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Re: Agency Information Collection Activities: Extension of a Currently Approved Information Collection With Non-substantive Changes; Comment Request; Forms ETA–9035, ETA-9035E, ETA-9035CP, WH-4, OMB Control No. 1205-0310.

The American Immigration Lawyers Association respectfully submits the following comments to the proposed revised 9035 form published in the Federal Register on June 26, 2008.

We appreciate the opportunity to comment on the proposed rule and believe that we are particularly well qualified to do so. AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

Our comments are organized by Form and then by section, and we indicate suggestions to the "FORM" and "INSTRUCTIONS" (on ETA 9035CP) section-by-section.

FORM ETA 9035 & ETA 9035CP

HOW TO FILE – 9035 CP

This new section is very useful in summarizing the process for filing. We recommend that the instructions reference section 20 C.F.R. § 655.760(c) of the regulations to determine how long the employer must retain documentation related to the filing. In Section B.2. the instructions indicate that the documentation must be maintained for 5 years. However, 20 C.F.R. §

655.760(c) states: “the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition applications expired or was withdrawn.”

Section A

No comment

Section B

Instructions

B-4: This item directs the employer to state whether the job is full-time or not. The clarity of the information collected would be enhanced by defining full-time, i.e., at least 35 hours per week.

Form and Instructions

B-7: This item asks for the total number of worker positions needed for each of six categories of employment (i.e., new employment, continuation of previously approved employment without change with the same employer, change in previously approved employment, new concurrent employment, change in employer, and amended petition). These categories correspond to the categories on Form I-129, the petition for nonimmigrant worker. These categories are unclear and a constant source of confusion on the I-129 Form. For instance, it is unclear whether a petition for an alien who is “porting” to a new H-1B petitioner and seeking an extension of H-1B status should be marked “new employment” or “change in employer.” Equally confusing is how to mark an H-1B petition filed to correct a prior H-1B approval that erroneously ignored a request for a change of status. Such a petition could be considered “new employment,” “change in employer,” or “amended petition.” While the U.S. Citizenship and Immigration Services has issued guidance memoranda in deciphering the meaning of these categories, they remain confusing and subject to conflicting interpretation. Since this information appears unnecessary for the proper performance of DOL’s function in administering the LCA program and will not enhance the quality, utility and accuracy of information collected, it should not be included in the LCA form.

Section C

Form

C-13: This item asks for the NAICS code (must be at least four digits). The NAICS provides codes from 2-6 digits. The form should allow NAICS codes that go from 2 to 6 digits. There are many instances where the most accurate code for an employer may be a 2-digit code based on the broad nature of their business.

Section D

No comment

Section E

No comment

Section F

No comment

Section G

Form

Item G.a. asks for the full street address of the place of employment. This information is likely to confuse employers about the continuing validity of an approved LCA and whether a new posting and LCA must be completed if the employer moves to a different street address within the same area of commuting distance. The more general request for just city and state on the current form reduces the possibility of confusion concerning when a new posting and LCA might need to be done. Alternatively, if the DOL chooses to collect this information, it should clarify that the LCA remains valid if the place of employment is moved to another address within the "area of intended employment" as defined in 20 C.F.R. § 655.715 provided that applicable notice requirements are satisfied.

Instructions

Items 9 and 10: Instructions should also state that "If the position is part-time, enter prevailing wage on an hourly basis."

Item 11.a: There is a typo in this item. The sentence should read: "Enter the year in which the data source used to list the prevailing **wage** [wage was left out] was published."

The instructions refer to Appendix II, which provides a sample list of the types of wage surveys acceptable from two (2) major wage survey companies. This sentence implies that these are the only two sources for alternative wage sources. We recommend that the instructions clarify that the employer may use any published survey which meets the requirements of 20 C.F.R. § 655.731(b)(3)(iii)(B) or (C), as appropriate.

Section H

Instructions

There is a typo in the **"working conditions"** paragraph: the word "nonoimmigrants" should be "nonimmigrants." There is also a typo in the "**strike, lockout or work stoppage**" paragraph: the word "ht" in the third line should be "the." The wording "with three days" in line 4 should be "within three days." The last typo is in the "**Notice**" paragraph, line 7, "AS" should be "As."

Section I

Instructions

If this section is for H-1B employers **only**, then references to "H-1B1 and E-3" should be taken out in the following places (*note the current instructions do not include references to H-1B1 or E-3 throughout this section.)*:

- Paragraph 1, sentence 1
- Subsection 1, Paragraph numbered 1, second bolded section, line 2
- Subsection 1, Paragraph numbered 2, second bolded section line 3
- Subsection 1, Paragraph numbered 3, second bolded section line 2
- Subsection 2, Paragraph labeled (A), line 2
- Subsection 2, Paragraph labeled (B), line 1
- Subsection 2, Paragraph labeled (C), line 1, 4, and 5

There is a typo in item 1, second paragraph, 3rd line: "that if it uses his application" should be "that if it uses **this** application."

There is a typo in item 2, second paragraph, 4th line: "that if it uses his application" should be "that if it uses **this** application."

Section J

If this section is marked with either "Employer's principal place of business" or "Place of Employment," what impact does it have on the validity of the document if the employer after the certification changes the location of the public disclosure materials? For that reason, it seems irrelevant and confusing to ask this question. We recommend this question be deleted, as it has no relevance to the certification of this application. Employers are already attesting to complying with the public disclosure requirements as set forth in 20 C.F.R. Part 655.

Section K

No comments

Sections L, M, N, O & P

No comments

FORM ETA 9035CP – Appendix I – mapping 3-digit DOT codes to SOC/O*Net

No Comments

FORM ETA 9035CP – Appendix II – sample of acceptable wage survey sources

The introductory note on Appendix II states that the listing of wage survey sources is not comprehensive, but a sample of acceptable sources used by employers from two (2) major wage survey companies. This sentence implies that these are the only two sources for alternative wage sources. We recommend that the instructions clarify that the employer may use any published survey which meets the requirements of 20 C.F.R. § 655.731(b)(3)(iii).

FORM WH-4

There is an inconsistent use of terms on the form. In item 4 instructions it refers to "section" 8 and then in Section 8 it refers to "item" 4. They should be EITHER "items" or "sections." Items 1-4 are bolded but Items 5-8 are not bolded.

Item 4 ("Description of Alleged H-1B Violations") requests information on possible alleged violations but includes several instances that are not necessarily violations. These inaccuracies create the appearance of a lack of objectivity in program administration and encourage the filing of baseless complaints and should be corrected. The specific examples are as follows:

Item 4(a) - This should refer to the labor **condition** application, not "certification" application.

Item 4(d) - This lists the following as an alleged violation: "Employer made illegal deductions from H-1B worker's wages (e.g., for H-1B petition processing…)." This is only unlawful if the employee is required to pay for the ACWIA training fee or if the deduction from wages for petition processing causes the offered wage to fall below what is required. We recommend the addition of a clarifying phase.

Item 4(i) - This allegation should be clarified to state: "Employer required H-1B workers to pay all or any part of the $750/$1500 **scholarship and training** fee."

Item 4(j) - This lists the following as an alleged violation: "Employer imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer." Since the regulations allow liquidated damages for early departure, not all employee obligations for early departure are "illegal penalt[ies]." This question should be clarified accordingly.

Items 4 (m),(n),(o), & (p) - All of these alleged violations are applicable only to "dependent" employers or "willful violator" employers as defined in 20 C.F.R. § 655.736. These items should be clarified accordingly.

As written many of these items do not advance INA § 212(n)(2)(G), which requires the Secretary of Labor to determine whether a complaint is credible and provides reasonable cause to believe that an employer has committed a willful violation of the attestations on the LCA. With respect to Item 4 in general, we believe that the proposed clarifications will help limit complaints to actual alleged abuses and will enhance the perception that the Department is administering the program objectively.

We are concerned that Form WH-4 may be misused as a tool for a disgruntled employee to cause harm to an employer. In order to prevent abuse, we recommend that the person submitting the form sign an attestation verifying the truthfulness of the information.

DOL Supporting Statement for Request for OMB Approval Under the Paperwork Reduction Act of 1995

Section A.12 details the estimates of the burden of data collection. We believe that the estimates provided by DOL for preparing the LCA, as well as complying with recordkeeping requirements are too low and should be adjusted to reflect the time that realistically must be spent to complete each activity.

A. Indicates that the estimate for complying with recordkeeping requirements takes 5 minutes. 20 C.F.R. § 655.731(b) sets forth the information that the employer must maintain. The employer is required to develop and maintain information regarding the wage and benefits. It is not realistic for an employer to comply with the extensive recording keeping requirements required by the regulations in 5 minutes. We recommend increasing the estimate to 60 minutes,
B. Indicates that the estimate for documenting a change in corporate identity takes 30 minutes. 20 C.F.R. § 655.730(e) requires that the employer maintain a document including specific information in its public access file in the event of a corporate change. The required information includes the LCA number and date of certification, description of new employer's actual wage system, new FEIN, and sworn statement acknowledging the new entity's assumption of all obligations, liabilities and undertakings arising from the still effective LCAs. As corporate transactions are often complex, it can take time to develop a statement concerning the assumptions of the new entity. We believe that the burden estimate should be extended to 60 minutes.
C. Indicates that it will take an individual 20 minutes to complete Form WH-4 Information Form Alleging H-1B Violations. The filing of this form can have serious consequences for an employer. Twenty minutes is a short period of time and gives the impression that it is something that can be completed with little care or thought. An individual submitting this form should be encouraged to provide as much information concerning the violation as possible. We recommend that the estimate be extended to 45 minutes.

Your consideration of these comments is appreciated.
Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION