AMERICAN IMMIGRATION LAWYERS ASSOCIATION

February 8, 2016

Ms. Renata Adjibodou, Center Director
Office of Foreign Labor Certification
Suite 12–100, Employment & Training Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via e-mail: ETA.OFLC.Forms@dol.gov

RE: Comment Request for Form ETA–9141, Application for Prevailing Wage Determination and Other Information Collections for Determining Prevailing Wages in Foreign Labor Certification Programs (OMB Control Number 1205–0508), Extension

Dear Ms. Adjibodou:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to the Department of Labor's "Comment Request for Form ETA–9141, Application for Prevailing Wage Determination and Other Information Collections for Determining Prevailing Wages in Foreign Labor Certification Programs (OMB Control Number 1205–0508)" published in the Federal Register on December 10, 2015.[1] We appreciate the Department of Labor's (DOL) desire to enhance the quality and efficiency of the ETA-9141, while minimizing the burden on stakeholders and maintaining a streamlined and efficient application process.

Established in 1946, AILA is a voluntary bar association of more than 14,000 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, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the ETA-9141 and believe that our members' collective expertise and experience makes us particularly well-qualified to offer comments on this matter.

[1] 80 Fed. Reg. 76711 (Dec. 10, 2015).

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1. Improve Coordination Between ETA Forms 9141 and 9089

While we understand that DOL is not proposing major substantive changes to the ETA-9141 at this time, we nevertheless encourage DOL to review Forms ETA-9141 and ETA-9089 to identify and eliminate inconsistencies between those forms. A PERM application, filed on Form ETA-9089, cannot be approved without the employer first obtaining a prevailing wage determination (PWD) using Form ETA-9141. At present, there is significant overlap between the two forms but no means of transferring data from the ETA-9141 to the ETA-9089 using iCERT or the OFLC Permanent Online System website. When an employer uses the Permanent Online System website to complete the ETA-9089, it must instead manually transfer data from the ETA-9141, including the Prevailing Wage Tracking Number, the assigned SOC/O*NET (OES) code, the Occupation Title, Skill Level, Prevailing Wage, Wage Source, Determination Date, and Expiration Date. This process is burdensome on employers, and it lends itself to error by even the most conscientious and careful user.

Additionally, the information requested on the ETA-9089 overlaps significantly with information already contained on the ETA-9141, including Attorney/Requestor Point of Contact Information (Section B), Employer Information (Section C), and Job Offer Information, including the job description, education requirements, and address of intended employment (Section E). The employer or agent must check and double check that all information is consistent, and again, this manual transfer of data is subject to error.

The benefits of automatic transfer of data from one form to the other will have a positive ripple effect on both the employer and DOL. One would expect fewer PERM denials for typographical errors, resulting in fewer appeals and reconsideration requests. One might also expect an opportunity for streamlined review of certain cases where automated data transfer allows OFLC to review one form (ETA-9089) instead of two.

Consistency between the two forms will also result in less confusion and fewer inadvertent errors. For example, the ETA-9141 asks whether travel will be required to perform the job duties. As there is no corresponding travel question on the ETA-9089, employers are left to determine whether to include it on that form and if so, where, particularly when travel is *de minimus*. Similarly, the ETA-9141 asks whether the employee will supervise others, and if so, whether they are peers or subordinates. By contrast, no such questions appear on the ETA-9089. Achieving greater consistency between these two forms would streamline and improve both the PWD and PERM processes.

2. Consideration of the Need to Collect Data that Does Not Affect the Prevailing Wage Process

In order to ensure the most effective use of government and employer resources, DOL should collect the data that is needed to appropriately assign a prevailing wage, but should not request

data or information that is not relevant to that determination. Toward that end, there appears to be several data items on the ETA-9141 that could be eliminated to improve efficiency.

For example, the ETA-9141 requests the employer's North American Industry Classification System (NAICS) code. However, it is unclear how the NAICS code is relevant to the PWD process, and therefore, whether it is necessary. If the NAICS is not a substantive element of the wage determination process, there is no reason to collect it. If it is substantive element, DOL should provide guidance to the regulated community as to its relevancy and how it is used.

Similarly, the ETA-9141 requests the job title of the supervisor for the proffered position. Job titles vary widely among employers, with some using traditional hierarchical titles and others using "flat" titling systems, where virtually everyone in the company is an "analyst" or "team member." Since very little can be gleaned from the job title of a supervisor, and given the potential for confusion, we recommend eliminating this question from the ETA-9141.

3. Elimination of the Requirement of a Street Address for the Worksite

The ETA-9141 requires an employer to list a street address for the worksite in Section E, "Place of Employment Information." Prevailing wage data is based on a Metropolitan Statistical Area (MSA), and the specific worksite address within that MSA does not in any way affect the PWD process. For employers with multiple locations within a given city, the collection of this information may result in an unnecessary increase in DOL workload, given that those employers are likely to file PWD requests for each different street address, even if the positions are identical and located within just a few blocks or a few miles of one another.

Employers change physical work locations according to their business needs. Occasionally, the move is to a building in same business park, but with a different address, or to a location just a few miles away. A move within the same MSA as the original location should not result in any negative consequences relating to PERM or H-1B processing. Therefore, we urge DOL to remove the question regarding the specific worksite address on the ETA-9141 and instead request the MSA where the worksite is located.

4. Modifications to Improve Efficiency and Reduce Processing Times

In seeking comments on the ETA-9141, DOL expressed the goal of evaluating the accuracy of its estimate of the burden of the information collection, including the validity of the methodology and assumptions used. Another goal is to minimize the burden on those who use the form. While DOL has estimated the burdens associated with completion and submission of the ETA-9141, DOL has not considered the burden that extended PWD processing times impose on employers. Therefore, we encourage DOL to identify and implement modifications to the form with an eye toward reducing processing times.

Processing times have recently risen to approximately 75 days. Where H-1B employers often face business pressures to on-board H-1B employees within a matter of days or weeks, 75 days is too long. Even 60 days, the stated processing time goal for PWDs, imposes a substantial burden on employers considering the wage data is accessible on-line. As a result, most employers are forced by business realities to forego the "safe harbor" of obtaining a PWD via Form ETA-9141 and instead use an alternative wage survey or DOL's online wage library. Nevertheless, the NPWC has stated that employers should not expect faster processing times due to a shortage of resources.

Employers also express frustration when the NPWC categorizes a position in the wrong occupational classification or at an incorrect skill level, resulting in a PWD that is far above the market wage. Contrary to sensationalized media reports, most employers do not take immigration status into account when setting rates of pay and instead pay their workers an appropriate wage given the duties, requirements, and market rate, without distinguishing between U.S. and foreign workers. Employers are thus justifiably surprised when a PWD is issued that is ten or twenty thousand dollars greater than the commonly known annual market rate salary. When seeking review of an erroneous determination, the employer must first seek reconsideration, then Center Director review, and may ultimately need to seek a review by the Board of Alien Labor Certification Appeals (BALCA). This process takes at least 60 days at each of the first two stages, while a review by BALCA can take months. If there were a better way to capture all of the information that the analyst needs to make a proper assessment and issue a correct PWD, employers would not need to go through these additional lengthy steps.

One indication that the ETA-9141 may not capture all of the required information is the apparent increase in issuance of Requests for Information (RFIs). Given the shortcomings of the ETA-9141, employers are forced to guess what additional information, beyond the questions listed on the form, an analyst needs to make a proper determination. AILA members report better success in obtaining accurate PWDs without an RFI when they upload additional information (such as a breakdown of job duties by the percentage of time and the names and job titles of those supervised) to supplement the ETA-9141. In reviewing the ETA-9141, consideration should be given to capturing all of the necessary information with the goal of precluding RFIs and preventing erroneous determinations that necessitate review. Even without a substantial revision to the form, DOL could revise the ETA-9141 instructions and provide employers with advance notice of the specific information needed and where to place it on the form.

5. Revise Portions of the ETA-9141 to Allow Space to Provide a Substantive Answer

One challenge with the current ETA-9141 that could be corrected without a major revision is the spacing on the form. The current form contains character limitations on a number of fields, requiring employers to either devise elaborate abbreviations or provide incomplete answers. This results in inefficiencies to the process, including the issuance of RFIs to clarify requirements, and the filing of reconsideration requests and appeals to correct erroneous

determinations. This could be easily solved by providing employers with additional space to insert complete answers to a number of questions. Examples include:

a. E.a.2 and 2a: More Space for the Requestor to Suggest Codes and Occupational Titles

