AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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

RE: Comment Request: Form ETA-9035, Labor Condition Application for Nonimmigrant Worker (OMB Control Number 1205-0310)

Dear Mr. Pasternak:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to your request for information regarding Form ETA-9035, Labor Condition Application for Nonimmigrant Worker (LCA) as published in the Federal Register on December 31, 2014.

AILA is a voluntary bar association of more than 13,500 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws and policies. We appreciate the opportunity to comment on Form ETA-9035 and believe that our members' collective experience and expertise makes us particularly well-qualified to offer views that will benefit the public and the government. We appreciate the Department of Labor's (DOL) desire to enhance the quality, utility, and clarity of the information collected, while minimizing the burden on stakeholders and maintaining a streamlined and efficient LCA process. It is in this same spirit that we offer the following comments.

Section B-2: SOC (ONET/OES) Code

Presently, iCERT requires the user to select a Standard Occupational Classification (SOC) code from the list of classifications in item B.2. The occupation title is then "auto-filled" in item B.3 based on the code selection. However, the SOC subcategories, of which there are many, are not included in the list of classifications in item B.2. In the interest of clarity and efficiency (for both the regulated public and DOL), we propose expanding the options for the SOC code to include the SOC subcategories.

For example, under the present system, even if the most appropriate SOC selection based on the job title and job description is Software Quality Assurance Engineers and Testers (SOC 15-1199.01), the employer is unable to select or manually enter SOC 15-1199.01 and must instead choose the broader category of Computer Occupations, All Other (15-1199). In addition to Software Quality Assurance Engineers and Testers, this category includes 12 other subcategories in far-ranging occupations such as Video Game Designers, Business Intelligence Analysts, and Geospatial Information Scientists and Technologists. Employers should be able to distinguish Quality Assurance Engineers from Business Intelligence Analysts on the LCA, just as it does in its standard business practices.

In addition to offering distinct job titles and job descriptions, the SOC subcategories often carry different O*NET Job Zones and Education and Training Codes (ETC). Thus, the inability to choose a more specific subcategory can create confusion for USCIS when it evaluates whether the position is a "specialty occupation" during the H-1B adjudication process. For example, the SOC classification for Compliance Officers (13-1041) has a Job Zone listed as "N/A," meaning the occupation and/or job duties are "too broad" to classify. By contrast, subcategory 13-1041.07 for Regulatory Affairs Specialists carries a Job Zone of 4, which means that a bachelor's degree is required in most cases.[1] Having the ability to assign a specific subcategory on the LCA which appropriately matches the job title and job description, and provides additional clarity regarding the appropriate Job Zone and ETC can be very helpful to both the employer and the H-1B petition adjudicator when assessing whether the position is a specialty occupation.

Section B-7: Worker Positions Needed/Basis for the Visa Classification

Another change that would help improve processing efficiencies is the removal of the question regarding "basis for the visa classification" in section B.7 from the ETA-9035. Collection of this information is unnecessary and redundant, as it is requested on the USCIS Form I-129, and it may result in employers submitting multiple LCAs where only one would suffice. The filing of a single LCA for multiple positions creates efficiencies for both DOL and the employer community by lessening the burden on the LCA system. Yet, many employers who desire to file one LCA covering multiple positions have not yet identified the individual beneficiaries and consequently, what type of action (new employment, change in employer, etc.) will be requested. Rather than focusing on the type of immigration processing the beneficiaries will require, the LCA should focus on the job. Section B.7 inhibits the filing of a single LCA in support of multiple positions and thus, blunts the potential for time and resource savings.

Section C-3 & C-4: Street Address as the Work Location

In the preamble to the 1994 Final Rule regarding Labor Condition Applications, DOL explained that a requirement to file a new LCA for a new work location for the same employee within the area of intended employment "appears to the Department to be burdensome…."[2] Therefore,

[1] http://www.flcdatacenter.com/jobzone.aspx
[2] *See* 59 Fed. Reg. 65646 (Dec. 20, 1994).

under 20 CFR §655.734(a)(2), a certified LCA can be utilized by an employer to support an H-1B petition for any work location which is within the area of intended employment. "Area of intended employment" is defined by 20 CFR §655.715 as "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed."

However, the current version of the ETA-9035 creates confusion on this issue by requiring employers to list the specific street address of the work location, rather than simply the city and state. Without an understanding of the legal parameters of 20 CFR §655.734(a)(2), an employer relying on an LCA listing a single street address might not understand that the LCA would also cover another street address in the same area of intended employment. Moreover, with the USCIS Fraud Detection and National Security (FDNS) directorate conducting more administrative site visits, investigators who are not aware of the flexibility created by 20 CFR §655.734(a)(2) may view an H-1B worker as not having an appropriate LCA. The potential for confusion could easily be avoided if DOL were to revise the ETA-9035 to remove the requirement for employers to list a specific street address for the work location and to instead require only the city and state.

Section C-12: Federal Employer Identification Number

Item 12 of section C asks for the employer's Federal Employer Identification Number (FEIN). Employers submitting an LCA for the first time will receive a warning message indicating that the FEIN has not yet been verified. When this happens, the employer has two options: (1) submit the LCA despite the warning message and then await a request from DOL for further documentation to verify the FEIN and the employer's existence; or (2) submit documentation verifying the FEIN and the employer's existence two to three days prior to submitting the LCA and await confirmation of FEIN verification. Regardless of the route chosen, the entire LCA process is delayed by at least two to three days.

Drawing upon technology that is available in the prevailing wage context (ETA-9141), DOL should consider implementing a process that would allow employers to upload FEIN verification documentation at the same time as filing the LCA. By doing so, the FEIN verification process and LCA submission could be completed in a single step, which would make the process more efficient and decrease the volume of e-mails to and from DOL during the FEIN verification process.

Your consideration of these comments and suggestions is greatly appreciated.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION