AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

July 7, 2014

William L. Carlson, Ph.D.
Administrator
Office of Foreign Labor Certification, Room C-4312
Employment & Training Administration,
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via E-mail: ETA.OFLC.Forms@dol.gov

RE: Comment Request for Information Collection for Form ETA-9089, Application for Permanent Employment Certification (OMB Control Number 1205-0451), Extension of Currently Approved Collection

79 Fed. Reg. 25621 (May 5, 2014)

Dear Dr. Carlson:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to your request for information regarding Form ETA-9089 as set forth in the Federal Register on May 5, 2014.

We appreciate the opportunity to comment and believe that we are particularly well qualified to do so. AILA is a voluntary bar association of more than 13,000 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 benefits, and are uniquely familiar with the ever-changing complexities of immigration law, policy, and procedure. We respectfully submit the following comments and suggestions for changing the current ETA Form 9089.

Section D: Employer Contact Information

Section D, Employer Contact Information, including the contact phone number (D.4) and e-mail address (D.5), is completed at the time an employer initially registers with the Permanent On-line System. However, the individual contact for an employer is subject to change, sometimes frequently, and there is no opportunity to update this information when drafting the application. Instead, the employer must go into its account to update the information and start a new application, a process which presents two practical problems. First, employers report difficulties

updating this information, even after contacting the Help Desk. It often takes days, if not longer for the information to be updated, which, given the time sensitive nature of the PERM process, is inconvenient and creates unnecessary pressure for employers seeking to submit an updated and accurate application. Second, if the contact information changes after the preparer has drafted the application, none of the changes carry over and the application must be re-drafted from scratch. We suggest that the PERM system/ETA-9089 be modified to allow the employer or preparer to update the contact information in Section D, or to provide an alternative contact, during the drafting of the application.

Section F: Prevailing Wage Information

In completing Section F, an employer must provide the SOC/O*NET (OES) Code under F.2 and the Occupation Title under F.3 that is assigned by DOL in connection with the prevailing wage determination (ETA Form 9141). However, the spaces to provide such information are not "free form" boxes but instead are completed by selecting from a list of pre-established choices that pop up when the "search" feature is clicked. Unfortunately, we have found that the available options do not include all of the codes and occupational titles which appear in the Online Wage Library and in O*NET. We respectfully request that the options for completing F.2 and F.3 match all available SOC codes or that these spaces be modified to allow the user to input an alternative code or title.

Section H: Job Opportunity Information

Currently, section H.6 reads, "Is experience in the job offered required for the job?" and section H.10 reads, "Is experience in an alternate occupation acceptable?" We suggest that these two sections be consolidated so that section H.6 simply asks: "Is experience required for the job?" The current bifurcation seems to be held over from the ETA 750A, and there appears to be no statutory, regulatory, or practical reason for asking separately about experience in the job offered and experience in an alternate occupation. Moreover, these questions are a frequent source of confusion and error among both unrepresented employers and less experienced practitioners who do not understand the nuances between "job offered" and "alternate occupation." For example, an employer who is filing an application for a Mechanical Engineer, which requires a bachelor's degree and two years of experience as a Mechanical Engineer, may mistakenly believe that the beneficiary's two years of prior experience as a Mechanical Engineer with a different company, where the job duties were 80% congruent with those listed in the PERM job opportunity is sufficiently equivalent to the "job offered" such that the employer answers "yes" to H.6 and "no" to H.10. This can often lead to a denial after audit, based on the finding that the beneficiary does not have experience in the *exact* "job offered." A simple open text box following the consolidated and rephrased question would allow employers to specify the experience needed for the job, rather than relegating this information to section H.14 ("Specific Skills or Other Requirements) as is the current practice.

The form should also allow employers to skip sections H.12, H.13, and H.15 for college and university teacher competitive recruitment and selection cases. All three questions relate to requirements that are not "normal" to the occupation, which may require a showing of "business necessity." The concepts of requirements "normal" to the occupation and "business necessity" only apply to cases filed under 20 CFR §656.17(h) as a result of the §656.17(a) carve-out for competitive recruitment and selection cases filed under §656.18.

Section I: Recruitment Information

Section I.b.4 should be updated to allow for the start and end dates of advertisements placed in a national professional journal given that employers who recruit under 20 CFR §656.18 are now able to utilize online posting for 30 days with the website of a national professional journal. Moreover, section I.b.5 should be changed to read "additional *verifiable* recruitment" because academic employers often advertise on multiple websites and locations which go far beyond the minimum one-time print advertisement or 30 day electronic advertisement, and frequently such ads have been deleted from websites by the time the ETA 9089 is filed. Unwitting employers may list recruitment sources which cannot be substantiated when later requested on audit. Moreover, even though 20 CFR §656.18(b)(4) requires "all other recruitment sources" to be listed, this serves no practical purpose as the same regulation (§656.18(b)(3)) only requires one advertisement. We respectfully suggest that 20 CFR §656.18(b)(4) be eliminated.

Section J: Alien Information

Section J.8 asks for the "class of admission" of the alien. Given that an alien's nonimmigrant status may change following his or her initial admission into the United States, we suggest using the term "current status" instead.

Section J.11 is phrased, "Education: highest level achieved relevant to the requested occupation." This question is misleading and employers are often confused as to what is relevant or not. We suggest changing this question so that it reads, "Education: highest level achieved **required by the requested job opportunity**." This terminology will make it clear to the employer that it must provide the educational level that meets the requirement set forth under H.4, will make it clear to the analyst as to whether an alien has met the minimum requirements of the required job opportunity, and is consistent with the language used in the regulations and elsewhere in the ETA 9089 under sections J.17, J.18, and J.21.

We recommend changing "Year relevant education received" in section J.13 to "Date required education completed" to allow an employer to input the actual month and year. This would obviate the need on audit to determine if the required degree was achieved prior to hire, or in 20 CFR §656.18 cases, prior to the date of selection.

Similar to the suggestions discussed above for sections H.6 and H.10, sections J.18 and J.20 should be combined into one question to read "Does the alien have the experience required for the requested job opportunity?"

Section K: Alien Work Experience

The language and requirements of Section K have been the subject of much recent discussion and debate during the last two DOL OFLC stakeholder meetings. On its face, section K appears only to require the listing of experience, and within such experience, the enumeration of all *skills* required by the job offer. There is no indication that the employer should also include other information in Section K, such as licenses, post graduate diplomas, certifications, board certifications, knowledge gained in an academic program, etc. At the December 2013 stakeholder meeting, DOL indicated that it had stopped denying Section K licensure cases and was working on an FAQ advising the public of the proper use and content of Section K. At the April 2014 stakeholder meeting, DOL indicated that it would consider whether to treat other Section K content issues in a manner consistent with how it had deemed to treat cases involving the licensure issue. In the meantime, there continues to be a lack of clarity on the part of both employers and analysts in this area. Therefore, we suggest that DOL add a question to the beginning of Section K, as was proposed in the 2009 review of the ETA 9089:

> **K.1.** Please list the date the beneficiary acquired each requirement for the job, excluding experience and skills acquired on the job, which should be enumerated below in the Job History part of this section. Such requirements may include licensure, post graduate diplomas, certifications, board certifications, knowledge gained in an academic program, the required degree if not indicated at J.11, and the like.

Your consideration of these comments and suggestions is greatly appreciated.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION