From:	Anthony Zarate
To:	ETA, OFLC Forms - ETA
Subject:	Submitted Comments on ETA Form 9089, Application for Permanent Employment
Date:	Thursday, September 17, 2020 4:08:09 PM
Attachments:	image001.png HNM, LLC Comment on Form 9089 Memo.pdf
Importance:	High

To whom it may concern,

Attached are written comments to the proposed changes to ETA Form 9089. We appreciate your service and hope that you consider our comments.

Best,

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Hammond Neal Moore, LLC Comment on Form 9089 Memorandum

September 17, 2020

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
200 Constitution Avenue NW
Box PPII 12-200
Washington, DC 20210

ETA.OFLC.Forms@dol.gov

RE: Public Comments on ETA Form 9089, Application for Permanent Employment Certification

Dear Sir/Madam:

Hammond Neal Moore is a full-service immigration law firm based in Cincinnati, Ohio with offices in Portland, Oregon, Los Angeles, California, and Phoenix, Arizona. We have a national practice, serving clients located throughout the United States. We began operations in 1991 and since that time have provided representation to a number of corporations who petition for permanent employment certification. Within our firm, our attorneys have developed expertise in the area of business immigration, especially within the area of permanent employment certification.

Introduction

Hammond Neal Moore is pleased to submit to the U.S. Department of Labor ("DOL") its comments regarding proposed changes to the labor certification system that were announced in the Federal Register on July 27, 2020, 85 Fed. Reg. 43877. We appreciate the DOL wanting to create an efficient labor certification system that minimizes the burden of collecting information while also enhancing the quality of requested information and attempting to clarify requirements. We also value the important role that the DOL plays in shielding foreign workers from unfair labor practices.

While we approve of the DOL's efforts to guarantee the integrity and efficiency of the labor certification process, we are concerned about some of the proposed changes that were suggested, including (1) requesting more detail concerning a foreign worker's qualifications, education, skills, and abilities; (2) requesting more detail concerning a foreign worker's job site; (3) requesting more detail concerning an employer's special requirements; and (4) requesting more detail to evidence that no other U.S. worker is qualified for the proffered position. We will discuss our concerns about each of these additions specifically in the coming paragraphs.

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Comments on Proposed Rule

I. The DOL appears to be collecting information that is not within its function to collect.

The DOL's responsibility is to certify to the U.S. Citizenship and Immigration Services ("USCIS") that there are not "sufficient U.S. workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers". *See* 8 C.F.R. § 656.24 (2004). The USCIS must then evaluate the Beneficiary's qualifications and look to the job offer portion of the labor certification to determine the required qualifications for the position and whether a bona fide job opportunity exists.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, the USCIS must examine "the language of the labor certification job requirements" in order to determine what the Petitioner must demonstrate to show that the Beneficiary is qualified for the position. *See Madany*, 696 F.2d at 1015. The USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *See Rosedale Linden Park Company v. Smith,* 595 F. Supp. 834 (D.D.C. 1984) (emphasis added).

It is the USCIS' responsibility to certify that all job requirements are met, and it is the USCIS' responsibility to determine how it will conclude whether or not job requirements are met through the proposed changes to the ETA Form 9089. The DOL will now be considering matters that should be left to the USCIS' interpretation such as the type of evidence that should be submitted to demonstrate that foreign workers are properly qualified for the sponsored position and the type of evidence that employers should submit to demonstrate their ability to pay foreign workers. The more detailed Form 9089 now creates additional confusion when evaluating job requirements instead of providing *plain language* for the USCIS to interpret. Ambiguities within the form complicates the USCIS' responsibility to determine whether or not all job requirements were met because the proposed Form 9089 does not clearly state all requirements. Ambiguities concerning an employer's ability to pay foreign workers also complicates matters. Traditionally, it has been USCIS' responsibility to certify that employers have the ability to pay foreign workers, and USCIS has already published guidelines for employers to reference concerning this matter. USCIS regulations state that the ability to pay can be shown by federal tax returns, audited statements, or annual reports. In addition, a USCIS Memorandum from William Yates, Associate Director of Operations for USCIS, dated May 4, 2004, instructs officers on how to evaluate evidence of ability to pay. Specifically, the Memorandum directs adjudicators to make a positive ability to pay determination if an employer's net income is equal to or greater than the profit or wage, the initial evidence reflects that the employer's net current assets are equal to or greater than the profit or wage, or the record contains verifiable evidence that the employer has paid or is currently paying the foreign worker the offered wage. For several years, the USCIS has successfully provided guidance concerning the specific information that employers should submit to evidence their ability to pay foreign workers, and the DOL's oversight concerning this matter will only add confusion concerning the type of evidence employers should submit with the ETA Form 9089.

We urge the DOL to publish additional commentary regarding this impact so that our concerns can be addressed before implementation.

II. The proposed changes will not meet the DOL's objectives.

The DOL has explained its reasoning for proposing changes to the labor certification process. The DOL states that the new changes will better align information collection requirements with the Department's PERM regulation, provide greater clarity to employers concerning regulatory requirements, standardize and streamline information collection for employers preparing PERM applications, and promote greater efficiency and transparency in OFLC's review and issuance of labor certification decisions. However, the DOL will be causing additional confusion because it is now collecting information that is not within its function to collect. The DOL is now requesting additional information concerning a foreign worker's qualifications and worksite location and an employer's ability to pay the foreign worker. It has traditionally been within the USCIS' discretion to decide these matters, and the USCIS has already offered specific guidance outlining the evidence employers should submit to evidence that foreign workers are qualified for the sponsored role, foreign workers will meet all worksite location requirements, and the employer has the ability to pay the foreign worker. The DOL's increased involvement concerning these decisions will complicate matters. We are concerned that the DOL's objectives outlined above will not be achieved and that the proposed ETA Form 9089 will lead to greater confusion. We have outlined our specific areas of concern below detailing how the DOL's increased involvement will lead to confusion concerning the specific evidence employers should submit with the proposed ETA Form 9089.

A. Proposed Appendix A – Foreign Worker Information

The DOL noted in *Supporting Statement* that it is proposing to remove Sections D, J, and K of the current form and expand Section A to provide more room for employers to provide extensive information concerning a foreign worker's qualifications, education, skills, and abilities. While we appreciate the DOL's efforts in consolidating information, we are concerned that there will be a lack of clarity concerning documents employers should submit with the labor certification applications. For example, Part G, Question 3 asks, "Will the employer accept a foreign diploma/degree equivalent to the employer's required U.S. diploma/degree identified in Section F of the PWD identified in Question E.1?" Part G, Question 10 later asks, "Did the employer use a credentialing service to qualify the foreign worker's education and/or experience requirements in Section F of the PWD identified in Question E.1?" Part G does not specify whether or not an employer is required to utilize a credentialing service if they accept a foreign diploma/degree equivalent to a U.S. diploma/degree. We are requesting the DOL to provide additional guidance to clarify the exact requirements employers must meet to qualify a foreign worker's education and experience.

As discussed above, it is the DOL's responsibility to outline a foreign worker's job requirements in plain language, and it is the USCIS' responsibility to determine whether or not the job requirements are met. The USCIS has the authority to interpret the 9089 Form and determine whether or not it needs additional information to confirm that the foreign worker meets the proper requirements, and the USCIS has the authority to determine what additional information it needs to consider in this matter. The proposed Form 9089 is now allowing the DOL to decide matters such as the type of education, training, or licenses a foreign worker must obtain as well as the skills and work experience a foreign worker must possess to qualify for a sponsored role. Therefore, the proposed form creates confusion because the DOL now has authority to decide matters that have been delegated to the USCIS to decide.

The proposed Form 9089 provides additional space for employers to provide more extensive information concerning a foreign worker's qualifications, education, skills, and abilities. However, the form makes it less clear where employers should list qualifications, education, skills, and abilities a foreign employee must possess. Therefore, it is our concern that employers will not understand the type of information they should provide in the additional spaces on Form 9089 and will submit irrelevant evidence. Employers may spend more time than necessary collecting information if they fill out the extensive foreign worker information on the proposed Form 9089 and then are later required to submit even more information to the USCIS. While many employers are diligent about ensuring that they are providing correct information, it is unfortunate that the DOL would increase the amount of time that U.S. employers must spend on answering questions on forms when these responses may not assist the DOL in determining whether the employer has correctly outlined the requirements for the role. The USCIS should retain the authority to determine the specific supporting documents a foreign worker should submit to demonstrate that they are qualified for a particular role after the USCIS has had the opportunity to review the foreign worker's full application.

B. Proposed Appendix B – Additional Worksite Information

The DOL noted in *Supporting Statement* that it is proposing to provide additional space for employers to list each worksite that foreign workers will perform work. The purpose for this new section is to account for variability in prevailing wages between different worksites. The proposed Appendix B creates two major concerns. First, the DOL does not offer guidance concerning the prevailing wages the employer must implement. It is common for a worker to be employed with one company and perform services at different locations. However, only the employer is responsible for paying the worker because an "employer-employee" relationship only exists between the employer and worker although the worker may perform services at different locations. The DOL is now adding confusion for common situations when a worker performs work at end-client locations. The DOL is now suggesting that an employer will need to account for the prevailing wage at each location the employee performs work. The DOL does not provide any guidance concerning the prevailing wage that should be used and how employers should determine the prevailing wage between different locations. Therefore, the proposed Appendix B complicates matters and does not achieve the DOL's objectives for proposing the new form.

The second concern we have with the proposed Appendix B is that the DOL is questioning matters within the USCIS' jurisdiction. It is within the USCIS' authority to analyze the worksite information listed on Form 9089 and request additional information from the employer to confirm employment information. It is proper procedure for the USCIS to review the information on Form 9089 and request supporting documentation in circumstances where the USCIS deems the additional information is necessary to confirm that an "employer-employee" relationship only exists between the employer and foreign worker. It is common for employees to perform work at different locations, and the DOL's increased involvement concerning end client locations complicates matters.

C. Proposed Appendix C – Supplemental Information

The DOL noted in *Supporting Statement* that it is proposing to provide additional space for employers to explain their specific need for special requirements not considered normal for the occupation in which the offered job is classified. However, no further guidance is given concerning the type of information employers should provide in this field. The DOL should clarify what "normal" means in this context and provide a clear explanation concerning acceptable SVP ranges. Unlike the prior DOT, the current OES system uses ranges, such as 7<8, for many current positions. Multiple interpretations have been posited as to whether this range means 7 or whether the numbers merely refer to the allowances that would translate into 4-10. If the term "normal" refers to the technical skills listed in the OES, clarification is needed as to whether or not all technical skills must align or merely some. Employers also need to know if they will have an opportunity as part of an audit to respond to a DOL decision regarding business necessity or whether the DOL will make a determination based solely upon the information provided in appendix C.

Form 9089 should be formatted in plain language so that employers clearly understand the requirements and to allow the USCIS to easily analyze the information. While we appreciate the DOL providing additional opportunities for employers to explain their requirements, we are concerned that the proposed Appendix C will create confusion. The USCIS already provides opportunities for employers to explain their special requirements if this matter is questioned, and the USCIS specifically states the types of evidence employers should submit to evidence their specific need for special requirements. The USCIS has already implemented effective procedures to assist employers in this matter. Therefore, it is unnecessary for the DOL to request supplemental information, and we request that the DOL allow the USCIS to continue to manage this matter.

III. The Proposed Section F, Area of Intended Employment, undermines the intent of the "Roving Employee"

One major change announced by the Department of Labor (DOL) in their revision to Form ETA-9089, is the addition of a new section on the Area of Intended Employment (Section F). The Form ETA-9089 General Instructions state, "It is important for the employer to define the area of intended employment with as much geographic specificity as possible by identifying every worksite location where work will be performed." If the employee will work at sites other than the one listed in Section F, those additional worksites will need to be listed in Appendix B. According to the DOL in the *Supporting Statement*, the addition of the new section on the Area of Intended Employment will allow the employer an opportunity to clarify information for potential roving employees and to ensure and verify that the worksite location is the same as the location notes on the Form ETA-9141. However, roving employees are defined as those who are expected to be reassigned by their employer to one or more as-yet undetermined worksites, thus creating confusion and burden on employers already familiar with a standard practice of reporting their employee's worksites.

The ETA Field Memorandum No. 48-94 (aka Farmer's Memo) published by the DOL in 1994 sought to provide clarity on how to input worksite information of a roving employee, whose worksite could be abruptly moved to an unanticipated client site within the U.S. This memo instructs PERM sponsoring employers to list their headquarters or main location as the employee's primary worksite, while indicating elsewhere on the PERM

that the employee may also be stationed at various unanticipated locations across the U.S. This memo provides guidance to sponsoring employers who have clients and satellite offices located throughout the country. It provides these organizations with a routine practice of using their main office location as the primary worksite on the Form ETA-9141 (prevailing wage determination) as well as a primary region for testing the labor market through advertising and recruiting. The revised Form ETA-9089 undermines the intent of a roving employee by requesting the employer to "identify every worksite location where work will be performed," despite being defined as an employee whose worksite may be relocated to a yet-to-be determined location.

The introduction of Section F and Appendix B of the revised Form ETA-9089 will increase the employer's overall reporting burden and increase their susceptibility to potential reporting violations. In Section F, employers will now have to report whether the employee's work will be performed at a business premises, employer's private household, or employee's private residence. If there is more than one location, the employer will need to list every worksite on Appendix B, even if the worksites are in the same metropolitan statistical area (MSA). If the MSA for the employer's job opportunity is not yet known, they are instructed to list all the possible geographic areas where the work may be performed in *c. Other Definable Geographic Areas.*

The DOL's *Supporting Statement* notes that the purpose of these new requirements is to ensure alignment to the PWD filed on behalf of the employee. However, numerous questions arise such as: What impact will this revised Form ETA-9089 have on already submitted PWDs; Will the employer need to list every potential geographic location in Appendix A of Form ETA-9141 and its effect on wage; What is the penalty for moving the employee to a location not specified on Form ETA-9089? We find that there are several unanswered questions that present themselves with the introduction of the revised Form ETA-9089 and it does not take into account things such as the employer obtaining a new client in an area unspecified on the already filed forms.

These issues are further compounded given the current state of the Nation and its battle with Covid-19. Many employees are working from home temporarily, though these work from home arrangements may continue in the long term. More guidance is needed on how employers should go about reporting these short term arrangements. Furthermore, we find the revisions go against the DOL's purpose for introducing them through increasing the employer's reporting burden and opening the employer to potential reporting violations. This is seen in the addition of a question in Section A, requesting the number of current employees on payroll in the area of intended employment (what if multiple locations are listed?), as well as in Section F/ Appendix B where the employer is required to essentially guess where their employee may be relocated to in the future.

Based on the above, we implore the DOL to issue additional commentary on this impact and whether employer's can continue to use their headquarters or main office location in order to avoid the burden of having to list potential employee relocation sites. We also urge the DOL to again revise in light of the fact that roving employee's worksites are unanticipated and undetermined. For example, we have a client that provides healthcare staffing to Federal government facilities. At the present time, there are literally 100s of sites that an employee may be assigned to and those assignments may be short term or long term. Guidance on the common fact pattern is requested.

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Conclusion

In conclusion, the overall themes of providing greater clarity on program requirements and reducing the overall reporting burden are positive. However, in attempting to achieve its objectives, the DOL has complicated matters. We ask that the Service take the additional step toward these goals and more clearly define the new requirements, allow for the USCIS to solely consider whether or not an employee has met the job requirements, and reconsider the DOL's suggested changes concerning employee relocation sites.

We ask the DOL to reexamine its proposed rule in light of these comments.

Sincerely,
Hammond Neal Moore

By:

Michael Hammond, Managing Partner

Cadence Moore, Partner

Anthony Zarate, Associate

Anita Smalley, Associate