



## **Making EB-3 Visas Work for America**

### **Background**

The need and desire for home care within the United States is strong and ever-growing. The 4,500+ agencies of the HCAOA provide care for hundreds of thousands of people annually. Unfortunately, thousands more don't receive the services they need due to a dire caregiver shortage. This shortage represents one of the most intractable problems facing our industry today.

HCAOA believes this shortage could be reduced by streamlining and clarifying the backlogged and convoluted EB-3 visa process. In a recently released report entitled "[The Home Care Workforce Crisis](#)," HCAOA found that the issuance of visas for legal permanent residence fell 48 percent between fiscal years 2019 and 2020, while temporary visa issuances dropped 54 percent. This is not tenable in an economic environment where workers are in short supply.

We also believe that the U.S. Department of Labor (DOL) should categorize caregiving as a [Schedule A occupation](#), which would involve predetermining that there are not sufficient U.S. workers who are able, willing, qualified, and available to be caregivers.

### **What is an EB-3 Visa?**

An EB-3 visa allows small business owners to hire eligible foreign workers who would eventually be eligible for citizenship. Our caregivers would fall under the "other workers" subcategory of this visa, reserved for those performing non-temporary, non-seasonal, unskilled labor requiring less than 2 years training or experience. The worker must be hired to perform duties for which qualified workers are not available in the United States.

Approximately 40,000 EB-3 visas are issued annually, but only a fraction of that figure is given to our EB-3 subcategory.

### **Overview of EB-3 Process**

#### **Step 1: Prevailing Wage Request and Solicitation (currently a 6-8 month process)**

Before our agencies can even start the EB-3 visa application process, they must obtain a prevailing wage determination by submitting a request to DOL's [National Prevailing Wage Center](#). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

**Problem 1:** DOL is taking up to 8 months to issue a wage survey that can be found within minutes on the [FLC Data Center's website](#). However, the agencies must wait and use the DOL-issued form.

#### **Step 2: Recruit U.S. Workers (currently a 2 month process)**



Once the prevailing wage in Step 1 is obtained, the agencies must then, at a minimum, place a job order and two newspaper advertisements within six months of the initiation of the EB-3 visa application process.

**Problem 2:** The mandatory recruitment process is antiquated and unlikely to result in hiring a ready, willing, and able U.S. worker.

The recruitment process mandated by DOL includes posting jobs in newspapers, a State Workforce Agency job order, and physical job postings at an agency's jobsite. As we know, today's workers do not seek jobs this way. Modernizing the process by which agencies post job openings would help both agencies and prospective employees alike.

### **Step 3: Apply for a Permanent Labor Certificate (currently an 12-24 month process)**

Once the recruiting occurs, our agency may then apply for a Permanent Labor Certificate (PERM). As part of the PERM application process, an agency must obtain a certified labor certification application from DOL's [Employment and Training Administration](#). DOL's issuance of the application means DOL determined there are insufficient U.S. workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Our agencies are seeing three different situations when they apply for a PERM.

**First possibility:** DOL reviews the application, finds everything in order, and approves it. The agency can then move to Step 4 below.

**Second possibility:** in an increasing percentage of the cases, DOL finds a concern and initiates an audit by emailing the agency's attorney a list of what it believes is missing from the application, such as proof of an agency's attempt to recruit U.S. citizens. Unfortunately, due to the newly adopted FLAG system, this step can only be accomplished by *physically mailing the proof* to DOL as DOL has not provided guidance on how audits will operate in the FLAG system.

- In 20-25 percent of audited cases, DOL then issues another request for information to the agency based on either the material the agency sent or on the Department's independent research. We have found that DOL's independent research is often used as an excuse to justify further unnecessary and redundant requests for information from our agencies. These second requests for information are typically more case-specific, asking for business license, payroll records, work site information or other agency related information.

### **Problems with the second possibility by DOL:**

- **Problem 3:** This audit step can add 6-8 months to an application process.



- **Problem 4:** Agencies cannot include the proof of their attempt to recruit at the initial submission stage of the application. As a result, DOL sometimes requests this information months later.
- **Problem 5:** DOL fails to provide technical assistance to agencies regarding what spurs an audit or supplemental request, so agencies are unable to adjust their applications accordingly.
- **Problem 6:** DOL appears to use independent research and information gleaned from the internet solely to initiate further requests for information rather than to complete pending visa applications, causing unnecessary delays.
- **Problem 7:** DOL's use of its new FLAG system to process PERM applications pointlessly forces agencies to answer audit responses through the mail rather than through the more efficient online portal.

**Third possibility:** in an increasing number of applications that have gone through the audit process, DOL finds further concerns and initiates a supervisory review process, which includes Supervised Recruitment (SR).

Supervised Recruitment is a multi-step process directed by DOL that mandates additional recruitment of U.S. workers even though demand for our job openings remains historically low. For example, SR requires our agencies to submit advertisement text for approval by DOL within 30 days. SR also mandates that our agencies pay for ads on 3-5 different websites on top of the solicitations they already paid for, dramatically increasing costs.

Once the ad text is approved, DOL issues a request for a Recruitment Schedule. In this request, DOL states the locations where the advertisements should be placed and requests a schedule of all advertisements within the last 30 days. Once the ads have run, it takes DOL at least 60 days to request a recruitment report detailing the hiring activities undertaken by the agency and any interest shown by U.S. citizens. Finally, once this recruitment report is submitted, DOL is currently taking about 4-6 months for a final determination.

After this excruciatingly detailed process, and despite our agencies showing that U.S. citizens have little to no interest in our job openings, DOL is arbitrarily denying applications without regard to underlying labor policy. It is never clear what leads to denials or certifications, as one officer may deny cases based on the same material that leads another officer to certify. The confusion this creates for our agencies and their attorneys cannot be overstated.

#### **Problems with this approach by DOL:**

- **Problem 8:** DOL does not provide technical assistance to agencies regarding why Supervised Recruitment requests are issued or how to avoid the need for such Supervised Recruitment.
- **Problem 9:** The current process is unnecessarily costly, unwieldy, and yields few if any additional U.S. applicants.
- **Problem 10:** DOL continues to reject applications for some Supervised Recruitment cases without explanation.



- **Problem 11:** DOL's website will display that an agency has been issued a Supervised Recruitment but fails to detail how to quickly reply.
- **Problem 12:** DOL does not effectively or meaningfully communicate with our agencies. Responses to DOL requests, specifically those sent to the Supervised Recruitment email address ([SR.processing@dol.gov](mailto:SR.processing@dol.gov)), are often lost or unreplied to. On multiple occasions, DOL has denied applications due to alleged non-response when responses have, indeed, been sent. DOL also has a history of claiming a notice was sent to our agencies or their attorneys when no such notice was sent. The only outlet for relief is to file a Request for Reconsideration, which typically adds 4-8 months. (ombudsman)
- **Problem 13:** Cases are denied during audit or Supervised Recruitment on bases wholly unrelated to policy. For example, when uploading a newspaper tear sheet during an audit response, DOL's scanner caused the newspaper ad to be difficult to read. Instead of requesting a clearer version, DOL denied the applications.
- **Problem 14:** DOL splits "batches" of applications, further complicating the Supervised Recruitment process. For instance, agencies will file a batch of 20 applicants only to have DOL issue Supervised Recruitment requests for 8 of the applications one week, and then request Supervised Recruitment for the other 12 applications weeks later. This results in agencies having to complete costly and redundant recruitments.
- **Problem 15:** Even where the Supervised Recruitment results in a grant, the process can add 6-10 months to the overall EB-3 visa application process.

#### Step 4: Form I-140 Petition to USCIS (currently a 1-8 month process)

If the above PERM application is approved, our agency must file [Form I-140](#) with the [U.S. Citizenship and Immigration Services](#) (USCIS). This form is paid for and filed by our agency on behalf of the caregiver and must demonstrate a continuing ability to pay the caregiver the prevailing wage (or more) through the time the caregiver becomes a permanent resident. Demonstrating this requires the submission of evidence such as tax returns, audited financial statements, and personnel records, among other things.

Once filed, the matter is transferred to the National Visa Center.

#### Step 5: Visa Application, Consulate Interview Abroad (currently an 8-24 month process)

Once the I-140 is approved, the last step in hiring a caregiver abroad is submission of a visa application (called a [DS 260](#)) and an in-person interview at a U.S. consulate. Depending on the caregiver's home country, this wait time can be years long.

**Problem 16:** As the [visa bulletin](#) shows, a major backlog exists for unskilled EB-3 visas (Caregivers are in the same category as all other EB-3, unskilled workers, such as laundry attendants, janitors and production workers.) The current wait for an EB-3 unskilled visa application is over 3 years. This is largely due to the halting of all EB-3 unskilled interviews from April 2020 to February 2021, which is when the backlog began.



## Solutions

Streamline the application process, which includes modernizing how jobs are posted, upgrading the FLAG system, allowing for audit materials to be submitted through the portal, and providing more and better technical assistance (solves for Problems 1-7.)

This proposal includes allowing more materials to be submitted with the initial application; creating a better document upload portal that has an accessible audit trail for agencies and offers technical assistance to agencies who need it.

As an initial matter, DOL should allow agencies to submit more information at the application stage. For instance:

- The agency should be allowed to download wage surveys found on the FLC website and directly submit that wage survey without having to wait for DOL to send one to the agency. (Solves for Problem 1)
- Allow the agency to submit proof of recruitment with the Permanent Labor Certificate at Step 3. (Solves for Problem 4)

Moreover, DOL should increase the functionality for the FLAG system to include:

- Establishing a portal within the FLAG system for uploading responses to requests made by DOL. (Solves for Problem 12).
- Allowing for the upload of supplemental application documents (such as recruitment tear sheets) through a portal on the FLAG system. (Solves for Problem 13).
- A tracker for each set of applications that includes an audit of materials uploaded to any portal on the FLAG system (Solves for Problems 7, 12, 13, 14 and 15).

Further, DOL should increase the use of technical assistance and provide more explanations when submissions are rejected. It would be helpful if DOL would create an ombudsman for visa related matters to ensure that all who are involved with the work of the Department have access to an impartial and confidential resource, one that operates independently and informally. DOL has a history of successful ombudsman programs such as the [Office of the Ombudsman for the Energy Employees Occupational Illness Compensation Program](#) and the [Office of Federal Contract Compliance Programs Ombuds Service](#).

DOL should provide guidance to agencies about what causes the audit or occasional supplemental requests in Step 3 so agencies can improve their applications – saving time and money for agencies and DOL. (Solves for Problem 5).

- DOL should provide guidance to agencies about what causes Supervised Recruitment requirements in Step 3 so agencies can improve their applications – saving time and money for agencies and DOL. (Solves for Problem 8).
- DOL should provide guidance to agencies about why DOL denies Supervised Recruitment efforts in Step 3. (Solves for Problem 10).



- DOL should provide more and better guidance regarding what agencies should do when the Supervised Recruitment efforts in Step 3 are approved. (Solves for Problem 11).

### *Schedule A should include caregiving*

Generally, EB-3 petitioners must obtain a labor certification from DOL that verifies that there are no qualified U.S. workers available for the petition. However, for certain occupations, known as Schedule A, DOL has pre-certified this so the petitioners do not need to obtain a labor certification from DOL. Examples include registered nurses, physical therapists, and others deemed to be of exceptional ability.

Caregiving should be designated a Schedule A occupation. No matter how hard we try, we are unable to recruit and retain adequate numbers of willing and qualified caregivers from our nation's current labor pool. The unmet need for home care is enormous and the shortage is dire, making a Schedule A designation sensible labor, economic, and immigration policy.

### *Eliminate the Backlog*

The EB-3 visa category is chronically backlogged. An agency filing their PERM application today would face a three and a half year wait to have their caregiver interviewed at a consulate abroad. These delays are hurting patients who need care and the American economy as a whole. Federal appropriations for more staff and a renewed prioritization of our visa category would help us create more jobs and provide more care to more people who need it.

### *Clarify the Process*

Our agencies stand ready and willing to work with the many relevant government agencies involved in this process. To do so, greater clarity as to how the process plays out and why is pivotal. For example, understanding why certain applications are flagged by DOL and what triggers supervisory review would go a long way in reducing both wait times and Department workload.

### *Lift the Cap on EB-3 Workers*

Finally, we ask that the unnecessarily low cap on EB-3 visas be raised. The demand for home care is well established. The supply of willing, qualified workers exists. Raising the cap makes sense economically and for the thousands of Americans who desperately need and rely on our care daily.

We encourage DOL, USCIS, and the U.S. Department of State to continue to work together and with us to help streamline and clarify the EB-3 process.