TEGL 11-07, Change 1
Questions From SWA Training Webinars – Round 3

Who must verify employment eligibility?

Q1. If USCIS guidance stipulates SWAs may choose, but are not required, to comply with the I-9 process, why is DOL requiring SWAs to comply with the I-9 process?

A1. Section 218(c)(3)(A) of the INA stipulates that DOL may issue H-2A labor certifications if DOL determines, among other things, there are not sufficient "eligible individuals who have indicated their ability to perform such labor or services." DOL fulfilled its statutory mandate by publishing regulations that state "no U.S. worker-applicant shall be referred unless such U.S. worker…is able, willing, and eligible to take such a job." 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."

Furthermore, in signing the Governor-Secretary agreement under the Wagner-Peyser Act, each SWA agreed to abide by DOL regulations (including 20 CFR Parts 651-658) and DOL guidance (such as TEGL 11-07, Change 1). H-2A regulations at 20 CFR Part 655, Subpart B, require employers to file job orders, and SWAs to circulate those job orders, in accordance with DOL interstate clearance regulations at 20 CFR Part 653, Subparts B and F. 20 CFR 653.103(a) instructs SWAs to "determine whether or not applicants are MSFWs as defined at § 651.10 of this chapter." 20 CFR 651.10 defines the term "MSFW" as "a migrant farmworker, a migrant food processing worker, or a seasonal farmworker." 20 CFR 651.10 further defines the term "farmworker" as synonymous with "agricultural worker," which is defined as "a worker, whose primary work experience has been in farmwork…who is legally allowed to work in the United States." Therefore, in order for a SWA to determine whether an applicant is an MSFW, in compliance with 20 CFR 653.103(a), it must determine whether such applicant is legally authorized to work in the United States.

Taken together, these provisions prohibit SWAs from referring ineligible (including non-work authorized) workers. In order to perform their referral functions, SWAs must verify employment eligibility.

USCIS regulations at 8 CFR 274a.6(a) state that, **if a SWA "verif[ies] identity and employment eligibility of individuals referred for employment by the agency**…it must: (1) Complete the verification process in accordance with the requirements of §274a.2(b) of this part [the I-9 process] provided that the individual may not present receipts in lieu of documents…; and (2) Complete the verification process prior to referral for all individuals for whom a certification is required to be issued pursuant to paragraph (c) of this section." (Emphasis added.) Paragraph (c) states that a SWA who "verif[ies] employment eligibility

pursuant to paragraph (a) of this section shall issue to an employer who hires an individual referred for employment by the agency, a certification as set forth in paragraph (d) of this section."

Therefore, in order to determine whether a worker is eligible to work in an H-2A job opportunity, SWAs must complete the entire I-9 process: (1) complete Form I-9, (2) issue a certification to the employer, and (3) properly retain I-9-related records.

Q2. Why must SWAs complete the I-9 process if DOL regulations suggest that U.S. worker-applicants may self-certify their employment eligibility?

A2. The INA clearly states that H-2A labor certifications may only be issued if DOL determines there are not sufficient "eligible individuals who have indicated their ability to perform such labor or services." 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." DOL regulations at 20 CFR 655.106(a) state a U.S. worker "has indicated, by accepting referral to the job, that she or he meets the qualifications required and is able, willing, and eligible to take such a job." However, a potential U.S. worker's indication of his or her eligibility is not an independent and objective verification of such worker's eligibility. As discussed above, DOL may only refer to H-2A job opportunities those individuals who are eligible to be employed in that job opportunity. A self-serving indication of eligibility is not sufficient to satisfy the statutory standard of eligible, which takes precedence over the regulatory interpretation.

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Whose employment eligibility must be verified?

Q3. Must SWAs verify employment eligibility for all workers referred to H-2A job orders (including MSFWs contacted during outreach services)?

A3. Yes. Section 218(c)(3)(A) of the INA stipulates that H-2A labor certifications may only be issued if DOL determines there are not sufficient "eligible individuals who have indicated their ability to perform such labor or services." 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." SWAs are instructed to complete the I-9 process to determine whether any worker is eligible to work in the job opportunity prior to referring such worker to any H-2A job opportunity.

