AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

Jeanne A. Butterfield
Executive Director

Susan D. Quarles
Deputy Director, Finance & Administration

Crystal Williams
Deputy Director, Programs

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Office of Information and Regulatory Affairs
ATTN; OMB Desk Officer for the ETA
Office of Management and Budget, Room 10235
Washington, DC 20503

Email: OIRA_submission@omb.eop.gov

Re: FR Doc. E7–16800 Agency Information Collection Activities: Revision and Extension of a Currently Approved Information Collection; Application for Permanent Employment Certification; Form ETA–9089, OMB Control No. 1205–0451.

The American Immigration Lawyers Association respectfully submits the following comments to the proposed revised 9089 form submitted to the OMB on March 25, 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 Section and we indicate suggestions to the "FORM" and "INSTRUCTIONS" section-by-section.

Section C

Form

C-12 asks for the number of employees currently on the employer's payroll in the area of intended employment. We find this question is likely to be

burdensome to employers with multiple worksites who do not track the number of employees based on area of intended employment. There is no regulatory requirement to have a specific number of employees in the area of intended employment, so the question is not relevant to the adjudicatory function and should be removed. However if the question is retained, it is reasonable to ask for the number of employees within the US.

C-15 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 F

Instructions

The Note in the instructions states that the employer needs to obtain a PWD from the SWA *"responsible for the state in which the work will be performed."* This instruction should be modified to reference the determination of the location of the worksite as stated in Section H, as follows: *"responsible for the* state in which the work will be performed as indicated in Section H 'worksite information'."

There is a typo in item 1. Enter the state/District/*Territory* of the SWA…

Section H

Form

H. a & b Worksite Information

The March 2008 version of the 9089 and its instructions do not provide sufficient guidance to employers regarding the correct location for posting the notice, advertising, and obtaining the prevailing wage. The form also does not provide sufficient information to DOL to enable it to verify regulatory compliance with advertising, notice posting, and prevailing wage determinations for the following reasons:

1) The form does not distinguish between situations where *most of the work* is performed at the worksite address given by the employer or where *very little of the work* is performed at such address. In the former situation, advertising, notice posting, and prevailing wage determinations could be at the worksite address and no other address. But if other MSAs are listed, DOL will not be able to determine whether the work performed at other locations is minimal or whether an employer should post a notice somewhere within any or all of the MSAs listed.

2) The form does not provide a place to list a specific workplace address within each MSA listed. Therefore, DOL lacks sufficient information to verify whether the

employer has complied with regulations regarding posting a notice if, for example, 40 % of the work was evenly divided within two different locations in the same MSA but the employer provides only one posted notice for the particular MSA.

3) The form does not provide any guidance to employers as to where to advertise, post notice, or obtain the prevailing wage determination if more than one worksite is listed or if the work is performed at the employee's residence. DOL has explained that the purpose of the 9089 is to serve as a data collection device and not as a tool to disseminate policy. However, the form leaves the employer confused as to its obligations and unsure of where to advertise, where to post notice, and where to obtain the prevailing wage in a variety of scenarios ranging from offsite assignments for only 5% of the time to multiple worksite assignments such that the employee works at no one location more than 50% of the time.

OMB has asked for comments evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the agency, and whether the proposed collection of information enhances the quality, and utility of the information to be collected. The answer, with respect to the worksite questions, is that the form needs to be improved.

H-1 should read as follows:

Type of worksite that best describes where most of the work will be performed (choose only one):

* Business premise (advertising, posted notice and prevailing wage must be based on location of business premise);

* Employer's private household (includes live-in and domestic household workers)(Advertising and prevailing wage must be based on location of employer's private household. Posted notice is required only when employer has other US workers);

*Employee's private household (only when work is performed directly from residence)(Advertising and prevailing wage may be based on location of employee's private household or employer's headquarters. Posted notice must be based on location of employer headquarters);

* No single location where work will be performed more than 50% of the time or no specific worksite address (advertising, posted notice, and prevailing wage must be based on location of employer's headquarters).

H-3 The text should say "additional address information (e.g. building name)." Otherwise, it suggests a second worksite location. The proposed form provides another place to enter additional worksite locations.

H-14 Because this section comes before the sections that list the primary and alternate requirements, some context is needed to assist the form user to complete the form correctly, this section should be changed from "Other special requirements" to "Specific requirements." In addition, the following text should be added: "Do not include requirements that are described in items H.d. and H.e."

H-15. The other education requirement is restricted to "other degree." Employers may wish to require education that is not "training" but does not result in the award of a degree. Example: 2 years of college coursework. This section should be revised as follows:

15. Replace the word "degree" with "degree/education."

15a. Replace text with: If "Other degree/education" in question 15 is selected, specify the diploma/degree or other education required.

H-20 As with H-15 above insert "degree/education" and delete "degree (JD, MD, etc)" after the "other" degree box to allow for some high school or college requirement (e.g., 2 yrs college) without a degree requirement.

Instructions

H-20 In first sentence, replace "degree/education" to allow for a requirement of some years of education without requiring an actually degree or diploma.

H-20c Insert a clause at end so question reads "Does the employer require a second U.S. diploma/degree or have a second educational requirement?"

Instructions

H-20c Similarly, after "requires a second U.S. diploma or degree" insert "or has a second educational requirement."

H-20d Similarly, after "indicate the second U.S. diploma/degree" insert "or educational requirement"

Instructions

H-20d Similarly, after "requires a second U.S. diploma or degree" insert "or has a second educational requirement."

H.h. Business Necessity

Form

Intro to Business Necessity

In bolded **Note,** second sentence should be changed from "Preferences will be considered to be the same as requirements for the job opportunity" to "Any preferred requirements will be considered to be minimum requirements for the job opportunity."

H-26 Delete "or preferred."

Instructions
H-26 Delete "and/or preference" from the first sentence.

H-27 Add the words "stated in Part F-4" so that the text is revised to state: "Do the job requirements exceed the Specific Vocational Preparation (SVP) level of the occupational code indicated in Section F-4 of this form?"

Instructions
H-27 Add the words "stated in Section F-4" to the first sentence so that the text is revised to state: "If the employer's requirements for the job opportunity listed in Section H of this form exceed the Specific Vocational Preparation (SVP) level assigned to the occupational code stated in Section F-4 …"

Add the words "stated in Section F-4" to the second sentence so that the text is revised to state: "If the employer's requirements for the job opportunity listed in Section H of this form do not exceed those assigned to the occupation stated in Section F-4 by O*NET Job Zone, mark 'No'."

In addition, edit the following sentence to accurately reflect the DOL process "If the SWA's prevailing wage determination did not include the prevailing wage (skill) level, mark 'N/A'." to state "If the occupational code set forth in SWA's prevailing wage determination does not include an O*NET Job Zone, mark 'N/A'."

Section I

Instructions

I-1 "**Note**:" We recommend the following revisions to the text as follows: "An employer may not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees (even those paid by the alien directly to the employer's attorney) or as a reimbursement for any costs incurred in preparing or filing the application. 'Payment' may include, but is not limited to: monetary payment **by the sponsored employee to the employer's attorney**, wage concessions (including **reductions in or** deductions from salary or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer."

In addition, we recommend the following text be added which would provide further guidance to employers in determining how to answer this question:

"Activity related to obtaining permanent labor certification" includes preparing the application, advising regarding appropriate recruitment activities, or any other action associated with the preparation, filing, or pursuit of an application.

The "employer's attorney" is the attorney who prepares the application and who may or may not actually submit the application to the Department of Labor. An attorney who represents both the employee and the employer is considered for these purposes to be the employer's attorney. Attorneys' fees and recruiting costs related to the labor certification are treated as employer-incurred fees and costs by the Department of Labor. An employee may only pay an attorney where the attorney represents solely the employee's interests in the review of a labor certification, and not in the preparation, filing, and obtaining of a labor certification.

I-6. If the employer's job order with the SWA has not ended, they are directed to enter the date the ETA-9089 is being submitted as the end date. However, this will presumably result in a denial of every case so submitted. The PERM regulations under Sections 656.17(e)(1)(i) for professionals and 656.17(e)(2) for non-professionals provide that the ETA-9089 cannot be submitted prior to 30 days after the job order runs with the SWA. Thus, listing the end date as the same date the ETA-9089 is submitted is in direct contravention of these sections of the regulations. We recommend the following revision to the text: "If the employer's SWA job order runs over 30 days and has not yet been ended by the SWA, enter an 'end date' which reflects a 30 day period."

I-25. We recommend the removal of 25d which can be confusing to the employer. Part 25a and 25c provide the two instances where an employer would not post a notice therefore the inclusion of 25d appears redundant and confusing potentially resulting in an employer selecting two boxes.

Section J

Form

J-11 and J-12: Telephone number and extension changed from current "phone number of current residence." We recommend that this remain the same as the current ETA-9089 because the existence of an extension implies that the question asks for a business number and not a residence number as stated in the form instructions.

J-16: (Class of Admission)
J-17: (Alien registration number)
J-18: (Alien admission number)

AILA continues to request that this information be excluded on the new form ETA-9089 since it is not required by the regulations.

J-22 This section asks whether the employer has paid for any of the foreign worker's education or training. We propose that this section should also state: 22a. If yes to 22, Does the employer

provide similar education or training to domestic worker applicants per 20 C.F.R. §656.17(i)(4). Y/N

Section J.d (Foreign Worker Education)

Thank you for including additional space to include more than one degree or diploma. However, we recommend that all education, including non-degreed coursework other than training courses, be included in this section.

J.d. **Bolded note**: We recommend the comment to state "Identify any relevant diplomas/degrees/**or other education (other than training courses attained). . . . "** because college level courses may be required that are not considered to fall under the training section.

The bolded note also refers to "3 sets of experience" and is confusing. This should be clarified to state 3 sets of education-related information.

J-23 The other education requirement is restricted to "other degree." Employers may wish to require education that is not "training" but does not result in the award of a degree. Example: 2 years of college coursework. This section should be revised as follows:

23. Replace the word "degree" with "degree/education."

23a. Replace text with: If "Other degree/education" in question 15 is selected, specify the diploma/degree or other education required.

Sections L & M

Form

Section M (1)—The first certification should be amended to state*:* "The offered wage equals or exceeds the prevailing wage and the employer will pay the prevailing wage from the time Permanent Residency is granted based on the approval of a labor certification or from the time the foreign worker is admitted **as a legal permanent resident** to take up the certified employment."

Your consideration of these comments is appreciated.
Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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