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# FOLLOW THE MONEY: WHAT THE OES COUNTS THAT YOU CAN'T

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What is the main complaint against foreign workers? Simple: They undercut American wages. How do we know that one might ask? Well, critics like Senator Charles Schumer (D-NY), who unveiled and passed HR 6080, the Border Security Emergency Supplemental Appropriations Act of 2010, do not tell us but the government actually does have a well established program to measure all this called the Occupational Employment Statistics survey. The Occupational Employment Statistics (OES) program conducts a semi-annual mail survey designed to produce estimates of employment and wages for specific occupations, www.bls.gov/oes/oes_emp.htm. All you have to do is to pay the foreign worker, when filing either an H-1B or labor certification application, based on what the OES says he or she should be paid and you know why our economy is in the ditch. While an employer is free to challenge the DOL's reliance on the OES with a private wage survey, such a challenge is often costly and time consuming. So, it seems that perhaps we might take a closer look at this OES survey to find out what it is all about. Then, so the argument goes, we will know why H and L visa fees need to be higher, why DOL needs to audit more labor certifications and why Congress should declare a moratorium on all immigration.

How does the OES define "wages"? Let's take a look at the OES website, http://www.bls.gov/oes/oes_ques.htm#Ques3

How are "wages" defined by the OES survey?

*Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Included in the collection of wage data are:*

*· base rate,*
*· cost-of-living allowances,*
*· guaranteed pay,*
*· hazardous-duty pay,*
*· incentive pay, including commissions and production bonuses,*
*· on-call pay, and*
*· tips*

Notice the inclusion of tips and incentive pay including commissions and production bonuses. These are obviously not guaranteed by their very nature. Now, this is passing curious since the Department of Labor PERM regulations bar consideration of such incentive compensation: "*wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis*." 20 CFR 6456.20(c)(3). Nor is this contradiction limited to PERM We find it in the H-1B regulations as well, something that Senator Schumer probably knew but the rest of us perhaps overlooked: If you look at the 20 CFR 655.731(C)(2)(v) definition of "cash wages paid" for purposes of satisfying H-1B required wage, you see the following: "*future bonuses and similar compensation…may be credited toward satisfaction of the required wage obligation* ***if their payment is assured(i.e. they are not conditional or contingent on some event such as the employers annual profits)…" ( emphasis added)****.* So using this definition, tips, commissions, and other forms of incentive pay could not be considered by the employer in demonstrating satisfaction of the required wage obligation even though OES considers them in setting the prevailing wage!

Well, what about fringe benefits? This is a way that employers reward performance without raising base salaries. Surely, DOL allows this you ask? Not so fast my eager young friend! In 1991, the Board of Alien Labor Certification Appeals (BALCA) decided a case styled *Kids"R"Us*, 89-INA-311 (Jan 28,1991). If you read this case,and you will doubtless want to after reading this blog, pay special attention to page 4 which talks about calculating the value of fringe benefits and relies upon *Peddinghaus*, 88-INA- 79 (July 6, 1988). The whole point is to allow a precise determination of how much the fringe benefits were worth- in contrast to OES acceptance of tips, bonuses and other incentive pay that cannot possibly be calculated with any degree of exactitude unless and until they are paid. Even if unique, fringe benefits must be guaranteed and cannot be based on contingent payments, such as bonuses based on profits or tips. In

*Kids"R"Us*, the following benefits were brought forward by the employer as part of the salary:

*· medical plan with HOM and Major Medical for which employee only paid $5 per week*
*· paid vacation*
*· life insurance*
*· stock options*
*· stock purchase program which company assisted by paying all brokerage fees and adding 10% to any employee purchase*
*· company paid profit sharing where employee had to pay nothing while company kicked in 8% into a retirement fund*
*· 401K where the company matched 1/2 of employee's contribution*

None of these depended upon corporate performance or profitability. They were not contingent compensation.The discrepancy between how the OES determines wages and how employers are allowed to do so is not a new controversy. Consider the following discussion between the American Immigration Lawyers Association and the Department of Labor from the last century:DOL/AILA Liaison Meeting Minutes (3/19/99)
DRAFT MINUTES OF DOL/AILA LIAISON MEETING ON MARCH 19, 1999

Question: It is our understanding that the OES survey reflects "total compensation," including incentive compensation and bonuses. We understand that the set of instructions sent with the questionnaires instructed participating companies to include items such as bonuses as part of the reported wages? Is this true? If so, does this not run contrary to the requirement that the "wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis." 20 CFR 6456.20(c)(3). Similarly, does the Service Contract Act also report total compensation benefits? In general, may an employer include sign-on bonuses, incentive pay, transportation and relocation allowances, which are all, reported as income to the IRS, as part of the salary? It the OES wage survey definition of compensation includes incentive pay, should we not be citing surveys that report "total cash compensation" wages rather than the "base salary"?

Answer: USDOL indicated that if a guaranteed bonus was paid every year, it could be considered as part of the prevailing wage.Question kind sir: Do the companies that respond to the OES survey have to prove they pay a

guaranteed bonus every year or any year for that matter? Fast forward a few years and we come another AILA-DOL discussion of OES wage methodology from March 22, 2001:

QUESTION: The OES survey includes the use of discretionary bonuses, including production bonuses, commissions, cost-of –living allowances and the like. The OES wage computations in OES do not comply with the definition of weighted average of the salaries of workers surveyed. OES does not obtain specific salaries for each worker but rather requests that employers identify how many employees fit into defined wage ranges. There are other flaws in the OES, including the fact that there are only two levels, and Level II has the same range for highly experienced workers and moderately experienced workers.

ANSWER: DOL is aware of the issues regarding the OES. The regs do not mandate it's use, but it is the best that DOL has to offer. OES will not be changed in the near future, so we will all have to live with the status quo. The PERM proposal will address prevailing wages and AILA will have an opportunity to comment on this issue in that context. However, DOL is continuing to provide training to SESA's on prevailing wage determinations and assessing employer-provided surveys.

What most attorneys practicing today do not realize is that the OES has only been applied to labor certification since General Administrative Letter 2-98 on October 31,1997. Before then, as us folks who have been in the practice for a few more years remember, the state workforce authorities ( SWA of blessed memory) conducted a customized wage survey for each employer. OES was never meant to apply to labor certification and always took incentive compensation into account because, for most wage settings, this is accepted as part of what workers really got paid. At the time, our eagle-eyed colleague Deborah Notkin wrote a prophetic article entitled *Labor Certification Practice: Coping With GAL 2-98 and the Occupational Employment Statistics (OES) Program* that appeared in the May 3, 1999 issue of Interpreter Releases. The clash between the OES and labor certification became more painful when the OES switched to the Standard Occupational Classification System in 1999. This is the same system that DOL uses today to determine prevailing wages. Listen to how it operates:

"In 1999, the OES survey began using the Office of Management and Budget (OMB) Standard Occupational Classification (SOC) system. The SOC system is

the first OMB-required occupational classification system for federal agencies. The SOC system consists of 821 detailed occupations, grouped into 449 broad occupations, 96 minor groups, and 23 major groups. The OES survey uses 22 of the 23 major occupational groups from the SOC to categorize workers in 1 of 801 detailed occupations...he OES survey's transition to the new SOC system, estimates are not directly comparable with previous years' OES estimates, which were based on a classification system having 7 major occupational groups and 770 detailed occupations. Approximately one-half of the detailed occupations were unchanged under the new SOC system, with the other half being new SOC occupations or occupations that are slightly different from similar occupations in the old OES classification system."
http://www.bls.gov/oes/oes_emp.htm

O*NET is based on the SOC system. It is the compressed nature of this system in its occupational categorization that often produces distorted wage surveys. Note when the OES began using SOC, not that far after GAL 2-98. It was only then that the SOC system acquired legal and logical relevance for labor certification.

So, if there is a double standard in the calculation of what wage should be paid, and if the OES system is used to penalize employers who have the temerity to file H1Bs and labor certifications when the methodology underlying the entire OES concept was never meant to apply to immigration in the first place, how in the name of Sam Adams and the Continental Congress did we wind up in this mess? For that, dear reader, you must endure a little history lesson. In 1993, Vice President Al Gore inaugurated the National Performance Review. From the point of view of labor certification, the impact of the National Performance Review was that the DOL, among other federal agencies, was asked to identify opportunities for reducing expenditures. The resulting savings would contribute to balancing the federal budget, which at that time was running heavily in the red. At the DOL, the labor certification program was a prime candidate for cutbacks. Being at the center of the labor certification process, the DOL experienced its artificiality and unreasonableness "up close and personal." It would be only natural for budget officials and other high officials in the DOL to dislike such a program. With this background, the DOL inaugurated its re-engineering" initiative for labor certification in 1995. *See Reengineering of Permanent Labor Certification Program; Solicitation of Comments*, 60 Fed. Reg. 36440 (July 17, 1995) reported and reproduced in 72 Interpreter Releases

976,993 ( July 24, 1995).

The National Performance Review reported to the President in September 1995 that $223.8 million could be saved over five years in the labor certification program by "streamlin the alien labor certification process by decentralizing authority to state employment agencies and automating form processing." *National Performance Review, Ch. 2, "Getting Results*" ( Sept. 7, 1995) It described its proposal as follows:

"Streamline Alien Labor Certification: Streamline and speed up the Alien Labor Certification process by decentralizing authority to state employment security agencies, consolidating DOL regional processing centers from 10 to four, and automating forms processing. Under this proposal, DOL will conduct spot audits of about 2 percent of its cases rather than review all state certifications. Also, states will be authorized to charge user fees to those few employers who use this service." National Performance Review, "Appendix C: New Recommendations by Agency" ( Sept. 7, 1995).

The Clinton Administration reduced the size of federal civilian workforce by 426,200 positions between January 1993 and September 2000, shrinking 13 of 14 departments.http://govinfo.library.unt.edu/npr/whoweare/appendixf.html. From 1992 to 2000, the federal workforce was reduced by about 20 percent. http://www.innovation.cc/discussion-papers/nat-performance.htm . None of the proposed changes that the DOL outlined in the National Performance Review actually happened. What did happen was that funding for labor certification was reduced from $60 million in 1993 to $40 million in 1997. These cuts contributed to the National Performance Review's aims, but none of the proposed reforms materialized. With the National Performance Review looking for federal programs to cut, the DOL's Employment and Training Administration (ETA) requested the DOL's Office of Inspector General (OIG) to conduct an audit of the labor certification program: "Since ETA requested the audit, we have launched our own reengineering efforts through the National Performance Review initiative to address program weaknesses and to achieve a more rational allocation of resources." *U.S. Department of Labor, Office of Inspector General, Office of Audit, Final Report: The Department of Labor's Foreign Labor Certification Programs: The System is Broken and Needs To Be Fixed*. Rep. No. 06-96-002-03-321 ( May 22, 1996). Herein lay a double irony: not only was the ETA asking for an audit that criticized the ETA, but the ETA felt alienated from its own roots because the ETA's predecessor agency grew out of the Bureau of

Immigration. Such cultural contradictions are the inevitable, though unintended, consequence of a system founded on a negative premise.

From 1992 to 2000, as a result of Vice President Gore's National Performance review, the federal workforce shrank by about 20 percent, http://www.innovation.cc/discussion-papers/nat-performance.htm. The Clinton Administration reduced the size of federal civilian workforce by 426,200 positions between January 1993 and September 2000, http://govinfo.library.unt.edu/npr/whoweare/appendixf.html. This was why GAL 2-98 came about, why the SWAs stopped doing wage surveys and the job of determining prevailing wages for labor certification cases went to Bureau of Labor Statistics that was already using OES for non-labor certification wage survey purposes. PERM today is the fruit of the Clinton Era emasculation of labor certification funding and is the perfect expression of a dysfunctional program whose internal contradictions have never been resolved. What began as a desire to reinvent government ended in the shot-gun marriage of OES and labor certification when the Department of Labor abandoned the very concept of a meaningful prevailing wage to the tender mercies of its critics.

The H/L fee hikes sponsored by Senator Schumer are a continuation of what Senators Durbin and Grassley began in 2009, namely to use the OES wage system as a way to punish employers for sponsorship of work visas. Under the Durbin- Grassley proposal (S. 887 ), an employer who transfers an L employee to the U.S. for a cumulative period of time in excess of over 1 year would have to pay the prevailing wage, for Skill Level 2 in the most recent Occupational Employment Statistics (OES) Survey. Incidentally, the Skill Level 2 requirement also applies to H-1B workers, and thus if someone is legitimately an entry level worker, and can qualify for the H-1B visa, Durbin- Grassley would still requires the employer to pay the higher level wage even though a U.S. worker in a comparable situation may command the entry level wage. The full text of S. 887 may be found here, http://www.govtrack.us/congress/bill.xpd?bill=s111-887. The OES is not neutral. From the time of GAL 2-98 to today, those who seek to choke off employment migration to this country have consistently sought to expand its reach and impose ever more onerous conditions so that employers who had the temerity to file an application would think twice.

Moreover, when one thinks of OES, it should be in concert with the replacement of the DOT by O*NET with a dramatic collapsing of occupational categories and a downgrading of SVP quotients for many technical and

scientific occupations that are the frequent subjects of labor certification. The end result of all this is artificially inflated wage determinations that must be paid by employers for less experience. We now have two forms of immigration restriction: numerical quotas set by Congress and qualitative restrictions applied by the DOL through the targeted deployment of administrative systems whose combined effect is to render successful immigration sponsorship more expensive, tedious and difficult. It would then be a mistake to believe that the world has not changed absent passage of CIR. In fact, the immigration calculus has shifted to a much less favorable posture so that legislative inaction has given way to administrative restraint.

There is another problem with the OES.The DOL violated the Administrative Procedure Act by adopting the OES system without providing stakeholders with the opportunity of notice and comment. Remember what BALCA said about attempts by DOL to make law through promulgating FAQs. In *Matter of HealthAmerica*, 06-PER -1 (BALCA July 16, 2006), the Board of Alien Labor Certification Appeals chastised the Certifying Officer's reliance on FAQ No. 5:, : " *Whether FAQ No.5 provides persuasive authority depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade... We find that FAQ No.5 imposes substantive rules not found in the PERM regulations, nor supported by PERM's regulatory history, nor consistent with notions of fundamental fairness and procedural due process*." Cannot the very same things be said with regard to the decision to abandon SWA wage surveys and use OES? We think they can and, for this reason, the decision to change the way wage surveys were conducted for LC purposes without notice and comment is an APA violation and unlawful. This represented an adoption by BALCA of the standard of deference previously articulated by the Supreme Court in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). Applying *Skidmore* deference, the weight accorded to such an administrative judgment "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. The failure of DOL to do any of this at the time they first applied the OES methodology to labor certification prevailing wage determinations following the promulgation of GAL 2-98 violated fundamental fairness and deprived DPL's decision of Chevron-style deference. We concede that the DOL did follow APA when it

promulgated PERM rules at 20 CFR 656. However, as noted above, these rules bar consideration of any form of incentive compensation. When confronted with this contradiction in the past, DOL has routinely claimed that it cannot control what BLS does Yet, facts are indeed stubborn things. Every time the DOL uses the OES to tell an employer what the wage should be, the DOL, is intentionally and consistently violating its own regulations which it cannot do under the Chevron test.

We propose that the best way to free up wages is to ensure that the worker is not held captive to the same employer for years. Once the H-1B worker arrives to work for the company that sponsored him or her, the requirement that a new employer again go through the same tedious application procedure be eliminated if the worker is in the same or similar occupation. Let's free the H-1B worker to work for another company without the need to file a new petition or to even start his or her own company in the same occupation. Also, while this H-1B worker is being sponsored for permanent residency, he or she could be allowed to continue the green card process if working in the same occupation much sooner than the law allows presently. Presently, Section 204(j) of the INA only allows "green card" portability at the final stage of the process, when the adjustment application has been filed and has been pending for over 180 days. An Indian waiting in the EB-3 queue may have to wait for over a decade before being able to file an adjustment of status application. The law should be changed to make the H-1B completely portable following initial approval. Once this happens, an H-1B worker will be on the same footing as a US worker. The employer will have less of an incentive to keep captive an H-1B worker. The market will determine the wage to be paid to an H-1B worker who would have an easier access to another employer. If the H-1B visa becomes truly portable, the protection of the market, via occupational mobility, replaces the false protection of the LCA. Moreover, we also propose three possible ways to solve the OES problem, first urged by AILA in March 2001. In each case, the effect would be to ameliorate the artificial wage inflation now resulting from the allowance of incentive compensation and once again, as before the application of OES to immigration, restore the primary of market driven forces as the ultimate arbiter of salaries:(a) Back out all non-guaranteed calculations from the OES averages; (b) allow employers to include these same items in their wage offers for labor certification purposes; or (c) return to the pre-PERM era and allow variance in wage offers to bridge the gap between what OES defines

as prevailing wage and what the employer can guarantee as base salary.

We know there is fear and loathing in the land for very good reasons. We know too that the misapplication of the OES wage methodology to immigration is not the whole problem or even most of it. Yet, it is key to what plagues our national conversation today for those who most loudly condemn substandard wages for foreign workers do not bother for a moment to acknowledge that those who decide these things are playing with the house's money and a stacked deck. The most damning indictment against the Schumer Bill and the other manifestations of immigration protectionism is not that they will cost American job by inciting retaliation by our major trading partners, which will happen, or even that they promote a fortress American mentality at a time when our economic revival requires even greater integration into the global economy. Rather, it is that such misplaced antagonism rests upon an ignorance of history and serves more than anything else as an unspoken but undeniable admission that America's best days are behind it. This is a lie that must not stand.