I-9 Process

Q4. How will a SWA complete Form I-9 for a self-referred applicant or for an applicant referred via internet or telephone?

A4. The SWA is not required to complete Form I-9 for any applicant who does not appear in person at the SWA.

Q5. Can section 1 of Form I-9 be completed without presenting documents?

A5. A worker does not need to present documents to complete section 1 of Form I-9. However, a worker does need to present documents in order for the SWA to complete section 2 of Form I-9.

Q6. Can SWAs comply with the requirement to verify employment eligibility by examining the required documents, but not completing Form I-9? Does it matter whether the SWA annotates the document information in its own case management system?

A6. SWAs are instructed to complete the entire I-9 process by following each of the following steps for each worker referred to an H-2A job opportunity: (1) complete Form I-9, (2) issue a certification to the employer, and (3) properly retain I-9-related records.

SWAs may choose to complete Form I-9 and/or retain Form I-9 and the certification electronically. USCIS regulations at 8 CFR 274a.2(e) provide standards for electronic retention of Form I-9, and should be consulted for such standards. SWAs should review the entire text of 8 CFR 274a.2(e) for a complete explanation of the standards and requirements therein.

Q7. Is there a specific Federal form which SWAs should use for certifications?

A7. There is no specific Federal form which SWAs must use for certifications. However, all certifications must comply with the standards set in USCIS

regulations at 8 CFR 274a.6(d). The certification must be on official SWA letterhead and must contain the following:

(1) The signature of a SWA official;
(2) A place for the worker to sign under penalty of perjury in the presence of the employer (not in the presence of the SWA);
(3) The date of issuance;
(4) The employer's name and address;
(5) The worker's name and date of birth;
(6) The job order number and type of work;
(7) The type of documents examined and identification numbers of such documents;
(8) Restriction information (A statement that the worker's employment authorization is not restricted **OR** a statement that the worker's employment eligibility has an expiration date or other restriction, in which case the certification should also include the expiration date and/or restriction information);
(9) A certification of compliance (A statement that the SWA complied with the requirements of section 274A(b) of the INA concerning verification of the worker's identification and employment eligibility **AND** a statement that, to the best of its knowledge, the SWA determined the worker is authorized to work in the United States);
(10) Employer I-9 requirements (A statement that the employer is not required to verify the worker's identification and employment eligibility **AND** a statement that the employer must retain the certification in place of Form I-9); and
(11) Information on certain violations (A statement that counterfeiting, falsification, unauthorized issuance, or alteration of the certification violates 18 USC §1546).

If the worker's employment eligibility expires during the time the worker is working for the employer, the employer will be required to reverify the worker's employment eligibility on or before the date work authorization expires. If a worker's employment eligibility document will expire prior to the end of the contract period, the SWA may wish to advise the worker that, on or before the expiration date, he/she must present to the employer a document that shows either an extension of the initial employment authorization or new work authorization.

Q8. Must SWAs issue certifications to employers within 21 days of referral or 21 days of hire?

A8. USCIS regulations at 8 CFR 274a.6(c)(1) states SWAs must issue a certification to employers "within 21 business days of the date that the referred individual is hired." As SWAs will not necessarily know the specific day on which each referred worker will be hired, SWAs may wish to institute a practice

whereby all certifications are issued within 21 days of referral. Such practice will ensure that SWAs are always in compliance with USCIS regulations.

Q9. Where must SWAs retain records?

A9. The SWA that completes Form I-9 must retain all completed Forms I-9 and certifications for three years. Such retention may take place on-site or off-site, so long as the SWA is able to retrieve the records within three days of a request made by a DHS, DOJ, or DOL officer.

Q10. Is this requirement in any way affected by the recent events surrounding the so-called "No Match Rule" promulgated by DHS?

A10. No. There is no relevant connection between the I-9 process and the "No Match Rule". The I-9 process relates to verification of employment eligibility and is outlined in section 274A of the INA and in USCIS regulations at 8 CFR 274a.2 and 274a.6. The No Match Rule relates to safe harbor procedures for employers who receive a Social Security "no match" letter and was initially published as an amendment to USCIS regulations at 8 CFR 274a.1(l).

Q11. Does TEGL 11-07, Change 1, rescind the March 9, 2005, memo issued by Bill Carlson prohibiting SWAs from completing Form I-9?

A11. TEGL 11-07, Change 1, rescinds the March 9, 2005 memorandum entitled "Restrictive/Incorrect Language in H-2A Applications." The memorandum stated, "Effective immediately, for H-2A purposes, Foreign Labor Certification Field Offices and SWAs should not accept language contained in the job order or assurances which require workers and/or the SWA to complete the I-9 Form prior to employment." This memorandum did not prohibit SWAs from completing Form I-9, but rather prohibited completing Form I-9 on behalf of employers.

E-Verify

Q12. Why have we not been provided access to E-Verify?

A12: DHS and DOL have been finalizing the Memorandum of Understanding (MOU) that permits SWAs to access the E-Verify system and is a necessary component to SWAs' use of the program. Because the MOU has not been finalized by both agencies, access to E-Verify for the SWAs has been impossible to implement on a large scale. The MOU is now available, as is training specific to SWAs and E-Verify, and SWAs may access E-Verify through completion and submission of the MOU as instructed on the OFLC website.

SWA staff must note, however, that completion of the I-9 is a necessary predicate to use of the E-Verify system. SWAs should continue to use I-9

employment eligibility verification until the MOU is widely available and staff have been trained in the use of E-Verify.

Q13. Does E-Verify provide an immediate response to an employment verification query?

A13. Although not apparent to the user, the electronic verification process differs slightly for persons who claim to be U.S. citizens and persons who claim to be foreign nationals.

For persons claiming to be U.S. citizens, approximately 96% of inquiries result in an immediate "authorized" finding. Approximately 4% of inquiries result in an immediate "tentative nonconfirmation."

For persons claiming to be foreign nationals, approximately 68% of inquiries result in an immediate "authorized" finding. Approximately 15% of inquiries result in an immediate "tentative nonconfirmation." Approximately 17% of inquiries result in further analysis by a status verifier, which takes approximately 24 hours. Of the inquiries that result in further analysis by a status verifier, approximately 48% result in an "authorized" finding and approximately 52% result in a "tentative nonconfirmation."

Workers who have been issued a tentative nonconfirmation letter may choose to contest the finding. If a worker chooses not to contest the interim finding, the worker is issued an immediate "final nonconfirmation." If a worker chooses to contest the interim finding, the worker is allowed eight Federal working days to resolve the discrepancy.

Q14. Does E-Verify respond with information regarding the validity of a worker's Social Security number?

A14. Although not apparent to the user, the electronic verification process differs slightly for persons who claim to be U.S. citizens and persons who claim to be foreign nationals.

For persons claiming to be U.S. citizens, E-Verify compares data entered from Form I-9 to the SSA database and immediately provides an "authorized" or "SSA tentative nonconfirmation" finding. The reasons for such "tentative nonconfirmation" findings are as follows: invalid Social Security number (5%), date of birth does not match SSA database (17%), name does not match SSA database (13%), name and date of birth do not match SSA database (27%), and other reasons (e.g., citizenship status could not be confirmed) (39%).

For persons claiming to be foreign nationals, E-Verify compares data entered from Form I-9 to the SSA database. If the data matches that in the SSA database, E-Verify compares the data to USCIS databases. If the data does not

match that in the SSA database, E-Verify immediately provides an “SSA tentative nonconfirmation” finding. Reasons for such “tentative nonconfirmation” findings are as follows: invalid Social Security number (19%), date of birth does not match SSA database (13%), name does not match SSA database (8%), name and date of birth do not match SSA database (61%), and other reasons (0.4%).