E.a.2 and 2a only permit one specific code designation for certain occupations. The form allows a requestor to note only a single suggested SOC (O*NET/OES) code, and provides no space to allow users to provide multiple occupational codes or titles. The current O*NET SOCs do not provide a comprehensive listing of all occupations in the United States, and users are often faced with having to choose from multiple SOCs that are equally applicable to the occupation. DOL could also provide space in this section to allow employers to explain why they believe a particular code is appropriate.

b. E.a.6.a: More Space and Guidance for Travel Requirements

Travel requirements have a direct effect on PWDs, but section E.a.6.a of the ETA-9141 provides very little space to explain travel requirements. In the interest of expedient processing and to avoid RFIs, we recommend that this section be expanded and/or revised to provide options as to the type of travel that is required and specific information required by DOL to assist the NPWC in analyzing the request. For example, the section could be expanded to provide users with options as to the type of travel required or explain the type of travel required as follows:

Type of Travel:

Telecommuting/Remote Work Location
Roving
Relocation
General business travel
Other:_____

Frequency of Travel:

Less than 20%
20%-40%
More than 50%

Areas of Travel (check all that applies):

State
Regional
National
International
Other:_____

By requesting detail about the nature of the travel involved, DOL could substantially improve the efficiency of the prevailing wage process and could ensure that travel requirements result in an increase in the wage only when travel is not a normal part of the occupation.

c. Section E.b: Include a Designated Section for Alternative Requirements

The current form does not allow the user to provide sufficient information regarding the employer's alternative requirements for the job. The provision of a space to note the employer's alternative requirements will also align with the ETA-9089. DOL could use the same questions regarding alternative requirements as those contained in Section H.8 of the ETA-9089.

6. The Instructions to the ETA Form 9141 Should be Updated to Ensure that Employers Use the Document Upload Feature to Provide Complete Information

DOL recently added a feature on the ETA-9141 which permits users to upload files. However, the General Instructions to the form do not address this feature and provide no explanation or examples of the information users should upload. At OFLC stakeholder meetings, OFLC has confirmed that users may – and should – upload any supporting information that will help the NPWC come to an appropriate wage determination. Users should also upload an employer wage survey for consideration under 22 CFR §656.40(g). While we applaud DOL for adding the upload feature, we are concerned that the lack of clear instructions causes uncertainty and ultimately results in wasted time, energy, and employer costs.

For example, a common attachment is alternative wage survey information. While DOL regulations set forth strict requirements for alternative wage surveys, the ETA-9141 fails to clearly lay out a format for users to provide this required information. Savvy employers might attach a document detailing regulatory compliance, but many users remain unclear on the appropriate format for providing this information.

DOL should provide clear instructions on both the form and substance of information that is appropriate for upload. DOL should also include a drop-down menu of commonly-accepted alternative wage surveys and the acceptable format for employers to attach satisfactory supporting evidence.

7. DOL Should Examine the Source of the Ongoing Discrepancy between OES Wages and Real-World Wages

The information requested on the ETA-9141 forms the basis for DOL's determination of the wage employers must pay a foreign worker in order to protect the wages of U.S. workers. While this issue goes beyond the mere form itself, we would be remiss if we did not comment on the impact of the resulting OES wage data as compared to real world salary levels.

While there are too many occupations to mention in the limited scope of this comment, there are certain industries where OES wage data is particularly unbalanced as compared to real-world wages. Consider certain industries in higher education where universities pay reasonable real-world salaries but frequently are issued PWDs that far exceed the market rate. This may be the result of limited data but may also be the result of the information collected on the ETA-9141. For example, the classification 11-9033, Education Administrators, Postsecondary, is used as a "catch-all" to cover roles from administrative assistants to university presidents. Positions commonly classified under this category, which often results in a six-figure wage determination, include Language Coordinator, Center Administrator/Director, Lecturer, and Initiatives Coordinator. However, the real-world salaries for many of these occupations are well-below six figures. In the private sector, we see similarly problematic wage determinations for occupations such as Engineers, Market Research Analysts, and technology workers who have supervisory responsibility.

Because the ETA-9141 is the form that DOL uses to determine the appropriate wage for foreign workers, DOL should closely review the sources relied on when issuing final wage determinations using this form. Toward that end, we urge DOL to consider whether modifications could be made to the ETA-9141 to ensure wage determinations are consistent with market wages.

Your consideration of these comments and suggestions is greatly appreciated.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION