



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

August 6, 2021

U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted via e-mail: dolstratplan@dol.gov

RE: Comments on Department of Labor (DOL) FY 2022-2026 Strategic Plan

Dear Madam or Sir:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Labor's request for comments on the DOL FY 2022-2026 Strategic Plan and Evidence-Building Plan.¹

Established in 1946, the American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, legal permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

AILA appreciates the opportunity to comment on both plans indicated above. We believe that our members' collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government. We have enjoyed a long-standing partnership with the DOL and appreciate the agency's transparency, creativity, and willingness to work with employers to ensure effective, efficient, and fair processes. AILA offers our comments below that we hope DOL will take into consideration when finalizing and implementing its FY2022-2016 strategic plan.

I. Employment and Training Administration (ETA): H-1B/PERM Programs

a. Increase resources to address lengthy processing times.

One of the most pressing challenges that employers face is lengthy processing times. DOL is currently reporting that it is taking an average of 145 days for DOL to issue a prevailing wage determination for H-1B applications and 145 days for PERM applications.² As of July 31, 2021,

¹ See *FY 2022-2026 Strategic Plan and Evidence-Building Plan*, OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION & MANAGEMENT, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/oasam/centers-offices/performance-management-center/reports/FY2022-2026-strategic-plan>.

² *Average Number of Days to Issue Wager Determinations*, FLAG.DOL.GOV, U.S. DEP'T OF LABOR, <https://flag.dol.gov/processingtimes>.

DOL is reviewing PERM applications filed in January 2021.³ We acknowledge that increases in processing times are the result of an ever-increasing number of applications along with a shortage of resources to meet the demand for processing.

Charging a “premium processing” fee has been raised by DOL for many years and we welcome this option should this result in a substantial decrease and a consistency in processing times. We would even welcome a reasonable application filing fee in return for faster processing times. In our communications with DOL over the years, we recognize and appreciate that the agency has been creative and effective in its use of limited resources. We believe that even a nominal fee charged would generate enough additional resources to see marked differences in processing times. We recognize that fees will require Congressional authorization and therefore we encourage DOL to continue making this request.

The PERM process is very exact. Any discrepancy between the information reported on the Form ETA-9141 and the Form ETA-9089 would be detrimental to the PERM application. Also, as the new Form ETA-9089 promises to auto-populate data from the Form ETA-9141, any information reported on the Form ETA-9141 is set in stone for the remainder of the life of an application. Due to lengthy processing times, details concerning the employer and/or the employment opportunity can sometimes change. Without a means for updating such information, employers must refile a Form ETA-9141 when a change occurs. This only adds to the workload of the DOL. AILA encourages DOL to develop and implement an option for employers to update information that is not material to the wage determination as this would decrease the number of overall applications requiring processing.

AILA has also been encouraging employers to avail themselves of the redetermination option in connection with the prevailing wage determination process so that the number of “new” applications would decrease. FLAG currently reports that as of July 31, 2021, the agency is processing H-1B and PERM prevailing wage redeterminations submitted in June 2021.⁴ If these processing times could be decreased even further, that would encourage employers to seek a redetermination and avoid refiling “new” prevailing wage applications where appropriate, which in turn would save on DOL’s resources.

Further, AILA recognizes that regulations compel DOL to process applications in the H-2B context within a certain timeframe whereas applications for the H-1B and PERM programs have no regulatory timeframe requirement. We would appreciate if DOL would explore this discrepancy in processing times and would encourage DOL to establish more equity in processing times among the different programs.

b. Update guidance to reflect current employment practices.

We encourage DOL to update its guidance, especially in the PERM context, to reflect current employment practices. In particular, many employers are moving away from having a centralized headquarters and more and more employees no longer sit in just one place to perform their duties.

³ *PERM Processing Times*, FLAG.DOL.GOV, U.S. DEP’T OF LABOR, <https://flag.dol.gov/processingtimes>.

⁴ *Prevailing Wage Determination Processing Times*, FLAG.DOL.GOV, U.S. DEP’T OF LABOR, <https://flag.dol.gov/processingtimes>.

The 1994 Barbara Farmer Memo to which the DOL has pointed employers for guidance no longer covers all of the situations in the current employment context.⁵ Updated guidance would greatly benefit employers.

c. Adopt better methods for employers to communicate with DOL regarding specific cases.

As DOL continues to modernize the PERM program, we urge DOL to consider the following suggestions regarding the ability of employers to communicate with DOL:

1. Improve the methods of communication between employers and DOL;
2. Provide a means for an employer to communicate with DOL regarding a specific pending application;
3. Provide an avenue to follow up on applications pending beyond posted processing times;
4. Provide a better way for an employer to communicate with DOL regarding business verification to avoid long registration delays;
5. Allow employers to update employer information after a PERM application has been initiated and also update any changes prior to the issuance of a final PERM decision; and
6. Expand the role of the Ombudsman Program to include the PERM program, not just the H-2A and H-2B programs.

II. ETA: H-2 Program

Similar to AILA's suggestions in the PERM program context, H-2A and H-2B employers desire better ways to communicate with DOL analysts regarding specific cases. For example, communications over a missing document could unnecessarily delay the processing of a case for weeks. We believe that improved means of communications between employers and DOL would improve processing times, minimize use of resources, and move cases forward towards a decision more quickly, efficiently, and fairly.

Another suggestion for a wiser use of resources is to implement the H-2B registration process so employers who use the program year after year don't have to prove temporary need each year and DOL analysts do not have to adjudicate the same question repeatedly.

III. Wage and Hour Division (WHD)

Employers want to comply with requirements of DOL's various programs. That said, as employment conditions and practices are changing, employers seek updated and clear guidance to help them comply. We would appreciate DOL updating its Immigration Fact Sheets regularly to ensure that the program guidance being provided to the public is current and accurate. Further, in determining non-compliance and calculating fines, we ask DOL to continue to consider factors such as good faith compliance.

⁵ See *DOL Policy Guidance on Alien Certification Issues*, AM. IMMIGRATION LAWYERS ASS'N (May 16, 1994), [AILA - DOL Policy Guidance on Alien Labor Certification Issues](#).

IV. Bureau of Labor and Statistics (BLS)

We recognize that the BLS collects data for a wide range of programs and acknowledge the challenges in obtaining data to include all of the occupations in the U.S. labor market and also enough data to distinguish among the different levels. Nonetheless, we encourage BLS to expand its outreach to employers to ensure sufficient data is collected. We also encourage BLS to gather data to assist DOL in providing prevailing wage data that is reflective of the U.S. labor market. In a prior comment, AILA had provided detailed recommendations in this regard.⁶

V. Office of Administrative Law Judges (OALJ)

We appreciate the OALJ's ongoing efforts to improve stakeholders' experience in working with them. Most recently, OALJ instituted an electronic filing system which we hope will help improve services and processing times. We encourage OALJ to continue to find ways of reducing its backlogs. Reducing BALCA PERM appeal processing times, shorter than it takes to file a new PERM application, would make it more attractive for employers to seek an appeal, as opposed to simply filing a new PERM application, which further taxes the limited resources of DOL for both a prevailing wage determination and for a labor certification adjudication.

VI. Conclusion

AILA appreciates the opportunity to provide these comments on DOL's FY2022-2026 strategic plan. We urge DOL to develop and implement methods to improve its processing times, adopt case-specific communications between employers and DOL, and update its guidance to reflect current employment conditions. AILA looks forward to a continuing dialogue between AILA and DOL on these and any other issues that arise as DOL moves forward with implementing its strategic and evidence-building plans.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

⁶ See *AILA Submits Comments to DOL on Data Sources and Methods for Determining Prevailing Wage Levels*, AM. IMMIGRATION LAWYERS ASS'N (June 1, 2021), [AILA - AILA Submits Comments to DOL on Data Sources and Methods for Determining Prevailing Wage Levels](#).