Department of Homeland Security (DHS)
USCIS
Chief, Regulatory Products Division, Clearance Office
111 Massachusetts Avenue, NW., Suite 3008
Washington, DC 20529-2210

RE: Agency Information Collection Activities: Form I-129. OMB Control no. 1615-0009

Dear Sir/Madam:

I, Deepak Khare, hereby submits comments to the Agency Information Collection of the Department of Homeland Security (DHS) proposing modification of Form I-129, Petition for a Nonimmigrant Worker (75 Fed. Reg. 6212 (Feb. 8, 2010).

**There is No Legal Authority for USCIS to Request Data Exclusively from IT Staffing and IT Consulting Firms that place H-1B Beneficiaries at Third Party Worksite.**

As an initial matter, we object to Part 6. in its entirety as it seeks to capture information exclusively from petitioners who place H-1B beneficiaries at third-party worksites. The H-1B statute and regulatory framework provides no authority for USCIS to impose this requirement on IT staffing and consulting firms.

Part 6. Additional Information about Employment under a Third Party Contract

Without waiving this general objection, we further object to the data collection in part 6. seeking the name of the company where the beneficiary will work, as well as the name, title, and phone number of the contact individual at the work site as duplicative and overly burdensome. USCIS Service Centers already routinely request a letter from the work site that is to include all of these details. Because this information would only be provided by the *Petitioner* on Form I-129, we expect that Service Centers will still require a confirmation of the same information in the form of a letter from the work site. Therefore, it is unnecessary to request the same information in a different format.

Part 7. Deemed Export Acknowledgement

We urge that before any attempt to require information regarding Deemed Export license requirements be included in Form I-129, that the Export Administration Regulations (EAR) and Commerce Control List (CCL) be clarified and available to employers in a more user-friendly format. The FAQs listed at http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html have not been updated since 2004. The FAQs make mention of source code and software, however, it is difficult to determine whether the software used by our members in the IT industry for various projects falls under the CCL. In its current form, the CCL consists of Categories 0 through 9 with each one being listed on the internet in a separate pdf file. There appears to be no searchable index. The Alphabetical Index to the CCL appears on the internet in a 49 page pdf file that is also not searchable. A more user-friendly format of the CCL and EAR should be implemented prior to requiring this information collection to be included in Form I-129.

Data Collection

We request clarification of the term "affiliate" as used in the proposed form. The term has implications for calculating the total number of full-time equivalent employees for purposes of determining the proper filing fees. For example, if one individual owns two separate businesses with two separate FEINs;

will the two businesses be considered affiliates, such that a petitioner must count the employees of both businesses to determine the proper fee? What about if one person is a majority shareholder of two separate businesses? What if a group on individuals owns both businesses, but in differing percentages?

Part D. Attestation Regarding Off-site Assignment of H-1B Beneficiaries

We reiterate our objection on the grounds that USCIS has no authority to collect information sought in this section. Further, USCIS seeks attestations exclusively from employers who place H-1B beneficiaries at third-party worksites. In this section, the petitioner will be required to attest that the Beneficiary will be paid the prevailing rate of pay at any and all off-site locations. We object to the terminology used. The wage requirement for H-1B workers is that the beneficiary be paid the higher of the actual or prevailing wage. Therefore, we suggest that this attestation be revised to state: The beneficiary will be paid the higher of the actual or prevailing wage at any and all off-site locations.

In addition, the requirement of the beneficiary's signature on the H-1B petition is overly burdensome. In New Employment and Consular Processing situations, the beneficiaries are often abroad at the time the I-129 petition is filed. Because original signatures are required on the form, this places an undue burden on petitioners as well as H-1B beneficiaries who must pay for postage to mail an original form from overseas to his or her employer in the U.S. It should be sufficient that the petitioner attests that the beneficiary has been advised of the off-site placement.

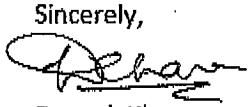
Changes to Instructions:

Amended Petition

The proposed instructions regarding the use of the Form I-129 for filing an amended petition indicate that a change of geographic location of the position is one of the reasons a petitioner would be required to file an amended petition. This is troublesome in that the current guidance indicates that a mere location change where all other aspects of the employment relationship remain the same will *not* be considered a material change in employment and therefore an amended petition would *not* be required. In the IT staffing/consulting industry, work locations can change quickly and often as new projects become available or a work site moves its principal place of business. Requiring an amended petition for such a minor change will cost the employer additional filing fees and attorney fees and will increase the amount of applications to be adjudicated by USCIS. This will serve only to increase processing times and create instability for the H-1B workers who will likely always have a petition pending.

In addition we suggest that the Form W-2 not be required as evidence of maintenance of status. There are situations in which an H-1B worker may change jobs before a W-2 is issued by relying on the portability provisions of AC21. In addition, many H-1B workers take extended trips outside the United States. Because of this, the Form W-2 may lead an adjudicator to conclude that a beneficiary was not paid the proper wage prior to filing a petition, when in fact the proper wage was paid for the time while the beneficiary was in the country. The current reliance on paystubs as evidence of maintenance of status should continue without change.

Sincerely,



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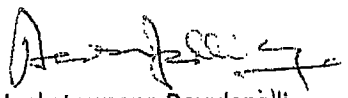

Venkatramana Devulapalli
VP – Operations
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Edison, NJ 08817.

musillounkenholt
IMMIGRATION LAW

April 8, 2010

Department of Homeland Security
USCIS
Chief, Regulatory Products Division, Clearance Office
111 Massachusetts Avenue NW, Suite 3008
Washington, DC 20529-2210

Dear, Chief, Regulatory Products Division:

Please accept this letter as Musillo Unkenholt LLC's formal written comments and suggestions regarding the items contained in the Federal Register Notice published February 8, 2010 (Volume 75, Number 25). Your Notice is also referenced by OMB Control Number 1615-0009.

The purpose of the Department's Notice is to inform the public of changes to its Form I-129, Petition for Nonimmigrant Worker.

Musillo Unkenholt wishes to raise one issue with the Notice and the attached Revised Instructions to the Form I-129.

It has long been the Department's policy that material changes to an H-1b worker's employment require an amended H-1b Petition. It has also long been the Department's policy that when an H-1b worker moves to a new worksite, an amended Form I-129 does not need to be filed as long as a Labor Condition Application Certification is in place prior to the employee's movement. This policy was explained in:

1. A letter by Efren Hernandez III, Director Business and Trade Branch (October 23, 2003)[1];
2. A letter by Thomas W. Simmons, Branch Chief, Benefits & Trades Section (November 12, 1998)[2];

[1] Please see October 23 letter from Efren Hernandez III to Lynn Shotwell, American Council on International Personnel, Inc.
[2] Please see November 12 letter from Thomas W. Simmons to Shirley Tang, Esq., Friedman Siegelbaum LLP.

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3. A letter by William Yates, Acting Associate Director for Operations, USCIS (July 11, 2003)[3];
4. A letter by T. Alexander Aleinikoff, Executive Associate Commissioner (August 21, 1996)[4]; and
5. A letter by Isaiah Russell, Jr., Acting Branch Chief, Business and Trade Services Branch, U.S. Department of Justice (March 12, 1997)[5].

The proposed amended Form I-129 misstates the Department's current policy. On Page 3, the new Form's instructions say that an amended petition is required if there is a change in the "geographical location of the position." This Section suggests that a change in the geographical location of the position is a material change. As the five cited letters by five different USCIS and Legacy INS officer all conclude: This is not the law.

Musillo Unkenholt believes that this new language may have been prepared by someone who is unfamiliar with the Department's current and long-standing policy on the necessity of an amended petition filing in instances of new geographical locations.

The undersigned are unaware of any formal or informal change in the Department's policy.

Practically and legally, there is a very good reason why the Department has never required an amended Form I-129 when there has been a change of geographical location. Changes in geographical location do not represent material changes in employment since all other characteristics of the job remain the same as they were at the time of the initial filing. For instance, an accountant who does work in New York City, who subsequently moves to Chicago, but performs materially the same job duties, does not present the USCIS with any plausible issue under regulation or statute for the Service to review. It is the Department of Labor's role to determine whether or not issues such as prevailing wage are being sustained in the new geographical location.

On the other hand, if the accountant's job duties materially change, then the Department is, of course, correct to require an amended H-1b petition. The material question should be whether or not the proposed job duties raise an issue as to whether or not the proffered position remains a Specialty Occupation. Since the job duties remain unchanged, then no amendment is necessary.

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[3] Please see July 11 letter from William Yates to Lynn Shotwell, American Council on International Personnel, Inc.

[4] Please see August 21 letter from Alexander Aleinikoff to Nathan Waxman, Esq., Sachs, Spector, Glasser and Waxman, P.C

[5] Please see March 12 letter from Isaiah Russell, Jr. to Nathan Waxman, Esq., Sachs, Spector, Glasser and Waxman, P.C.

Thank you for your kind consideration of this letter. Our office is happy to discuss this issue with the Department if the Department seeks further fact finding.

Warm regards,
MUSILLO UNKENHOLT LLC

Christopher T. Musillo, Esq.
Attorney-at-Law

Cindy J. Unkenholt, Esq.
Attorney-at-Law