nearly all efforts were focused on emptying file cabinets, creating some kind of inventory or packing list, packing and labeling boxes, and otherwise preparing for the move.

In early October 2004, over 12,000 files were moved from the downtown Philadelphia RCO to the BRC just outside the city. Since that time, the Philadelphia BRC has received an additional 10,000 cases from the RCO in San Francisco, for a total workload of over 25,000 applications. The Dallas center has a similar amount, including 10,000 cases that were sent from the San Francisco office. Between the two centers, this represents roughly 50,000 cases, or just over 15 percent of the nationwide total. These first cases include only those previously transmitted from the SWAs to the RCOs. Until substantial progress is made on these applications, no further files will be sent to the BRCs. Thus, for the time being, the backlogs at the SWAs for those states will remain unaffected by the implementation of backlog reduction.

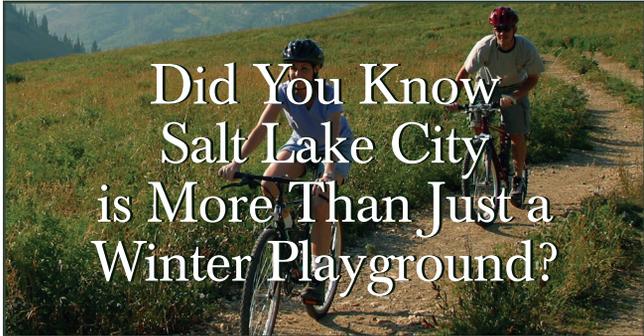
As an initial step in the process, all cases are being logged into DOL's new data-entry system, the Permanent Backlog System (PBS). This replaces the CAPS system, a file management system developed in connection with the Gaithersburg project. The Gaithersburg Project was a pilot program, based at a facility in Gaithersburg, Md., established by the Department of Labor in 2003 to test certain new procedures for centralized and standardized processing of applications for alien labor certification.

However, there is no ability to link the existing databases with the PBS/CAPS system. As a consequence, all of the data on cases must be newly recorded onto new data management systems. For the time being, this is an entirely nonautomated system, which requires manual input of data one file at a time.

#### Staff Training Efforts

Before processing of cases at the BRCs can begin, the Team Exceed employees must first be trained in the many detailed legal and procedural aspects of the labor certification process. The training of Team Exceed's staff is the responsibility of another government contractor. As of November 2004, staff training was just beginning. The contractor employs two trainers at each site whose knowledge of labor certification was gained from studying various manuals and guides and from consulting with DOL employees.

Before they "go live" with the processing of applications, the new employees will be introduced to all of the issues that relate to labor certification adjudication, including prevailing wage, minimum requirements, on-the-job experience, unduly restrictive requirements, foreign language requirements, live-in requirements, adequacy of recruitment, and similar issues. In addition to classroom training using the PBS data system and examples of applications, there also will be a significant amount of ongoing, on-the-job training.



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Presumably, much of the training will be based on the TMS draft training manual. According to the manual, its development "has been guided by TMS' real world experience in operating the simulation study for six months and processing more than 1,500 applications for permanent labor certification." The TMS manual introduces the basic concepts of labor certification and includes 30 pages of instructions and five appendices with forms, sample letters, information about special handling, and sample "boilerplate" language for rejecting incomplete applications; identifying deficiencies in recruitment; questioning special requirements; challenging wage offers; and raising other commonly occurring issues.

The duration and extent of the training has not been made clear. The TMS manual itself admits, "The complexity of the process led to a steeper learning curve for TMS staff assigned to the project than initially anticipated." So it may take a day or two of training on each of the principal themes identified in the *BALCA Desk Book* and the *Technical Assistance Guide*, with perhaps several days of training on such key issues as prevailing wage, unduly restrictive requirements, adequacy of recruitment, etc. No analysis of cases can begin until training is complete.

#### Mass Mailing of Letters

Once all of the data is recorded and the personnel are trained, the staff will begin a project to send "45-day letters" on all applications. The 45-day letters will be sent to both the employers and to the attorneys identified on the Form G-28. The 45-day letters will request the employer and/or the attorney to affirmatively →

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indicate that they wish to continue with the application. In the alternative, employers may indicate that they wish to withdraw an application. If there is no response within the 45-day period, the application will be deactivated.

The 45-day letters will be sent to the last address that DOL has on record. If the attorney or the employer has moved, or if there has been a change in representation, it is by no means certain that the 45-day letter will reach its intended destination. Regardless, DOL states that it will not accept any late response to the 45-day letter and will not recognize as valid any excuse for failing to respond within the 45-day period. This is based on DOL's assumption that employers and attorneys have a responsibility to inform the SWA and/or DOL of any changes of address.

DOL estimates that there will be a 20 to 25 percent no-response or withdrawal rate, especially with respect to older cases where the employer may no longer be in business; the employer may no longer wish to support the application; the employee cannot be located; or the employee has pursued other immigration options.

Within the past two years, beginning with the well-publicized conviction of a Washington, D.C., immigration lawyer for conspiracy, labor certification fraud, making false statements, immigration fraud, and money laundering, DOL and its Office of Inspector General have "discovered" the labor certification process and is closely examining certain practices for evidence of illegal conduct. It is anticipated that, as a result of anti-fraud initiatives, there will be an additional number of cases withdrawn.

### Processing at the BRCs

As responses to the 45-day letters reach the BRCs, contractors will begin to scrutinize the applications, first for paperwork deficiencies (e.g., missing information or exhibits) and then for substantive compliance. All applications will be handled by date order, with the oldest cases being handled first. By directive of the Chief of the Division of Labor Certification, there will be no expedited handling of any application (AILA InfoNet Doc. No. 04100410).

Cases will be tracked in three groups: (1) reduction in recruitment, or RIR; (2) traditional or basic filings requiring supervised recruitment, and (3) those with special handling requirements, e.g., university professors. At the outset, the contractor teams will not be broken down by industry, occupation, geography, or other



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factors—although this could come about at a later date. There is no separation of applications by state of origin. This means that applications from states with lesser backlogs (e.g., West Virginia or Delaware) will be mixed in with and processed behind earlier-filed cases from states with greater backlogs (e.g., California or Texas).

According to available information, contractors will be responsible for reviewing applications for completeness and regulatory compliance. They also will be coordinating supervised recruitment for traditional cases, identifying prevailing wage issues, and preparing notices of findings (NOFs) with reference to adequacy of recruitment, restrictive requirements, and other legal issues. But the adjudicatory function will belong to DOL staff.

In actual practice, this means that contractors will be provided with specific criteria for recognizing approvable cases, and those that meet the criteria will be forwarded to DOL staff for certification. Applications for more commonly approvable occupations, e.g., foreign specialty cooks, auto mechanics, university professors, computer professionals, and allied health care professionals, may be "pulled" and worked as a group—presumably in date order of receipt.

As to those cases that do not meet the pre-determined criteria, these will be subject to additional review by supervisors and by DOL staff. Presumably, DOL staff will review and be responsible for adverse final determinations. Contractors will have no authority to certify or deny cases, only federal staff will make final determinations—although such decisions may be made in a general, rather than a case-by-case manner, based on pre-determined criteria for approval of cases. →

DOL statistics indicate that combined approvals for applications in the Philadelphia regional certifying office were close to 85 percent. This refers to both applications approved without any NOF or rebuttal and those applications approved following a NOF and rebuttal. It is anticipated that, in applying the same standards and using more accelerated procedures, DOL will continue to approve applications in roughly the same proportion. However, the number of cases deactivated for nonresponse to the 45-day letters and other factors—such as the inexperience of the contractors' staff and their unfamiliarity with routine labor certification issues—makes the percentage of favorable outcomes difficult to predict.

### What About the SWAs?

The role of the state workforce agencies (SWAs) is being drastically reduced. Their budgets have been cut by half. An already thin staff has been reduced even further, and, according to recent pronouncements, the role of the SWAs in the permanent labor certification process will soon be eliminated. While this had been anticipated as part of the BRC/PERM re-engineering, until recently, the deadlines and procedures for transferring cases and responsibility for cases had been a matter of conjecture.

The first step in taking SWAs out of the process was announced in a September 29, 2004, memorandum from Emily Stover Derocca, Assistant Secretary of the Employment and Training Administration (AILA InfoNet Doc. No. 04101941). The memo, directed to state workforce administrators, states that 2005 will see a change in the SWA role that involves shifting the processing of permanent labor certifications from the states to centralized federal locations.

The memo references the July 21, 2004, interim regulation as the source of authorization to reduce the role of SWAs and provides an introduction to DOL's backlog reduction initiative and PERM. It informs the SWAs that their budgets for the 2005 fiscal year, beginning October 1, 2004, will amount to only half of their FY2004 allocation. The DOL plan contemplates that SWAs will continue to play a significant role in preliminary processing of applications filed for H-2A (agricultural workers) and for H-2B (nonagricultural seasonal or temporary workers) nonimmigrants and will continue to be a resource on prevailing wage issues.

The memo also informs the SWAs that, beginning January 1, 2005, they will no longer process labor certification cases. As of that date, although they will still accept cases, log and date-stamp them, SWAs will begin forwarding the cases to DOL for all processing. The September 29 memo outlines the manner in which SWAs will discontinue processing and transfer their inventories to DOL. However, current regulations at 20 CFR Part 656 require that labor certification applications be filed with the states. So until DOL drafts and implements a change to existing regulations, applicants will continue to file applications with the state agencies, which will then forward the applications to DOL.

The more specific instructions came in a memo dated December



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3, 2004, from William Carlson, Chief of the Division of Foreign Labor Certification, to SWA administrators (AILA InfoNet Doc. No. 04120767). That memo helps to clarify some of the earlier uncertainty regarding the flow of cases from the states to the DOL processing centers. It clearly states that, by the end of the calendar year, SWAs will send all applications with receipt dates prior to 2003 to the designated BRC, with the eastern half of the country sending applications to Philadelphia and the western half of the country sending cases to Dallas. The memo further directs SWAs to send all remaining applications to the designated BRC by March 31, 2005.

### The Future of Backlog Reduction

DOL's backlog reduction effort will soon be fully operational. Although the BRCs have not met initial projections for the logging of cases and transmittal of 45-day letters, they do not appear to be far off their goal. With PERM becoming effective on March 28, 2005, the success of DOL's backlog reduction efforts will be of critical importance. Although many of the details and framework for backlog reduction have been considered and analyzed, there remain a number of unknowns for the future of backlog reduction.

### Regional Certifying Offices

One unknown is the future of existing regional certifying offices. It appears that, with PERM, the Atlanta and Chicago regions will shut down traditional processing of cases and ship all of their inventories to the PERM centers. During the lead-up to full →

implementation and perhaps for sometime thereafter, it seems likely there will continue to be some processing of traditional cases, as well as H-2B and H-2A filings, at the Atlanta and Chicago offices.

Regarding the remaining regional certifying offices in New York, Boston, Kansas City, Denver, San Francisco, and Seattle, these offices may continue, for the time being, to process their current caseloads. It is likely, however, that as backlog reduction proceeds, there will be consolidations among these offices and a reduction in DOL staff.

Another area of concern is how the regional certifying offices will handle cases filed under the H-2A and H-2B programs. It remains unknown as to how these applications will be handled within the structure of the BRCs and PERM centers, but it is likely that they eventually will be filed with the PERM centers.

#### Mass Filing Prior to PERM

Another unknown is whether the implementation of PERM will be preceded by the filing of large numbers of new applications under the traditional system. If this happens, this could push the projected goals for completing backlog reduction, now set at two years, far into the future. On the other hand, if PERM presents an alternative that seems to hold positive advantages for employers, there could be a significant number of cases converted from traditional to PERM processing, which would have the effect of reducing backlogs at the centers.

#### Worker Knowledge

It is also not clear how steep the learning curve will be for Team Exceed contractors. For example, it is not clear how efficient or productive the newly hired staff will be, without any prior knowledge of labor certification processing, standards, or criteria. It remains to be seen how well they will understand the process and how they may interpret the law, regulations, and policy. The first groups of cases now at the BRCs from the Dallas, Philadelphia, and San Francisco certifying offices will be the “test cases” most affected by this uncertainty.

The future of backlog reduction will depend on whether labor certification is a part of any newly implemented immigration initiatives over the next few years. For now, employers and their attorneys can expect to see a huge increase in the number of approved labor certifications over the next two years. This flood of approved labor certifications will lead to the filing of large numbers of Petitions for Alien Worker (I-140s), which will, in turn, have a major impact on the availability of immigrant visas in the employment-based categories as well as on the efforts of U.S. Citizenship and Immigration Services (USCIS) to reduce and control its own backlog.

#### Agency Communication

The future of labor certification will include a change in the nature and extent of communication between immigration professionals

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and DOL. In the past, the regional certifying officers had a great deal of autonomy and used a wide range of standards to interpret regulatory provisions. This resulted in considerable confusion as well as inconsistent outcomes from region to region. Apparently, in order to reduce inconsistency in adjudication and policies, it is likely that the flow of information will come from DOL headquarters and possibly from the directors of the new BRCs and PERM centers, enabling DOL to conduct a more centralized approach to communicating with the public and the immigration bar.

The next chapters in the story of backlog reduction and the ripple effects of this initiative on USCIS, the national economy, and the political debate over immigration reform have not been written yet, but will undoubtedly have an impact beyond their foreseeable scope.

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#### Notes

<sup>1</sup> Available online at [www.doleta.gov/sga/rfp/PwC\\_Final\\_Report.pdf](http://www.doleta.gov/sga/rfp/PwC_Final_Report.pdf).

<sup>2</sup> Available online at [www.doleta.gov/sga/rfp/SIM\\_DRAFT\\_FINAL.cfm](http://www.doleta.gov/sga/rfp/SIM_DRAFT_FINAL.cfm).

<sup>3</sup> Available online at [www.doleta.gov/sga/rfp/SIMTrainingManual.pdf](http://www.doleta.gov/sga/rfp/SIMTrainingManual.pdf).

<sup>4</sup> Available online at [www.doleta.gov/sga/rfp/rfp03-43.doc](http://www.doleta.gov/sga/rfp/rfp03-43.doc). The original RFP was subject to a number of amendments and revisions that also can be found online. 