

**From:** [Paul Stern](#)  
**To:** [ETA, OFLC Forms - ETA](#)  
**Cc:** [sarah@spsimmigration.com](mailto:sarah@spsimmigration.com); [Vincent Lau](#); [Sharvari Dalal-Dheini](#); [Diane Rish](#); [Pasternak, Brian - ETA](#)  
**Subject:** AILA Comment on Proposed Form ETA-9089 9.18.2020  
**Date:** Friday, September 18, 2020 5:05:55 PM  
**Attachments:** [9.18 Final ETA9089 Comment AILA.pdf](#)

---

Good afternoon,

The American Immigration Lawyers Association respectfully submits the attached comments in response to the Department of Labor's proposed revisions to Form ETA-9089 and its instructions. Please feel free to follow up with any questions or concerns.

**Best regards!**

**Paul Stern**

*Policy Associate*

Direct: 202.507.7653 | Email: [ps Stern@aila.org](mailto:ps Stern@aila.org)

[American Immigration Lawyers Association](#)

Main: 202.507.7600 | Fax: 202.783.7853 | [www.aila.org](http://www.aila.org)

1331 G Street NW, Suite 300, Washington, DC 20005



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

September 18, 2020

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

**Submitted via e-mail:** [ETA.OFLC.Forms@dol.gov](mailto:ETA.OFLC.Forms@dol.gov)

**RE: OMB Control Number 1205-0451**

Department of Labor 60-Day Notice and Request for Comments:  
Form ETA-9089, Application for Permanent Employment Certification

Dear Madam or Sir:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day notice and request for comments published in the Federal Register on July 20, 2020.<sup>1</sup>

AILA is a voluntary bar association of more than 15,000 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, legal permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to Form ETA-9089, Application for Permanent Employment Certification, and believe that our members' collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.

**I. Introduction**

AILA appreciates the efforts of the Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) to develop forms that are more easily accessible by the public and that are clear and concise in their use and instructions. We note that there have been some marked improvements in the proposed Form ETA-9089 (ETA-9089). However, we encourage OFLC to make some additional revisions to the proposed form to further increase clarity, reduce the need for additional information from the employer through the audit process, and ensure the best and most efficient use of OFLC and employer resources. Our specific suggestions are outlined below.

---

<sup>1</sup> 85 Fed. Reg. 43877 (July 20, 2020), available at: <https://www.federalregister.gov/documents/2020/07/20/2020-15592/agency-information-collection-activities-comment-request>.

## **II. Comments**

### **Section A. Employer Information**

AILA provides the following recommendations for Section A. of the proposed ETA-9089:

1. In Section A.3-A.9 on the proposed ETA-9089 asks for an employer address. The instructions for this form specifically indicate that a P.O. box is not acceptable. However, due to the global COVID-19 pandemic, employers across the United States are reconsidering the need for an actual physical worksite due to ongoing work-from-home orders. AILA encourages OFLC to provide employers the utmost flexibility in recognizing a variety of legitimate employer addresses and recommends that OFLC expands the instructions regarding how an employer should complete this section if it is not maintaining a “brick and mortar” physical headquarters. This is particularly important in light of the fact that many employers – large and small – are implementing virtual worksites due to the global COVID-19 pandemic. The flexibility that could be applied by OFLC may include instructions specifically allowing use of the residential address of a manager or executive as the company headquarters, a We-Works or similar office sharing space, or other legitimate headquarters arrangements that employers may develop.

The instructions also indicate that the employer worksite address must be the same as the information stated on the Form ETA-9141 (ETA-9141). As with other sections of the form that will be auto-populated from the ETA-9141, AILA requests that OFLC provide guidance in the form instructions concerning how an employer may update Section A of the ETA-9089 in the event there is a change in address within the same Metropolitan Statistical Area (MSA) such that a new prevailing wage is presumably not required.

2. AILA further recommends that OFLC revise Section A.14. of the proposed ETA-9089 to request only “number of current employees,” and omit, “on payroll in the area of intended employment.” As drafted, Section A.14 changes dramatically the information that employers currently track and report in the Labor Certification Application process. AILA asks OFLC to also revise its instructions for this section to direct an employer to enter only the total number of employees currently employed by the U.S. employer. These revisions would align with the current ETA-9089 Section C.9 and correlating General Instruction entry, and we believe that such a request elicits sufficient detail from employers to address any OFLC compliance concerns.

AILA notes that OFLC previously sought to request the number of employees in an area of intended employment in previous form proposals, and it ultimately decided to revise relevant sections to request only the number of employees.<sup>2</sup> We believe that approach of

---

<sup>2</sup> OMB Control No.: 1205-0451; ICR Reference No. 200707-1205-012.

requesting information concerning only the entire employer is sound, as requesting information about an area of intended employment (1) serves no regulatory compliance purpose, and (2) places a burden on larger employers with employee tallies that may vary daily. We discuss both points below.

First, requiring employers to identify the number of employees in an area of intended employment does not elicit information that serves a regulatory compliance concern. AILA acknowledges that OFLC previously advanced in comment responses that requiring information about the area of intended employment “is of value in determining the existence of a bona fide job opportunity, as it is used by the Department to determine whether there are a disproportionate number of applications in comparison to the number of employees in the area of intended employment.”<sup>3</sup> But, the relevant *bona fides* regulatory provision does not support such a broad information request. Specifically, OFLC requires that an employer retain additional documentation to demonstrate the existence of a *bona fide* job opportunity only when:

- a. An employer is a closely held corporation or partnership in which the foreign national has an ownership interest, or
- b. if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the foreign national, or
- c. if the foreign national is one of a small number of employees.<sup>4</sup>

Notably absent is a criterion in which an employer must retain documentation to demonstrate that a job opportunity is *bona fide* where it has a small number of employees in a specific area of intended employment. Three specific conditions are mentioned that give rise to a *bona fides* inquiry, and that mention is made to the exclusion of any other condition.<sup>5</sup> Thus, here, where a specific criterion involving employees in an area of intended employment is not found in the relevant regulatory provision providing a basis for a *bona fides* inquiry, such a condition is excluded, and any claim that such an information request furthers an agency *bona fides* compliance concern is unsupported.

Second, requiring information concerning a specific area of intended employment is a burden on larger employers that have employee tallies that can vary daily across the United States. To be sure, relevant organizations’ human resource stakeholders should have information available as to how many employees are at a specific work location, but the question as it is formulated in the proposed ETA-9089 relates to the area of intended employment, which involves a commutable distance metric that varies in different areas of the country. That variable can create confusion as to which of the employer’s offices should be included in the area of intended employment personnel count requested in the form. Moreover, it is not clear what *bona fides* inference OFLC draws from a small employee count conveyed in the ETA-9089 where it relates to a satellite office of a much

---

<sup>3</sup> *Id.*

<sup>4</sup> 20 CFR §656.17(l)

<sup>5</sup> *Expressio unius est exclusio alterius* - a principle in construction: when one or more things of a class are expressly mentioned, others of the same class are excluded.

larger organization or the remote home worksite of an employee employed by a large organization.

Lastly, in regard to Section A.14. of the ETA-9089, AILA requests that OFLC clarify whether it is looking for the total number of employees, including full and part-time employees, or is OFLC asking for the full-time employee (FTE) equivalent?

## **Section B. Employer Point of Contact Information**

AILA requests clarification on how an employer can update the Employer Point of Contact section on the ETA-9089 in the event there is a change in the employer point of contact both before filing a prepared ETA-9089 and after filing the ETA-9089. This is particularly important as certifications will be electronic. Therefore, sending the certification to the correct employer point of contact is paramount to this process. The ability to electronically update this section in the FLAG portal will provide a necessary efficiency to the oversight of the PERM program.

## **Section C. Attorney or Agent Information (If applicable)**

Similar to Section B above, the Employer Point of Contact, AILA requests clarification on how an Attorney can update this section on the ETA-9089 in the event there is a change in representation both before filing a prepared ETA-9089 and after filing the ETA-9089. Given that certifications will be electronic, it will be important to ensure that the certification is sent to the correct attorney or agent. The ability to electronically update this section in the FLAG portal will provide a necessary efficiency to the oversight of the PERM program.

## **Section D. Foreign Worker Information**

AILA provides the following recommendations for Section D. of the proposed ETA-9089:

1. AILA commends OFLC for creating an Appendix A to ETA-9089 for completion of information about the foreign worker and his/her credentials (see comments about Appendix A below). The proposed ETA-9089 asks the preparer to indicate via YES or NO boxes whether the appendix for the foreign worker is attached. To ensure continued efficiency and less user error, AILA suggests that the FLAG portal automatically check the YES box once the appendix has been completed online, to avoid a denial if the preparer inadvertently checks this as NO.
2. The proposed ETA-9089 inquires whether the attorney or agent represents both the employer and the foreign worker. 20 CFR Section 656.10 (b)(1) states that employers may have agents or attorneys represent them throughout the labor certification process. It does not specifically permit but also does not prohibit simultaneous representation of the foreign worker. Dual representation related to PERM applications is generally permitted, subject to applicable ethics laws regarding conflicts of interest and waivers of such conflicts. To the extent that OFLC believes this information is relevant, AILA suggests that it would be sufficient to simply ask “Does the agent or attorney represent both the employer and the PERM beneficiary with respect to this application?”

## Section E. Job Opportunity and Wage Information

AILA commends OFLC for attempting to reduce user clerical error by automatically importing data from the ETA-9141 and transferring such data onto the ETA-9089. However, as of the date of this notice deadline, the revised ETA-9141 that also recently went through notice and comment, is still not published meaning that AILA is unable to compare the final ETA-9141 to this proposed ETA-9089. What is more, the proposed ETA-9141 included significant modifications to a long-standing OFLC prevailing wage policy and AILA encouraged DOL to conduct APA notice and comment rulemaking prior to making significant, long-standing policy changes regarding how alternative requirements are reviewed and considered in the prevailing wage process.<sup>6</sup>As a result, it is challenging to properly comment on this section without being able to review the final version of the ETA-9141.

Additionally, AILA would recommend the following additional modifications for Section E. in order to further reduce user error in the PERM process:

1. AILA recommends that OFLC include fields on the ETA-9089 for the job duties, job requirements, special skills, licenses, and certifications which have been imported from the ETA-9141 so that users can confirm that the data has been imported correctly and completely prior to submitting the application.

Additionally, if these fields are displayed on the ETA-9089, it will be easier for employers to confirm that they have explained in other appropriate sections where and when the beneficiary obtained these requirements. If employers have to toggle between two forms for this information, there is a greater likelihood of user error which it appears OFLC is attempting to eliminate by automatically importing data from the ETA-9141 to the ETA-9089.

Furthermore, if this information were captured on the ETA-9089, in the event that USCIS is not able to access the FLAG system to confirm information about the offered position and its requirements as part of the Form I-140 adjudication process, the agency would have the information available to them. This will reduce unnecessary delays created when a Request for Evidence (RFE) is issued for a copy of the ETA-9141.

Finally, OFLC has not explained how the job requirements, special skills, licenses, and certifications will be transmitted to the Board of Alien Labor Certification (BALCA) if a PERM denial is appealed and this information is not contained on the four corners of the ETA-9089. It would be easier and more efficient for BALCA to consider an appeal if all of the information about the offered position is contained on the ETA-9089.

---

<sup>6</sup> See AILA Submits Comments on Proposed Revisions to Form ETA-9141, available at: <https://www.aila.org/infonet/aila-comments-on-proposed-revisions-form-eta-9141>; and AILA Submits Additional Comments on Proposed Revisions to Form ETA-9141, available at: <https://www.aila.org/infonet/aila-additional-comments-revisions-form-eta-9141>

2. OFLC should include a field on the ETA-9089 showing the prevailing wage, as imported from the ETA-9141. Some users may be confused by the new prevailing wage determination process, which may result in the issuance of two prevailing wages if the offered position allows for alternative requirements. Therefore, the prevailing wage for the offered position should be clearly indicated on the ETA-9089 to ensure consistency and efficiency. Also, similar to the current PERM portal, the new PERM system in FLAG should contain a warning in this field that the application may be denied if the offered salary is not equal to or greater than the prevailing wage. Users of the current PERM system have found this warning to be very beneficial, in particular when the prevailing wage is provided as an annual wage and users have incorrectly divided the annualized amount into an hourly offered salary.
3. OFLC should include a field on the ETA-9089 showing the prevailing wage issuance and expiration dates. Should the new ETA-9089 allow for data from any ETA-9141 to be imported into the application (including data from an expired ETA-9141), the new PERM system should warn users that the application may be denied if data from an expired Form ETA-9141 is imported into the form, although, we understand that pursuant to 20 CFR 656.40(c), users can rely on an expired prevailing wage determination if the employer began the recruitment period required by 656.17(e) or 656.21 within the validity period.
4. In Section F.d.3. of the ETA-9141, OFLC is requesting information about travel requirements for the offered position. Data from this field should be automatically populated into a section of the ETA-9089. A travel requirement does not only potentially affect the prevailing wage for an offered position, but BALCA has indicated that a travel requirement may have to be disclosed on the ETA-9089 and in the mandatory PERM recruitment. See Matter of Pediatric Group of Acadiana, LLC, 2015-PER-00309 (Oct. 9, 2019). Therefore, in order to avoid potential user error, OFLC should import information about travel from the ETA-9141 to the ETA-9089 to ensure efficient use of the program.
5. AILA commends OFLC for providing fields that allow an employer to provide additional details related to the offered wage in Section E.5. As drafted, this field requires that the drafter manually enter “NONE” into this field where there is no additional information to include. To mitigate the risk of human error in the proper completion of the form, where a drafter has left this field blank, we encourage OFLC to consider auto populating this field with “NONE.”
6. In the proposed instructions for Section E.5. of the ETA-9089, OFLC requests that employers describe any conditions about the wage rate to be paid. OFLC indicates that employers should describe “any” benefits associated with the job opportunity in this section. However, OFLC is only allowing employers up to 500 characters to describe the benefits being offered for the position and AILA would like confirmation that employers should only list specific benefits that go beyond the usual benefits offered by employers (such as health insurance, retirement plans, paid time off, etc.). To ensure clarity in the process, OFLC should specify in the form instructions the specific benefits for which it would like information so that stakeholders may stay within 500 characters or less for the

field. Additionally, OFLC should confirm that information about these benefits does not have to be included in the mandatory PERM recruitment for the offered position. See Matter of The Choate Rosemary Hall Foundation, Inc., 2012-PER-03326 (Oct. 23, 2019).

## **Section F. Area of Intended Employment Information**

AILA provides the following recommendations for Section F. of the proposed ETA-9089:

1. Section F.a.1. offers employers an opportunity to provide additional clarity regarding the nature of the physical location at which the position is located. While the options provided in the proposed ETA-9089 are expansive, given the continual evolution of the nature of work and worksite, we recommend adding an “other” or free form section to allow for maximum flexibility. This will enable an employer to provide additional detail to OFLC where required.
2. Sections F.a through F.c. provide an employer with the opportunity to provide additional information related to the area of intended employment. While these fields offer an opportunity for employers with clearly defined areas of intended employment to provide this information, it is unclear from the instructions and language on the proposed ETA-9089 how OFLC expects employers to complete these fields where the employment is roving. It is clear that a filing on behalf of a roving employee would require an employer to mark “yes” in Section F.b.1. The instructions indicate that widely dispersed employment should be clarified in F.c.1. That said, it is unclear whether the employer should mark Section F.b.2. as “no” or “N/A” when the offer is for roving employment. While we recognize that much of this information may be auto-populated from the already finalized ETA-9141, OFLC could resolve this ambiguity in two ways:
  - a. OFLC could add a free form field to Appendix B for inclusion of the language, or
  - b. In the instructions for the ETA-9089 or on the face of the form itself in Section F.b.1., OFLC could include an instruction which confirms that where the offer of employment will require that work be performed in various unanticipated worksites throughout the United States, this field should be marked “N/A” and an explanation should be entered in F.c.1.
3. Section F.c. includes an instruction for use only where specific MSA(s) are not known or the area of employment will be dispersed over a wide geographical area. To the extent it is possible, we encourage OFLC to include the specific language in this field that the details of roving employment should be captured in Section F.c.1.
4. OFLC has indicated that worksite information will be automatically populated from the ETA-9141 to the ETA-9089. Unlike the job opportunity information/requirements and prevailing wage information, OFLC has included this information on the ETA-9089. As discussed above, by including this information on the ETA-9089, employers will be able to review the information on the form prior to submission which should reduce user error. AILA would like to thank OFLC for including this information on the proposed ETA-9089 and would encourage OFLC to also include information about the job opportunity



information/requirements and prevailing wage information on the form, as discussed above.

However, AILA notes that the worksite information being requested on the ETA-9141 is different than the information requested on the ETA-9089. Sections F.a.1., F.a.8., and F.a.8a. of the ETA-9089 are not included on the Form ETA-9141. Additionally, Section F.c. of the ETA-9089 is not included on the ETA-9141. The requested information should be the same on the two forms in order to ensure that employers can provide consistent information in both the prevailing wage determination process and the PERM process.

## **Section G. Additional Job Opportunity Information and Other Requirements**

AILA provides the following recommendations for Section G. of the proposed ETA-9089:

1. For Section G.2a., AILA recommends that the one year of paid experience as a live-in household domestic service work be qualified with “full-time basis” to reflect the regulatory language at 20 CFR 656.19(b)(3).
2. For Sections G.2b. and G.2c., AILA recommends replacing the word “work contract” with the term “employment agreement” to reflect the regulatory language at 20 CFR 656.19(b)(2).
3. In Section G.3., AILA recommends that “foreign diploma/degree” be replaced with either “foreign degree” or foreign educational equivalent” to align with regulatory language at 20 CFR 656.3. The latter will provide for greater flexibility beyond “diploma/degree.”

Section G.3. also asks whether an employer would accept a foreign diploma/degree as equivalent to the U.S. degree **required in Question E.1** on the ETA-9141. While the overwhelming majority of employers will answer this question “YES” in the normal course, it is unclear how an employer should respond to this question where there is an alternate requirement and the alien qualifies based on a foreign degree that is equivalent to that alternate. We encourage OFLC to strike specific reference to Question E.1 on ETA-9141, or otherwise broaden this language to make clear that it could also apply to alternate requirements.

4. For Section G.4., AILA recommends that the word “working” be replaced with the term “employed” to align with regulatory language.
5. Section G.4.b. asks whether an employer is willing to accept “any suitable combination of education, experience, or training.” This standard is commonly referred to as the Kellogg language but is only applicable to the basic labor certification process set forth at 20 CFR 656.17 and not applicable to the optional special recruitment and documentation procedures for college and university teachers set forth at 20 CFR 656.18. We therefore recommend adding a question first to determine which process is being employed and then have the employer answer Section G.4b. only if the basic labor certification process is being employed.

6. AILA recommends that the language in Section G.5 be amended from “employed by” to “while working for the employer, including as a contract employee” to align with regulatory language at 20 CFR 656.17(i)(3)(i).
7. In Sections G.7 and G.8, the proposed form instructions require a brief business necessity explanation to be included in Appendix C if you select “YES”. However, the regulations at 20 CFR 656.17(h)(3) require “the job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation *and* [emphasis added] must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones.” As worded, the instructions require any employer whose requirements exceed the SVP to provide a brief explanation of business necessity, when under the regulations is this not required. In addition, AILA assumes, but asks that OFLC confirms in the instructions that should OFLC require additional business necessity evidence that it will issue an audit rather than outright denying if there are remaining questions on business necessity.

## **Section H. Recruitment Information**

AILA provides the following recommendations for Section H. of the proposed ETA-9089:

1. AILA commends OFLC for including the Schedule A check box in Section H.b.1d. along with the other filing types in the subsection. Additionally, we appreciate the convenience of having a specific Appendix to report the recruitment specifically for a college or university teacher under the competitive recruitment process in Section H.b.1c.
2. Under Section H.d., when inputting the data in relation to the advertisement dates, AILA encourages OFLC to program the FLAG system to generate an error message if the advertising dates entered in this subsection are outside the 30-180 timeframe. This has ensured greater accuracy and efficiency in ETA-9089 submissions in the current program.

AILA questions whether it is necessary for “Radio and/or TV advertisements” to be plural when the other fields included in Section H.d. are in singular form. We ask that OFLC list this in the singular like all of the other supplemental recruitment provisions.

3. Under Section H.e., AILA recommends that DOL consider revising the term “customary practice” included in Sections H.e.1b., H.e.1c., and H.e.1d. and the accompanying instructions for the ETA-9089 and replace it with “normal procedure for similar positions” to be consistent with the regulations at 20 CFR 656.10(d). The term “customary practice” does not appear in the regulations and could cause confusion. Additionally, recruitment procedures can sometimes be different for different occupations, so specifying “similar positions” as contained in the applicable regulations provides additional instruction and explanation in line with the regulations.

AILA further recommends combining Sections H.e.1c and H.e.1d. The applicable regulations at 20 CFR 656.10(d) describe this requirement together. Splitting it apart sparks confusion because it is not clear whether Section H.e.1d. refers to electronic or print efforts. Combining the two in line with the language in the regulation would remove confusion in determining which box applies when in-house media is electronic and reduces administrative burden.

AILA recommends that DOL remove the phrase “at least one time” from Section H.e.1c. because it appears to impose a requirement that is *ultra vires* to the regulations. The regulations mandate that electronic notice be done but do not specify a number of times it must be done.

Finally, AILA recommends removing Section H.e.1f. The notice requirement is mandatory for employers seeking permanent certification for employment opportunities. Inclusion of this option does not appear to serve an adjudicative purpose.

## **Section I. Employer Labor Condition Statements**

AILA notes that both in the title and in the certification box that OFLC references the “Employer Labor Condition Statements”, which should reflect the “Employer Labor Certification Statements” to mirror the regulations found at 20 CFR 656.10(c ).

## **Section J. Preparer**

Under the current Form ETA-9035, Labor Condition Application for Nonimmigrant Workers if the Preparer section is left blank, there is no negative impact to the application. Please confirm that the same applies for the proposed ETA-9089.

## **Appendix A**

AILA provides the following recommendations for Appendix A. of the proposed ETA-9089:

### *A. Foreign Worker Contact Information*

AILA applauds OFLC for ensuring the Appendix A to the Form-9089 can be used to support a National Interest Waiver (USCIS Form I-140) so that self-petitioning individuals, or their employers, can use a current and revised Appendix A with the submission to USCIS rather than the expired and outdated ETA Form 750 B or the current ETA-9089 which is not well suited to capture the main points of a National Interest Waiver (NIW) petition. Once implemented, AILA further encourages OFLC to actively engage with USCIS and encourage a public announcement regarding USCIS’ acceptance of this new Appendix A to ETA-9089 in lieu of longstanding USCIS policy to accept the ETA Form 750B/current ETA-9089.

AILA appreciates the option to enter “FNU” for Sections A.1. and A.2. for the foreign worker given that not all individuals have names that fall within Western naming conventions.

AILA requests that Section A.12. “Class of admission” be removed, as the nonimmigrant status, or lack of status, of the foreign worker is not relevant for the consideration of the application. Rather, the foreign worker’s status is under the jurisdiction of USCIS. If OFLC were to retain

Section A.12., AILA requests that clarification be provided in the instructions and in the question's box concerning whether this field is requesting information about the foreign worker's class of admission upon last entry into the U.S. or the foreign worker's current nonimmigrant status. The instructions currently proposed do not explain this. Furthermore, if OFLC decides not to remove this field, AILA requests that an option be made available and known in the instructions to leave the field blank without negative consequence to the adjudication of the application.

### *B. Foreign Worker Education*

AILA welcomes the addition of 5 separate sections (a through e), in the event the foreign worker holds more than one degree. AILA commends OFLC for only requiring mm/yyyy for time attended, and for providing an option to select "Other degree" as had been suggested in the 2004 Comments to ETA-9089. The current ETA-9089 allows for only one degree, requiring the preparer to list additional degrees in Section K.

AILA asks that the OFLC clarify the following in the instructions for this section. Given that the form and instructions ask for "relevant" diplomas/degrees, should or can the preparer also list diplomas/degrees that are not needed to show how the foreign worker qualifies for the position, but that help show the full education history? Please confirm whether the OFLC is only requiring the listing of those diplomas/degrees that show how the foreign worker meets the minimum requirements set forth by the employer.

### *C. Foreign Worker Training Qualifications- Training, Certification(s), and/or License(s)*

AILA welcomes the addition of a separate section for this, with up to 3 sub-sections in the event the foreign worker holds more than one training, certification, or license which will lead to more accurate drafting and adjudication. AILA again welcomes the mm/yyyy format for the "Month/year awarded" as a foreign worker may not recall the exact date.

In Section C.a.1a., AILA suggests changing the title to "Name or description of training and/or coursework received", rather than using "experience" (as per the form) or "training experience" (as per the instructions). This will avoid possible confusion regarding a presumed need to include actual employment experience in this space.

AILA asks that the OFLC confirm in the instructions whether the preparer should list skills and knowledge gained during *non-completed* training and/or coursework periods in Section D. under "Skills, Abilities and Proficiencies", given that the instructions under Section C only ask for *completed* training programs, coursework and/or other training. This is also implied by the fact that the preparer must insert start date, end date, and date awarded in this section.

AILA also suggests that the titles of Sections 1c. and 1d. in each sub-section be revised to read "Start date of training, certification, licensure or coursework" and "End date of training, certification, licensure or coursework" to make clear the OFLC refers to certification, coursework, and licensure as well.

Finally, it is not clear what information a preparer would indicate in 1e. for training or coursework, as the foreign worker may not actually have been "awarded" anything for the completion (as

compared to a certificate or licensure award). AILA suggest inserting a “YES” or “NO” option with the question “Did the foreign worker receive dated documentation for completion of training or coursework?” The preparer would then only have to insert a mm/yyyy date if he/she respond “YES” to this question. The instructions should explain that if the preparer responds “NO,” completion of Section 1d. suffices. In that instance, the foreign worker would need to provide suitable evidence during the Form I-140 petition process.

#### *D. Foreign Worker Training Qualifications – Skills, Abilities, and Proficiencies*

AILA notes that the proposed ETA-9089, as opposed to the use of Section K in the current ETA-9089, separates this section from non-employment training, coursework, certification, licensure, and employment experience, and does not provide areas to insert start and end dates. Hence, the preparer is not able to clearly align, in chronological order, skills and knowledge learned with the particular non-employment training, coursework, certification, licensure, and employment experience in which the foreign worker gained certain skills and/or knowledge.

AILA recommends capturing the information in the proposed Sections C and D under one section such that employers can provide the information in chronological order. AILA further recommends that the OFLC revise Section C to allow for the insertion of skills and knowledge obtained during (non-employment) training, coursework, certification, and licensure periods to allow the preparer to align skills and knowledge obtained with the respective Section C sub-sections. Lastly, AILA recommends eliminating Section D altogether in order to allow the preparer to align skills and knowledge obtained with the respective employment experience sub-section (currently in section E), as one can currently do in Section K of the existing Form ETA-9089. Finally, AILA suggests increasing the character limit in 1c. to 3,000, because 1,500 characters amounts to only about 200 to 400 words.

#### *E. Foreign Worker Experience*

AILA welcomes the clarification in the instructions that employment experience can include paid and unpaid “experience” (we assume this refers to both employment and non-employment experience such as training) and internships. In light of statutory sections such as INA 245(i) and 245(k), AILA recommends amending the instructions to also state that this can include experience gained irrespective of the issue of whether the PERM beneficiary possessed proper work authorization at that time.

AILA welcomes once again the mm/yyyy vs. mm/dd/yyyy format, and the deletion of the request for the employer’s telephone number and the name of the foreign worker’s supervisor, because under many circumstances the actual supervisor is no longer with the employer or the former employer is no longer in business.

If Section D remains as is, AILA requests clarification related to Section E.a.11. and the information provided in the instructions. Please confirm what the difference is between described “skills, abilities and proficiencies” in Section D of the form, and “equipment and tools used, materials or products handled, and all other relevant information” as explained in the instructions

for Section E? Can the preparer duplicate information that could fit under both sections to make sure he or she can clearly show how the foreign worker meets the requirements?

Finally, AILA suggests that the character limit in Section E.a.11. be increased to at least 5,000 to allow for at least 500 to 1,000 words (5 to 10 sentences).

## **Appendix B**

AILA addresses this Appendix above in Section E. Job Opportunity and Wage Information, points #5 and #6.

## **Appendix C**

AILA welcomes the opportunity for free-form boxes such as Appendix C. The space will allow for explanation of special circumstances of the application and provide supplemental information. However, it would be helpful to include additional space. AILA would recommend space for 5,000 characters.

## **Appendix D**

AILA provides the following recommendations for Appendix D. of the proposed ETA-9089:

1. AILA commends OFLC for sectioning this out, as it will help identify filings under the optional special recruitment and documentation procedures for college and university teachers and, hopefully, ensure that OFLC will generate the correct audit template for special recruitment cases. However, under 20 CFR 656.18(b)(3) an employer using the optional special recruitment procedures for college and university teachers is required to use only one recruitment effort, not multiple. For this reason, AILA is concerned that listing three different entries under “Name(s) of national professional journal, educational organization publication, or other publication” is misleading.
2. Additionally, the instructions reference the items as “2” and “2a” instead of “2a” and “2b,” etc. It would be helpful for OFLC to edit to reflect the format used on the proposed Appendix D. AILA also requests that space be provided for the use of electronic versions of the listed recruitment efforts, per OFLC FAQ “College and University Teachers – Recruitment,” Item 6, which must be run for at least 30 days.

## **Permanent Employment Certification Approval**

As mentioned above, AILA recommends that the “Permanent Employment Certification Approval” document contain details of the job opportunity, such as the employer’s job title, job description, job requirements, and job location. Not knowing what information will be transmitted to USCIS or any other agency, AILA is concerned that when it comes to the Form I-140 stage at USCIS employers will be issued RFEs to provide more details about the job opportunity. To avoid such delays and to avoid any misinformation concerning a particular job opportunity, AILA recommends that this information be included in the approval to avoid delays.

## **Public Burden Statement**

AILA appreciates that OFLC is concerned with efficiency and we appreciate the auto-population of information from ETA-9141 to ETA-9089. That said, we believe that the burden estimates for completion of ETA-9089, along with the accompanying appendices, at 1 hour and 52 minutes is grossly underestimated. Given that BALCA has iterated over and over again that the PERM is an exacting process to ensure efficiency, and that typographical errors are rarely forgiven in the process, employers and their agents and attorneys spend much more time on the application than the roughly 2 hours estimated in this section.

## **Conclusion**

AILA appreciates the opportunity to comment on the proposed changes to the ETA-9089. While this revised form provides improvements to the current form, we encourage OFLC to consider and address the issues noted in this comment.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION