



**NAFSA: Association of
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July 1, 2014

William L. Carlson, Ph.D.
Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U. S. Department of Labor
Washington, DC 20210

RE: Form ETA-9089 Application for Permanent Employment Certification
(OMB Control Number 1205-0451)

Submitted Via E-mail: ETA.OFLC.Forms@dol.gov

Dear Dr. Carlson:

I write today on behalf of NAFSA: Association of International Educators with respect to the notice, published at 79 *Fed. Reg.* 26801 (May 9, 2014), requesting public comments on Form ETA-9089 Application for Permanent Employment Certification. NAFSA is the world's largest nonprofit association for international education professionals, with nearly 10,000 members at approximately 3,500 colleges and universities throughout the United States and around the world. Our membership includes many professionals who complete and submit Labor Certification Applications to the United States Department of Labor (the Department). For this reason, NAFSA is well situated to provide comments to assist you in enhancing the quality, utility, and clarity of Form ETA-9089 and minimizing the associated reporting burden.

We encourage the Department to consider whether the terms "job opportunity," "job offered," "job title," "position," "job," and "occupation" are used appropriately and consistently throughout Form ETA-9089 and revise the form to enhance clarity. The Department should also define these terms in the instructions to the form. We also recommend expansion of the form to allow the user to indicate all of its requirements and how all have been met by the alien. These recommendations are explained in detail below.

Revise the Form to Ensure Appropriate and Consistent Use of Terminology

The terms “job opportunity,” “job offered,” “job title,” “position,” “job,” and “occupation” are used throughout section H of Form ETA-9089. It is unclear how the Department conceives of each of these terms. If users are to understand the form and the Department’s informational requirements, the terms should be defined by the Department (for example, in the form’s instructions) or the questions on the form should be simplified so that users are not penalized for applying a reasonable but different definition than the unstated definition applied by the Department.

Field H.6 is one that should be revised. It asks “is experience in the job offered required for the job?” Then in field H.10 the form asks “is experience in an alternate occupation acceptable?” and in field H.10 states “identify the job title of the acceptable alternate occupation.” Despite the fact that many dictionaries consider “job” and “occupation” to be synonyms, the Department seems to consider “occupations” broader categories of jobs within which specific “jobs” fall. But, if users intuit this approach and try to follow it, they are provided no opportunity to state whether a job that could be considered in the same occupation as the job offered, but that is different from the job offered, is required. For example, if the job opportunity is for a Programmer Analyst but the user would accept experience as a Software Developer (which, according to O-Net, both fall within 15-1131.00 Computer Programmers), the user is not provided the opportunity to demonstrate this fact clearly on the form. Many users simply indicate “yes” in field H.10, with concern that they may be penalized by the Department, but we are aware of several other and equally uncertain approaches common among users of the form.

Since it is rare that an employer would accept experience only in the specific job that it is offering, many users assume that field 6 is simply a strangely worded question aimed at determining whether any whatsoever experience is required. The Department should consider revising the question to recognize this more logical and intuitive approach. The question could be phrased simply “is employment experience required?” and field 6.A could read “if so, state the requirement (including the number of months of experience required).” This simple question would allow the user to state any and all experience requirements in common language and not require the user to parse terms and anticipate the Department’s understanding of the terms. Other uses of similar terms in fields H.5, H.12, H.15, H.16, and H.17 should also be adequately defined.

Clarify the Relationship of Fields H.6 and H.10

If the Department chooses not to revise field H.6 as suggested above, so that users need only submit information about the experience required, it should at least clarify the relationship between fields H.6 and H.10. Field H.10 allows users to indicate that experience in an alternate occupation is “acceptable,” but it is unclear how this field relates to field H.6. Many users understand field H.10 to ask if experience in an alternate occupation is acceptable *in lieu of* a

specific amount of experience in the job offered. The Department's PERM FAQs [Alien Experience, FAQ 5] seem to indicate that "alternate" has as a necessary referent a "primary" requirement. The FAQs suggest that a user could only check yes to question H.10 if it also checked yes to question H.6. The Department should clarify this in its FAQs and, since users should not be required to go beyond the form and its instructions in order to understand the form, the Department should clarify this in the form instructions.

Clarify Any Requirement Concerning the "Kellogg Language"

The Department should clarify under what circumstances the phrase, "any suitable combination of experience of education, training, or experience is acceptable" (known as the "Kellogg language") must be included on Form ETA 9089. In *Federal Insurance Co.*, BALCA Case No. 2008-PER-00037 (February 20, 2009), the Board of Alien Labor Certification Appeals held that, "because the existing Form 9089 does not reasonably accommodate an employer's ability to express this attestation, we hold that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089." Despite this decision, DOL FAQs [PERM FAQs, Advertising Content, FAQs 7 and 9] still indicate that the Kellogg language must be included on the form in certain circumstances. If this phrase must be included under any circumstances, the Department should create a field on the form dedicated to receive this statement, such as a checkbox next to suitable language that expresses the attestation and the circumstances under which the attestation is necessary. The form's instructions should also be revised to explain the necessity of the attestation.

Expand the Form to Allow Full Listing of Minimum Requirements and Beneficiary's Satisfaction of those Requirements

The current configuration of Form ETA-9089 does not allow users to indicate fully the locations at which the work will be performed, the specific training required for the job, the nature of the experience required for the job, and how each requirement has been met. So that each requirement and satisfaction of it can be established on the form, we recommend that the Department:

Expand Field H.1 to Allow Listing of All Known Worksites

Many jobs involve multiple worksites. Some require the employee to spend varying amounts of time at numerous locations. In such situations, users of Form ETA-9089 find it difficult to specify a "primary worksite." The form should be revised so that users can list all known worksites.

Expand Field H.4 to Allow Listing of Multiple Degrees

Some jobs require two degrees as a minimum requirement. For example, a patent attorney may be required to have both a law degree and an undergraduate degree in science or engineering, and a medical research position may require both a medical degree (M.D.) and master's degree in public health (M.P.H.). The form should be expanded so that users can accurately list educational requirements.

Expand Field H.5 to Allow Listing of Required Training

Some jobs require more than one kind of training. Field H.5 should be expanded to allow users to show this. Also, we recommend rephrasing the question to "is training required for the job opportunity" (the current phrasing is "in the job opportunity").

Expand Field H.8-C to Allow Years and Months

Field H.8-C only accepts whole number entries. When the "number of years of experience acceptable" is other than a whole number, DOL FAQs [PERM FAQs, Job Requirements/Duties, FAQ 4] instruct users to enter special notes in Field H.14 as a work-around. Here is a sample work-around from the FAQ:

Example 2: Where the employer accepts, as an alternate combination of education and experience, a Bachelor's degree and 15 months experience (1.25 years), the employer will mark "Bachelor's" in 8-A. and will enter "1" year in Section H, Item 8-C, having rounded the 15 months (1.25 years) down to the nearest whole number, in terms of years. The employer will then explain in Section H, Item 14, that its actual acceptable alternate combination of education and experience is a Bachelor's degree plus 15 months (1.25 years) experience but it entered 1 year in Section H, Item 8-C, per the FAQ.

The Department should update the electronic form to accept both years and months, to reduce the number of such required workarounds that are disclosed only in FAQs on the Department's web site.

Expand Field J.11 to Allow Listing of Multiple Degrees

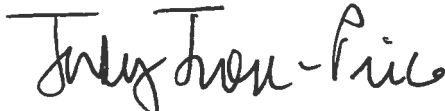
As noted above, some positions require more than one degree as a minimum requirement, but section J allows submission of information about only one degree. The form should be expanded so that users can demonstrate satisfaction of all degree requirements.

Expand Section K to Allow Users to Demonstrate How All Requirements Have Been Met

Section K is labeled “alien work experience” and provides additional fields for “job 1,” “job 2,” and “job 3.” The Department has indicated in its FAQs that section K is also to be used to demonstrate the required training acquired by the alien. The Department has also indicated informally that section K should be used to demonstrate that “specific skills or other requirements” listed in field H.14 have been obtained or met. However, the form itself asks for information about the alien only in relation to specific jobs held by the alien. A special qualification such as a license or a language, however, is not always connected to past jobs. In those cases, and in order to provide users the opportunity to demonstrate the satisfaction of all requirements, the form should be revised to include a separate section in which the alien’s special qualifications may be listed. Also, this is another instance in which the Department requires users to have information about the form that is not found in the form and the instructions. In order to alleviate this situation and improve the form, the Department should revise section K and specify its proper use. We recommend dividing it into three sub-sections: one for work experience, one for training, and one for special skills and other requirements.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink that reads "Judy Judd-Price". The signature is written in a cursive, flowing style.

Judy Judd-Price
Deputy Executive Director
Leadership and Professional Development Services
NAFSA: Association of International Educators