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September 18, 2020

John Pallasch
Assistant Secretary for Employment and Training
U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
200 Constitution Avenue NW
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Submitted via email (ETA.OFLC.Forms@dol.gov)

Re: Comment On Proposed Revisions To ETA Form-9089
Application For Permanent Employment Certification
OMB Control Number 1205-0451; 85 Fed. Reg. 43,877 (July 20, 2020)

Dear Assistant Secretary Pallasch:

This comment is submitted on behalf of Management Health Systems, LLC d/b/a MedPro; Avant Healthcare Professionals, LLC; Guardian Healthcare Providers, Inc.; Health Carousel, LLC; and Shearwater Health, Inc., which are leading healthcare-staffing companies that hire foreign healthcare professionals for careers in the United States. Their clients are hospitals and other healthcare facilities that are unable to hire sufficient domestic healthcare professionals because of the longstanding and well-established labor shortage for these occupations, particularly registered nurses. The staffing companies recruit, screen, train, test, credential, sponsor, relocate, and resettle foreign healthcare professionals. The staffing companies then employ those professionals and place them at their clients' facilities to supplement their clients' existing workforce. The staffing companies are frequent users of Form ETA-9089 because they file thousands of applications for permanent employment certification (PERM) for foreign healthcare professionals every year. Their expertise and experience make them particularly well suited to assist the Department with improving its forms and the PERM process.

BACKGROUND

Our nation suffers from a chronic shortage of nurses that dates back to at least the 1930s.[1] The American healthcare system has thus for decades relied on foreign nurses to supplement the domestic workforce. And the Department has for decades recognized the importance of foreign

[1] *See, e.g.*, *Where Did All the Nurses Go?*, Univ. of Penn. Sch. of Nursing, https://www.nursing.upenn.edu/nhhc/workforce-issues/where-did-all-the-nurses-go/.

nurses to our labor market by designating registered nurses as a Schedule A occupation.[2] But while Schedule A designation streamlines the labor-certification process, identifying a qualified foreign nurse willing to migrate to the United States and sponsoring that nurse through the entire immigration process remains a significant undertaking that requires specialized expertise and substantial economic investment. And the process is lengthy and rife with uncertainty.[3] If a busy hospital is short multiple critical-care nurses, it can't wait years for foreign nurses to complete the immigration process and obtain their visas. The hospital needs those nurses immediately.[4] The result is that it is often impractical for healthcare facilities to make use of the immigration system, and indeed healthcare facilities have significantly reduced their sponsoring of foreign nurses over the last 20 years. Yet their need for more nurses remains constant.

Healthcare-staffing companies address those critical staffing needs. Staffing companies recruit, hire, and then continuously employ nurses, including foreign nurses, and place those nurses at healthcare facilities with unmet staffing needs to work alongside the facilities' existing nurses. Because they are frequent users of the immigration system, healthcare-staffing companies have invested significant resources in developing infrastructures to identify foreign talent and navigate that talent through the complex immigration system. Because healthcare facilities cannot efficiently hire foreign nurses on their own, healthcare-staffing companies are now the primary sponsors of foreign nurses.

The needs of healthcare facilities are urgent and constantly in flux, and thus healthcare-staffing companies frequently hire foreign nurses without knowing at the time of hiring exactly where the nurse will be working. At the same time, as confirmed by the designation of nurses as a Schedule A occupation, our country's drastic shortage of nurses effectively guarantees that the staffing companies will have a placement available for these professionals when they arrive—even if the exact worksite cannot be determined at the beginning of the immigration process.

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[2] *See* 20 C.F.R. § 656.5. "Schedule A is a list of precertified occupations" for which the Department has categorically "determined that there are not sufficient United States workers who are able, willing, qualified, and available and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in such occupations." U.S. Dep't of Labor, *Labor Certification Process for the Permanent Employment of Aliens in the United States; Implementation of Immigration Act of 1990*, 56 Fed. Reg. 54,920, 54,922 (Oct. 23, 1991).

[3] *Cf. Improving the Processing of "Schedule A" Nurse Visas* at 8, U.S. Dep't of Homeland Sec., Office of the Citizenship & Immigration Services Ombudsman (Dec. 5, 2008), https://www.dhs.gov/xlibrary/assets/cisomb_recommendation_36.pdf ("Many hospitals, organizations, and stakeholders have expressed frustration with the immigration process for nurses . . . [and] have indicated that it can take many years to complete the entire immigration process[.]").

[4] *See, e.g.*, Russell Gold & Melanie Evans, *Why Did Covid Overwhelm Hospitals? A Yearslong Drive for Efficiency*, Wall St. J. (Sept. 17, 2020), https://www.wsj.com/articles/hospitals-for-years-banked-on-lean-staffing-the-pandemic-overwhelmed-them-11600351907 (detailing the urgent nursing needs faced by healthcare facilities as a result of the COVID-19 pandemic).

Healthcare-staffing companies thus routinely file PERM applications for immigrants for whom the exact worksite cannot be anticipated at the time of filing. And the Department has long recognized the necessity and propriety of such applications. For over 26 years, these applications have been principally governed by a Department Field Memorandum referred to as the Farmer Memo.[5] The Farmer Memo instructs that if the employment will involve work at a location "that cannot be anticipated," the labor-certification application should be filed "with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located."[6] The Memo also provides that in "the Application for Alien Employment Certification, the employer should indicate that the alien will be working at various unanticipated locations throughout the U.S." and include a "short statement . . . explaining why it is not possible to predict where the work sites will be at the time the application is filed."[7] The Department has time and again reaffirmed the validity of the Farmer Memo—both in formal and informal guidance[8] and in administrative decisions by the Board of Alien Labor Certification

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[5] *Field Memorandum 48-94: Policy Guidance on Alien Labor Certification Issues*, U.S. Dep't of Labor, Division of Foreign Labor Certifications (May 16, 1994), *available at* https://www.aila.org/infonet/dol-policy-guidance-on-alien-labor-cert-issues.

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, *U.S. Dep't of Labor, Office of Foreign Labor Certification Q. Stakeholder Meeting (H-1B, Prevailing Wage, & PERM)* (June 16, 2015), AILA InfoNet Doc. No. 15080705 at 7 ("OFLC Response: The 1994 Barbara Farmer memo remains the controlling guidance on issues relating to employees who do not work at a fixed location."); *Stakeholder Questions Submitted for DOL Stakeholder Meeting* (Feb. 13, 2013), AILA InfoNet Doc. No. 13022144 at 12 ("DOL anticipates providing guidance on this issue, but cannot provide a timeline for when guidance will be released. In the interim, the 1994 Farmer memo remains valid guidance."); *Questions Raised By DOL Stakeholders for Meeting* (Sept. 28, 2012), AILA InfoNet Doc. No. 12102641 at 14 ("'Roving employee' issues are still governed by the 1994 Farmer memo. DOL recognizes that business practices have changed with developments in technology, and any changes in policy will be made with clear notice to stakeholders, such as an FAQ or Federal Register notice that will provide additional guidance and clarification."); *see also DOL/OFLC Stakeholders' Meeting Notes* (Mar. 29, 2012), AILA InfoNet Doc. No. 12042544 at 8 ("As before, the current policy guidance for posting these types of positions is at the employer's HQ office."); *PERM FAQs* at 2, U.S. Dep't of Labor, Office of Foreign Labor Certification (Feb. 21, 2006), https://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_2-21-06.pdf ("If the employer does not know where the [permanent] employee will be placed, the . . . prevailing wage will be derived from the area of the staffing agencies' headquarters."); *Frequently Asked Questions: PERM Program, Notice of Filing, Q&A #12*, U.S. Dep't of Labor, Office of Foreign Labor Certification, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!176 (same).

Appeals (BALCA)[9]. Since issuing the Farmer Memo, the Department has also issued additional guidance to answer further questions about unknown-worksite applications.[10]

But the Department has never revised its PERM forms to account for its longstanding guidance governing unknown-worksite applications. Nor has the Department revised its PERM forms or the process to account for the fact that healthcare-staffing companies are now the main sponsors for Schedule A nurses rather than healthcare facilities.

DISCUSSION

The Department should bring Form 9098 into conformity with its guidance on applications involving unknown worksites. As explained below, some of the Department's currently proposed revisions threaten to exacerbate the confusion surrounding unknown-worksite applications because these revisions explicitly contemplate a single (or multiple) determinable worksite(s). By making only a few minor modifications to the Form and its instructions, the Department could provide clarity and harmonize its form and longstanding guidance on unknown worksites.

A. *New Question A.14: Specify the number of current employees on payroll in the area of intended employment.*

On Question A.14 of the proposed Form 9089, the Department proposes to ask for the "Number of current employees on payroll in the area of intended employment." This proposed revision appears to adapt Question C.5 on the current Form 9089, which asks employers to list how many employees they have. The Department's Supporting Statement does not appear to reveal the rationale for this proposed change. And neither new Question A.14 nor the proposed instructions explains how an employer should answer if the "area of intended employment" is unknown. The Department should clarify how an employer should answer in that case. One solution is to revise the proposed instructions to specify that if the worksite is unknown, the area of intended employment is the United States—meaning the employer should use its total number of domestic employees.

B. *New Section F, on the area of intended employment, and new Appendix B, which requires listing all worksites.*

Proposed new Section F requires employers to specify the "[t]ype of worksite location that best describes where work will be performed," with the only options being (a) "[b]usiness premises"; (b) "[e]mployer's private household"; (c) "[e]mployee's private residence"; and

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[9] *See, e.g.*, *Matter of Ebusiness Applications Sols., Inc.*, 2005-INA-00087, 2006 WL 4579779, at *7 (BALCA Dec. 6, 2006) ("The Memorandum fills a gap in the statute and implementing regulations . . . [and] constitutes a reasonable construction of the regulations given the underlying purpose of the statute."); *see also Matter of Cognizant Tech. Sols. Us Corp.*, 2012-PER-03285, 2016 WL 7430491, at *5-6 (BALCA Dec. 16, 2016) (reversing denial of labor certification based on Farmer Memo).

[10] *See generally supra* note 8.

(d) "[n]o one specific worksite address or physical location." The proposed instructions explain that answer (d) should be chosen "if there is more than one worksite location." But the proposed form and instructions do not explain how to answer this question if the worksite is unknown.

For a healthcare-staffing company following the Department's guidance on unknown worksites, the correct way to answer new Section F appears to be selecting "[b]usiness premise," providing the company's headquarters address, and answering "Yes" to Question F.b.1 to indicate that work will be performed in a geographic area other than the specified location. But as the proposed instructions explain (at 15), "[e]mployers are required to complete [new] Appendix B when 'Yes' is marked for question b.1 under Section F." Appendix B, however, requires listing additional worksites. Yet if the worksite is unknown then the employer has nothing to include on Appendix B. And requiring more than the headquarters address would be redundant and burdensome in any case. After all, "[i]f the employer does not know where the [permanent] employee will be placed, the . . . prevailing wage will be derived from the area of the staffing agencies' headquarters."[11]

The Department should resolve the proposed revision's tension with its longstanding guidance governing unknown worksites by either:

i. Revising proposed Question F.a.1 to add a fifth option: "e. The worksite is unknown," and revising the proposed instructions to explain that an employer who selects answer e should provide its headquarters address in answering Questions F.a.2-8 and omit Appendix B; or

ii. Revising proposed Question F.c.1 or the corresponding proposed instructions to specify that if the worksite is unknown, the employer should select answer a for Question F.a.1, provide its headquarters address in answering Questions F.a.2-8, omit Appendix B, and write "Unknown worksite" in Question F.c.1.

C. *New Section H.e. concerning the forms of notice that the employer has provided.*

Proposed new Section H.e addresses how employers specify what type of notice they have provided to their employees to satisfy the Department's notice regulation. Unless there is a bargaining representative, the Department's notice regulation requires that employers post notice "at the facility or location of the employment."[12] But the regulations do not specify where the employer should provide notice if "the facility or location of the employment" is unknown. The Department should clarify this question, and answer it in the instructions to new Section H.e.

By way of background, notice for applications involving an unknown worksite is currently most closely addressed in a FAQ by the Department's Office of Foreign Labor Certification that

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[11] *PERM FAQs* at 2, U.S. Dep't of Labor, Office of Foreign Labor Certification (Feb. 21, 2006), https://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_2-21-06.pdf.

[12] 20 C.F.R. § 656.10(d).

addresses *roving* employees. This FAQ instructs that the employer must post notice at "*all of its current clients*, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question."[13] The burden on healthcare-staffing companies and their healthcare-facility clients of posting *physical* notice at the *client* sites is immense. Because staffing companies do not control the physical premises where their employees work, every year each large staffing company spends hundreds of hours coordinating with their clients (busy healthcare facilities) to post and remove notices. Those notices must be posted, scanned, and then returned to the staffing company, and someone physically present at the healthcare-facility-client location must certify that the notice was posted for the requisite duration. That process often involves *hundreds* of client sites *per staffing company*.[14] Thus—as to healthcare-staffing companies—the Department's current estimate in the Supporting Statement that complying with the notice requirement takes only about 0.5 hours is inaccurate. In actuality, thousands of hours are spent every year by staffing companies and their clients dealing with the notice process.

The significant burden aside, requiring staffing companies to post notices at *client* sites is in significant tension with both the regulatory and statutory language and does not meaningfully advance the goals of the notice requirement. Under the statute, an employer must provide notice to its *own* employees—by "provid[ing] notice to the bargaining representative (if any) of the *employer's employees*," or, "if there is no such bargaining representative, to *employees employed* at the facility . . . ."[15] The Department's implementing regulation likewise requires that notice be given to (1) the bargaining representative of the *employer's employees*, or (2) if none exists, "to the *employer's employees* at the facility or location of the employment . . . where the *employer's U.S. workers* can readily read the posted notice."[16] A staffing company may have hundreds of healthcare-facility clients, but many of those clients—which will often have hundreds of their own employees—may only have an insignificant number of staffing-company employees placed at them. Thus, a requirement to post notices at *client* sites seems designed to give notice to the staffing company's *client's* employees—and not to the *staffing company's* employees. That serves no useful purpose. As the Department has recognized, "Congress' primary purpose in promulgating the notice requirement was to provide a means for persons to submit documentary evidence bearing on the application," such as "documentation concerning wage or fraud issues."[17]

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[13] *PERM FAQs* at 2, U.S. Dep't of Labor, Office of Foreign Labor Certification (Feb. 21, 2006), https://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_2-21-06.pdf (emphasis added).

[14] Such an inefficient system has many points of failure. Indeed, although it is not required by statute or any regulation, the United States Citizenship and Immigration Services (USCIS) frequently demands that staffing companies submit evidence of *every* posting. And an unclear scan from *one* client may cause USCIS to conclude that notice was deficient and to deny the petition.

[15] 8 U.S.C. § 1182 note (uncodified Section 122(b) of the Immigration Act of 1990) (emphasis added).

[16] 20 C.F.R. § 656.10(d) (emphasis added).

[17] U.S. Dep't of Labor, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77,326, 77,338 (Dec. 27, 2004).

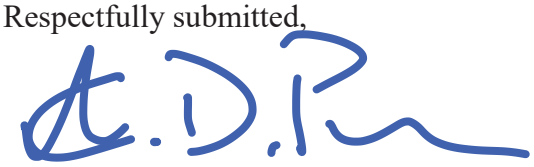
This purpose is not furthered by notice to a staffing company's *client's* employees, who are necessarily employed under different contracts and not privy to the employment terms and conditions of the staffing companies, and thus are not well positioned to "submit documentary evidence" on "wage or fraud issues" bearing on the application.[18]

The Department's update of Form 9089 provides an opportunity to put an end to this senseless and highly burdensome process. Specifically, the Department should revise the instructions to Form 9089 to specify that, if an application involves an unknown worksite, the employer must provide physical notice of the filing of the application only at its headquarters. If the Department were concerned that such notice may not reach a sufficient number of the employer's workers, revising the instructions to additionally require electronic notice consistent with the new option the Department added at Question H.e.1c on proposed Form 9089 is an additional option. That way, employers filing applications for unknown worksites would (1) post notice at their headquarters; and (2) provide electronic notice to their own employees in the relevant occupational classification.

CONCLUSION

The Department's efforts to streamline the various components of Form 9089 are laudable, but Form 9089 should be brought into conformity with the Department's long-standing guidance on applications involving unknown worksites.

Respectfully submitted,



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[18] *Id.*