

Attachment No.: 1

Program Planning Guidance and Information Package

Introduction

This document provides the necessary guidelines to be used by State Workforce Agencies (SWAs) to prepare annual plans and request funds in order to administer their Foreign Labor Certification (FLC) responsibilities.

Wagner-Peyser funding allocations for SWA National Activities in Fiscal Year (FY) 2008 are available to support case processing activities associated with applications for temporary labor certification as well as prevailing wage and practice surveys. The estimated FY 2008 appropriation for state FLC activities is approximately \$12,517,432, consistent with the omnibus appropriations bill signed into law December 26, 2007. Of this amount, \$639,675 is being retained at the National Office level for discretionary activities. The remaining disbursement of \$11,877,757 includes the postage allowance withheld in previous years from each state's allocation, but has been reduced commensurate with the decrease in the total FLC grant appropriation since FY 2007. A total of \$3,016,208 was provided under the four continuing budget resolutions in effect through December 31, 2007. Distribution of remaining grant funds is in progress and dependent on approval by the Office of Foreign Labor Certification of state workplans. An estimate of each SWA's total FY 2008 funding is provided in Attachment 2.

FY 2008 Annual Plan

The procedures for submission of the twelve (12) month plan (October 1, 2007, through September 30, 2008) are provided in Attachment 4. Upon receipt and approval of the plan at the National Office, Office of Foreign Labor Certification (OFLC), the Grant Officer in ETA's Division of Federal Assistance will issue an additional Notice of Obligation to provide the balance of funds due to each state from its annual allocation.

In FY 2008, SWA responsibilities for FLC activities include, but are not limited to, the following:

- Providing prevailing wage determinations for all non-agricultural labor certification programs in accordance with the Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs;
- Processing H-2B temporary non-agricultural labor certification applications in accordance with existing policy and time frames;
- Receiving applications for H-2A temporary agricultural labor certification, performing prevailing wage and prevailing practice surveys, ensuring housing inspections are conducted, and processing job orders, and referring eligible U.S. workers to the employer for consideration;
- Verifying employment eligibility on all referrals made to H-2A job orders; and
- Complying with all applicable laws, including those governing freedom of information and privacy.

SWAs are to issue prevailing wage determinations to employers to accompany their applications for permanent labor certification. These wage determinations are to be provided in a responsive and timely manner. Guidance on providing prevailing wage determinations is given in Attachment 3, Number 4. All other functions of permanent labor certification are performed by the National Processing Centers in Atlanta and Chicago.

SWA Responsibilities

SWAs are responsible for administering grant funds for FLC programs within established guidelines. These responsibilities include:

1. Certifications and Assurances

Regulations require recipients of SWA grants to submit various standard certifications and assurances. These have already been provided under the PY 2007/FY 2008 Wagner-Peyser Annual Funding Agreement. Current SWA regulations at 20 CFR Part 658, Subpart E (20 CFR 658.400-658.426) cover the complaint and appeals procedures. Regulations at 20 CFR Part 653, Subpart F and 20 CFR Part 654, Subpart E apply to housing inspection activities under the reimbursable grant. Other applicable regulatory provisions and special assurances are incorporated in the Statements of Work (attached).

2. Utilize Mandated Forms for Inter-Agency Communications

SWAs must utilize the proper formats to ensure uniform communications. These formats include, but may not be limited to, the following:

- **Form ETA-7147**
Form ETA-7147 is the Alien Certification State Agency Transmittal of Application for an alien employment certification.
- **Form ETA-232**
Form ETA-232 is the Domestic Agricultural In-Season Wage Report.
- **Form ETA-232A**
Form ETA-232A is the Wage Survey Interview Record.
- Other ETA forms that contain a valid Office of Management and Budget (OMB) control number and expiration date.

3. Reporting Responsibilities

The required reports are listed below:

- **SF-269**
The SF-269 is the Financial Status Report and must be submitted by the SWA on a quarterly basis for each fiscal year of funds.
- **SF-9127**
The SF-9127 is the Quarterly Activity Report and a completed form must be submitted by the SWA on a quarterly basis for each fiscal year. SWAs must correct deficiencies to the form upon request by the National Office.

4. Fiscal Management Responsibilities

The National Office will retain flexibility to recommend the modification of the negotiated split of FLC funds between agricultural and non-agricultural FLC activities for a given state. Modifications should be communicated to the Federal Project Officer for approval.

National Office approval must be obtained for all equipment purchases made using FLC funds that are above five thousand dollars (\$5,000) in value. If such requests are included in the annual plan and are clearly detailed in a cover memorandum, the National Office can pre-approve the purchases. Otherwise, states must provide a written justification and cost estimate for the purchase(s). The National Office will generally not approve capital purchases such as buildings and vehicles.

Although Employment Service (ES) grants are valid for three (3) years, FLC grants are intended to be used during the fiscal year that they are issued. Any carry over funds in excess of twenty (20) percent of the total grant value are subject to recoupment by the National Office. See the Employment and Training Order "Closeout Procedures for ETA Expired Grants, Agreements, and National Office Contracts" for information regarding the procedures for closing grants.

5. Training

SWAs are required to send appropriate staff to program training, when such training is offered. The costs of SWA travel to regional and national meetings and training sessions are included in grant funds. Attendance at these sessions is a condition of the grant. If SWAs do not attend mandatory meetings, funds may be recaptured.

6. Employment Eligibility Verification

Section 274A(a)(1)(B)(i) of the INA requires every person or entity who hires workers to verify employment eligibility of every such worker. Section 274A(a)(1)(B)(ii) requires every agricultural association, agricultural employer, or farm labor contractor who hires, recruits, or refers workers for a fee, to verify employment eligibility of every such worker.

Section 274A(b)(1)(A) of the INA sets forth the process for persons or entities -- including agricultural

associations, agricultural employers, or farm labor contractors – that are hiring, recruiting, or referring workers, to meet the requirements for verification. Under section 274A(a)(5), employers hiring workers referred by a SWA will be deemed to have complied with the statute's requirements for verification if they have obtained from the SWA documentation of the referral certifying the SWA has complied with the verification system established by the statute.

Section 218(c)(3)(A) of the INA stipulates that H-2A labor certification may only be issued if the Department of Labor determines there are not sufficient "qualified eligible individuals who have indicated their ability to perform such labor or services." DOL fulfilled its statutory mandate by publishing regulations that confirm that "no U.S. worker applicant shall be referred unless such U.S. worker . . . is able, willing, and eligible to take such a job." 20 CFR 655.106(a). Section 218(i)(1) of the INA defines eligibility, with respect to employment as "an individual who is not an unauthorized alien . . . with respect to that employment."

Taken together, these provisions prohibit SWAs from referring ineligible (including non-work authorized) workers. For the reasons set forth in section 4.B.ii of TEGL 11-07, Change 1 (Nov. 14, 2007), States were instructed in that TEGL to verify the employment eligibility of workers referred against H-2A related job orders. A forthcoming TEGL 22-07 (March 2008) will require SWAs to verify the employment eligibility of workers referred against all agricultural job orders. To provide clarity and consistency among the SWAs, this TEGL requires such verification to be performed through completion of a Form I-9 by the SWA. Use of the E-Verify System continues to be highly recommended. USCIS regulations at 8 CFR 274a.6 set forth the process by which SWAs may complete Form I-9 prior to referral and issue certifications to employers. Employers in possession of a SWA-issued certification are not required to complete Form I-9 for the certified worker.

National Office Responsibilities

The National OFLC's responsibilities include, but are not limited to, the review and approval of the grant plan applications, analysis of expenditure and performance data, execution of programmatic plan modifications, on-site reviews, and administering SWA sanctions for non-compliance with the requirements stipulated in this package. States are advised to administer the plan in accordance with the approved plan and the terms and conditions of the Wagner-Peyser Annual Funding Agreement. The National Office Grant Officer funding authority remains with the National Office, Division of Federal Assistance.

The state's non-compliance with the employment eligibility verification function under the INA, as well as any other ETA policies, directives, or advisories concerning foreign labor certification activities may require ETA to administer sanctions on the SWA. The Grant Officer will make the final determination regarding sanctions for non-compliance with applicable statutory and regulatory provisions and policy guidance, directives, or advisories. The Grant Officer may ultimately require the removal of funding for such activities under the Cost Reimbursable Grant package.

Labor certification funds are provided for labor certification activities only and cannot be used for other Wagner-Peyser activities, such as the routine referral of workers on job bank orders, Migrant Seasonal Farmworker (MSFW) activities, and processing of complaints under the SWA complaint system.

Conclusion

Grant funding balances will be issued to SWAs upon availability of funds. The National Office Grant Officer will issue a Notice of Obligation (NOO) to SWAs upon approval of the SWA Alien Labor Certification Annual Plan. Budgets can only be approved for annual plans after the National Office (Office of Foreign Labor Certification) has approved the Annual Plan Narrative for the Agricultural/Non-Agricultural programs.