From:	Joel Stewart
To:	ETA, OFLC Forms - ETA
Subject:	Comments on New Proposed Form 9089
Date:	Friday, September 18, 2020 5:18:44 PM
Attachments:	Comments on new Form 9089.docx

Att: Brian Pasternak

Dear Brian,

Based on my 40 years of experience with labor certification, I culled together my observations and am pleased to send them to you for your consideration in the attached document.

Several of the more important points mentioned in my Comments are these:

1. **Omission of the phrase 'Substantially Similar' in Kellogg Language.** In the Kellogg section of the new PERM Form, you really should include the first part of the clause which explains that the Kellogg language refers to requirements that are 'substantially' similar. By leaving this out, you are just adding to the great amount of doubt the exists at sister agencies whether the Kellogg language simply substitutes or deletes the employer's minimum requirements.
2. **Are you or have you ever been?** I have seen over and over again where employers have not fully understood the DOL's point of view on alien ownership/influence. The question is phrased on Form 9089 in the past tense, but it should be in the past and present tense. It should say "Are you or have you ever been…." Many employers and professionals like CPA's and some attorneys simply do not understand that it is not OK to modify the structure of a business to pass muster with PERM. After all, it is perfectly normal for a business to make substantial changes of ownership and structure of officers on the last day of December to obtain favorable tax benefits. But that rationale does not work with DOL, which considers changes to corporate structure pre-filing as misrepresentation. If you could just clarify this by rephrasing the question to include the past as well as the present, you can do a great service to stakeholders.
3. **Non-Travel as Travel requirements –** based on the dismal experiences with Travel during the last 15 years of PERM, if you want to include non-travel as travel, why don't you itemize the different kinds of travel relationships that you want Employers to descrtibe within the notion of travel. Telecommuting, home office, and even relocation are not really travel, but apparently these and other types of virtual and personal types of work relationships have been subsumed into the travel requirement. Why not spell this out in plain English?

Overall, the new Form 9089 is great!

Respectfully submitted,

Joel Stewart
Editor of the PERM Book
Senior Legal Strategist / Fakhoury Global Immigration

Joel Stewart's Comments on new proposed PERM Form 9089 / September 18, 2020

1. **Incorporation of 9141 Fields into Form 9089**
   The PERM Form incorporates the 9141 by reference and the relevant fields from the Form 9141 will populate the fields of 9089. In addition, the remaining fields in Form 9141 are always relevant to PERM processing, so I will begin by commenting on the Form 9141.
   a. **Travel.** Travel information remains vague on the 9141 and does not include options such as home office, telecommuting, relocation, and other hybrid versions which OFLC has established as pertinent forms of travel.
   b. **Training.** Training remains an enigma. A lot can be said about this, but the word 'training' has most often been used to mean a structured training program such as an apprenticeship or a journeyman program, although it can sometimes be characterized as educational, as work experience, or as unpaid vocational activities. This should be clarified.
   c. **Alternative Requirements**. Form 9141 has no field in which to indicate alternative requirements for the job. The only opportunity is to insert Alt Req into the Special Requirements box E.b.5. This is a chronic problem in labor certification processing, and must be better addressed.

2. **Substantive Issues on 9089**
   a. **Alien Influence.** Question A 16 and 17 about alien influence should be phrased to include the present and the past, not just the present. The reason is that many attorneys, employers, and aliens believe that they can modify their influence by removing themselves from corporate responsibilities before filing PERM. The notion may seem fraudulent to some and perfectly reasonable to others. For example, in the IRS code, it is encouraged and permitted to make radical changes in ownership or control of funds before the end of the tax year to take advantage of tax code benefits or to avoid unnecessary taxes. These changes are considered rational, ethical and professional when recommended by experts. Yet in the context of PERM, this is always seen as a question of misrepresentation or fraud and serves as a 'trap' for the unwary who do not realize that they are doing something improper. Therefore, it is in the public interest that the questions about alien influence should be changed to include the past and not just the present.
   b. **Definition of the Term Employee.** Question B. The general instruction to 'B' uses the word 'employee.' This term is too narrow to properly construe different types of employment relationships, whether as contract workers, full-time employees, part time employees, employees abroad, voluntaries and persons remunerated just for the purpose of being the contact point for PERM.
   c. **Attorneys and Agents Lumped Together.** Question C. There is a lamentable lack of distinction between attorneys and agents on the current Form 9141 and Form 9089. The questions in Box C are used to identify the person who will act as agent, whether an attorney or not. The subset of questions 17-19 clarifies whether the agent is an attorney but does not clarify whether the attorney is acting as an agent or attorney only or as an agent and attorney.

d. **Worksite Issues.** Question F 1 offers four worksite options; however, there should be an additional box 'e. Other' to allow for clarification. For example, a PERM employee may be asked to work on the employment premises of a third party or even abroad. In the latter case, the PERM application would be valid if the job required more than 50% travel within the United States.

e. **Work Schedules with less than 35 hours per week.** Question G 1. It is black letter law that some permanent jobs, including airline pilots, have less than 35 hours. The question should provide an option to clarify, "If less than 35 hours, provide the work schedule that qualifies as full-time employment for the occupation."

f. **Reference on 9089 to Alternate Requirements on 9141.** Question G.4.a refers to alternative requirements identified in "Section F of the PWD identified in Question E.1." But where in Section F of the PWD does the phrase "alternative requirements occur"? And Question E.1 on the 9141 refers only to Education. Where on the 9089 or on the 9141 is the employer supposed to write the Alternative Requirements?

g. **Kellogg Quandary.** Question G.4.b refers to the Kellogg Language, but not to the first section of the PERM Rule that states that alternative requirements must be substantially equivalent to the primary requirements. The word 'substantially' is completely missing from the form. The materiality of this word 'substantially' cannot be overemphasized, since the Kellogg rule impacts on the employer's sworn attestation of minimum requirements, which may result in an interpretation by USCIS that the inclusion of the Kellogg language, replaces the employer's statement of minimum requirements. In actual fact, the Kellogg language is a signal to the Center Director and the Certifying Officers that impacts the requirement to consider job applicants with acceptable combinations of skills which are 'substantially' the same as, and not necessarily with a combination of skills that are lesser than, the employer's minimum requirements. The omission of the word "substantially" on the form will needlessly add to misinterpretation and misapplication of the Kellogg Rule by officers adjudicating, analyzing or readjuciating I-140 petitions at sister agencies.

h. **Third party relationships.** Question G-4 should include more options of details to include relationships where the work is being performed using a contract with a third party or other close relationship.

i. '**Solely' is an inappropriate standard**. Question G-5 regrettably uses the word 'solely' which does not conform with the limited definition of the prohibition to use employment, training, or skills gained with the employer, which may have been gained as little as 1% with the employer and 99% in a relationship with some other employer.

j. **Overlapping Occupations.** Question G7 does not resolve the question of percentage of employment in each of the two occupations. The DOL has taken the position that any percentage of a combination, even as little as 1%, would result in the selection of the occupational title with the higher wage. This seems unreasonable as there is no occupation listed in the DOT or SOC which does not contain some minimal elements of other occupations. OFLC is urged to consider whether this interpretation may be ultra vires of the regulations.

k. **Foreign language proficiency.** Question G 8 uses the word 'proficiency' in a foreign language. In the United States, there is little in the way of generic qualification

standards for translators. The word 'proficiency' is not defined in the PERM Rule. If it is a term of art, it should be defined. If it is a term without specific meaning, then there should be clarification, perhaps a selection of competency levels plus an option to state 'other' for additional interpretations depending on the employer's need.

l. **Question H-1a does not define profession.** The PERM rule has two contradicting sections relating to professions. One definition is provided in section 656.b in the section for definitions and another is found in the list of professions provided in relation to professional recruitment: first, in the original preamble to the PERM Rule and again in the prevailing wage guidance memo of November 2009. The PERM Rule definition resembles the definition of an H-1b specialty worker, and the prevailing wage guidance relies solely on the fact that an occupation appears on the DOL's list of professions. There are many anomalies between the two definitions.

m. **Typographical error.** Question H-1e has a typo. It states, 'this application is a professional athlete,' whereas it should state, 'this application is for a professional athlete.'

n. **Ambiguities in Professional selection of three professional recruitment sources.** Question Hd allows more than three recruitment events to be listed. While this appears to make sense, I caution that the last time this opportunity was promoted by OFLC was with the introduction of expedited recruitment known as "Reduction in Recruitment." At that time, DOL regions had differing interpretations. Some stated that for expedited processing, the employer must advertise in each of the six months preceding filing Form 9089. Others held that all recruitment could be done in one month. Since there is an element of discretion involved in PERM processing, the option to list more than three seems to be a form of rulemaking that may be interpreted to mean that three forms of recruitment may deserve more favorable discretion by OFLC. Such an interpretation may be ultra vires. To eliminate this ambiguity, the instruction should clarify that only three are required by the Rule. If more than three forms of recruitment may be reported, and if one form of recruitment turns out to be inadequate or incorrectly reported by the employer in the recruitment report or on Form 9089, would adequate responses for at least three types of recruitment be sufficient? Or would the application for PERM fail because one form of recruitment was insufficient, even if three were sufficient?

o. **Conflation of Preparers**. Question J states as an instruction that the questions need not be answered if Preparer is other than the agent or attorney described in Section C. The DOL has conflated differing situations with varying meanings of the word 'preparer' into one: (1) The agent or attorney is acting as agent only, as explained in the PERM Rule, to receive correspondence and nothing more; (2) The attorney is acting as attorney and not as agent; (3) The attorney is acting as attorney and as agent; (4) The agent or attorney has prepared the form, i.e., actually typed the answers onto the form, but has not assisted the employer in determining the answers that should be filled out on the form; (5) The agent or attorney has assisted the employer in determining the answers that should be on the form and has also typed the answers onto the form; (6) A third party has either advised the employer how to prepare the answers but has not typed the answers onto the form; or (7) A third party has advised the employer how to

prepare the answers but has not typed the answers onto the form. The distinctions are important, because the sole meaning assigned to Section J by OFLC is that the preparer is the person who has filled out the form. The OMB statement of the current Form 9089 states that the entire PERM process requires one hour and 15 minutes. Whereas most employers and their attorneys must spent a great deal more time than one hour and 15 minutes to analyze the questions, answers and their consequences, the proposed conflation of statements by preparers and attorneys into one field seems to be a misstatement of the legal responsibilities attributed to these widely differing parties who are required to sign the form under penalty of perjury.

3. **Foreign Worker Information**
    a. Question A 1-3. Unfortunately, the fields for first, middle and last name do not allow foreign names to be accurately represented as **not all foreign workers have convenient name patterns familiar to the American system.** Perhaps names should be elicited on Form 9089 based on birth certificates, passports, or other standardized documents.
    b. Question A 13. **Does an alien registration number need to be provided to the DOL?** Even if it were, some aliens have temporary alien registration numbers, not permanent, or even more than one number, and some may not be sure if they have an alien registration number while others may confuse alien registration numbers with IRS taxpayer numbers or with numbers issued by states on driver licenses or state taxpayer returns. May aliens omit this number if they are not sure that it is an appropriate number? Is the inclusion of a number which is not a valid alien registration number sufficient to justify a denial of a PERM application?
    c. Question B 1. **The term GED is not defined in the PERM Rule.** Is the term used here generically, or does it mean specifically GED from a US state educational system? What if the GED is from Canada or some other country with an educational system similar to the US? Or is this issue left entirely to diploma evaluators?
    d. Question C 'Foreign Worker Training Qualifications' goes a long way to shedding light on the meaning of the word training, but perhaps not far enough. There is no instruction for **paid or unpaid training**. Note that the questions in Part C overlap with employment and education, and that the details may be inconsistent with the information gathered on the 9141.

4. **Signatories.**
    a. Part C **Attorney or Agent Certification** conflates agency with preparation with data entry on the form and does not provide an opportunity to explain which of these duties were performed.
    b. Question D **Employer Declaration** does not allow the Employer to indicate correctly indicate that the information was typed onto the form (prepared) by someone other than the Attorney or Agent.

Respectfully submitted,

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