Workers who have been issued a tentative nonconfirmation letter may choose to contest the finding. No adverse action may be taken solely on the basis of a tentative nonconfirmation. Rather, the system will issue an “authorized” or “final nonconfirmation” finding after the worker has been given the opportunity to contest the finding.

Q15. If a SWA learns through E-Verify that a worker is not eligible to work in the United States, what are the SWA’s responsibilities with regard to that worker? (E.g., May the SWA refer the worker to any other job opportunities? Must the SWA report the worker to another government entity?) If a SWA learns that a previously referred worker is not eligible to work in the United States, should the SWA advise the employer of such worker's status?

A15. If a SWA learns through any method that a worker is not eligible to work in the United States, the SWA may not refer that worker for any H-2A job opportunity or issue to an employer a certification of compliance with the I-9 process with regards to such worker. However, the SWA is not obligated to report such worker to DHS or any other Federal Government entity.

Other

Q16. How should SWAs respond if SSA issues a “no match” letter for a referred worker?

A16. SSA began sending Employer Correction Request letters, commonly referred to as “no match” letters, to employers in 1994. Each letter informs an employer that Social Security numbers on Forms W-2 provided by the employer to the IRS do not match SSA records. Currently, SSA sends letters to employers who, in the previous year, reported more than 10 employee no-matches that represented more than 0.5% of Forms W-2 submitted by that employer. Each letter lists the Social Security numbers that could not be matched and requests the employer to prepare Corrected Wage and Tax Statements (Forms W-2c) for each number the employer is able to correct.

The current controversy surrounding “no match” letters involves proposed DHS regulations which stated, in summary, that employers who fail to correct erroneous Social Security numbers may be held liable for knowingly employing workers not authorized to work in the United States.

Because SSA issues "no match" letters as a result of inconsistencies between Forms W-2 and SSA records (not between Forms I-9 and SSA records), SWAs could only receive a no-match letter for actual SWA employees for which it completed Forms W-2 and submitted such forms to the IRS.

Q17. What is the connection between SAVE and the I-9 process/E-Verify?

A17. The Systematic Alien Verification for Entitlements (SAVE) Program is a USCIS program designed to inform government benefit agencies, including the Unemployment Compensation Program, whether a non-citizen is a "qualified alien" eligible for public benefits. SWAs should follow SAVE guidelines when administering unemployment benefits.

The I-9 process and E-Verify were instituted such that employers and SWAs may determine whether a citizen or non-citizen worker is eligible to work in a particular job opportunity. SWAs must follow the I-9 process when referring workers to an H-2A job opportunity, and may choose to follow the I-9 process for all other referrals.

As the labor certification process is not part of the unemployment benefits process, there is no inherent link between SAVE and H-2A referrals. As SAVE only provides information on non-citizens, verifying workers through SAVE solely because of interest in an H-2A job opportunity (and unrelated to unemployment benefits) may constitute discrimination and document abuse on the basis of citizenship. As such, SWAs should be careful to separate its unemployment benefits functions from its H-2A referral functions. Furthermore, because the definition of "qualified" as related to the SAVE program is different from the definition of "eligible" as related to the H-2A referral process, a positive response from SAVE is not evidence a worker is eligible to work in the job opportunity.

For SWAs who choose to utilize the E-Verify program, workers who have been issued an SSA tentative nonconfirmation letter (i.e., a letter indicating there are discrepancies between information provided by the worker and information in the SSA database) may choose to contest the finding. No adverse action (e.g., failure to refer a worker) may be taken solely on the basis of a tentative nonconfirmation. Rather, the system will issue an "authorized" or "final nonconfirmation" finding after the worker has been given the opportunity to contest the finding.

Q18. Will USCIS provide I-9 and E-Verify training?

A18. OFLC provided I-9 training to SWAs via webinar on December 4 and December 6, 2007 and again on March 14 and March 25, 2008. Recorded versions of the December 4 training are accessible through the Workforce3 One system. Additional trainings are being provided.