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April 24, 2008

Attn: OMB Desk Officer for the Employment and Training Administration (ETA)  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
Room 10235  
Washington, DC 20503

Via email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov)

RE: Submission for OMB Review: Comments  
OMB Control Number: 1205-0451  
Form: ETA 9089

Dear OMB Desk Officer:

Thank you for the opportunity to provide comments to the proposed new ETA 9089 Form. On behalf of the immigration firm of Tindall & Foster, P.C., we provide the following comments:

- **C.12. Number of employees currently on the employer's payroll in the area of intended employment**

We request that the DOL reformulate the question to ask for the number of employees currently on the employer's payroll. For many large companies with offices all over the country, this question seems unnecessarily burdensome, when the number of total employees is easily obtained through an Annual Report or audited financial statements. To require employers to count heads in a particular occupation or geographic area prior to submitting each application for Alien Labor Certification serves no real purpose to prevent fraudulent activity nor does it provide the DOL with any information which would otherwise be useful in adjudicating applications.

- **C.16.: Is the employer a closely-held corporation, partnership, or sole proprietorship in which the foreign worker has an ownership interest?**

Please provide a definition for closely held corporation.

- **C.17.: Is there a familial relationship between the foreign worker and the owners, stockholders, partners, corporate officers, and/or incorporators?**

Please provide a definition for familial relationship.

- **H.a.: Worksite Information**

It is difficult if not impossible for a U.S. employer to identify every worksite location where work will be performed. Many positions, such as consultants and sales professionals, require travel that can only be projected on a quarterly or even monthly basis. The business needs of the employer vary based on new projects, assignments or ongoing sales and marketing ventures, and thereby require a flexible travel schedule for certain employees.

For these cases where the employer can not identify one worksite location, it appears we are instructed to select “d. No one specific worksite address or physical location” in H.a. Then, we are instructed to complete “H.b.2.10. Identify the geographic area(s) where work will be performed. For example, this can include a listing of cities or townships/states, counties/states, or states located within a geographic region.”

If the employer does not know which cities or townships/states the employee may be assigned to for those positions that require extensive travel, please provide an option to indicate in this question that “this position requires extensive travel and the MSA and cities where work will be performed is not known at this time,” or please provide an alternative solution to this scenario.

Also, if several worksite locations across different MSA areas are indicated for a position, what prevailing wage does Department of Labor instruct employers to obtain and utilize to complete the ETA 9089?

Last, please define area of intended employment. For certain positions that require extensive travel, would the area of intended employment be where the foreign national employee works the majority of the time?

- **H.d.17.: Is training required for the job opportunity required?**

Please clarify what is meant by training. The instructions to ETA 9089 state “training may include, but is not limited to: programs, coursework, or training experience (other than employment).” Please describe if training can include coursework counted toward completion of a degree when the degree is also a minimum requirement for the position.

- **H.d.18.b: Indicate the occupation required**

Please consider stating “Indicate the occupation or type of expertise or type of experience required.” Often times, U.S. employers do not require experience in a particular occupation that can be readily articulated. Employers may instead be looking for candidates with a particular experience in a particular industry. This experience can be found in various occupations.

- **H.h.26., 27 and 28.: Please provide additional space for explanations for business necessity.**
- **H.h.26.: Is proficiency in a foreign language required or preferred to perform the job duties?**

We recommend that Department of Labor remove the word “prefer” from this question. It is our understanding that an employer can not prefer a job duty. If it is a preference, it is not a minimum requirement. Having a preferred requirement on the ETA 9089 contradicts established caselaw.

- **H.h.27.: Do the job requirements indicated in Section H exceed the Specific Vocational Preparation (SVP) level assigned to the occupation as shown in the O\*NET Job Zones?**
- **H.h.27.: Do the job requirements indicated in Section H exceed the Specific Vocational Preparation (SVP) level assigned to the occupation as shown in the O\*NET Job Zones?**

In December 1998, the Department of Labor officially released the Occupational Information Network, or O\*NET, for use by the general public, as a source of occupational information. The O\*NET was created by the Department of Labor to replace the outdated Dictionary of Occupational Titles (DOT), to address the “...need for occupational information that is more relevant to the modern workplace...”<sup>1</sup> O\*NET is also a database, which defines each occupation based on the types of skills and worker attributes required to perform the duties of any particular occupation, using many variables. The specific education, experience and training required to perform any particular occupation is also expressed in one of five job zones, which are as follows:

- Job Zone One: Little or No Preparation Needed
- Job Zone Two: Some Preparation Needed
- Job Zone Three: Medium Preparation Needed
- Job Zone Four: Considerable Preparation Needed

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<sup>1</sup>Mariani, Matthew “Replace with a database: O\*NET replaces the Dictionary of Occupational Titles,” *Occupational Outlook Quarterly*, U.S. Department of Labor, Bureau of Labor Statistics, Spring 1999.

- Job Zone Five: Extensive Preparation Needed

Not only does this structure provide information regarding particular experience, education and training requirements, it also provides users with the ability to analyze their own current and future vocational preparation when exploring careers. Each Job Zone describes education, training and experience separately, and provides the user with more specific information on how to prepare for a career in any particular occupation. Consequently, the user is able to determine these factors without relying on the legacy DOT and its description of Specific Vocational Preparation.<sup>2</sup> “Job Zones were developed to transition from SVP, as shown in the DOT, to measures of experience, education and job training included in the O\*NET database.”<sup>3</sup> This is reiterated by the DOL in *Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs*, revised May 9, 2005, and published by the Department of Labor’s Employment and Training Administration. It seems clear that the development of O\*NET, and the Job Zone summary, was meant to establish separate education, experience and training requirements for each occupation, thus allowing users to more clearly define each element and its relationship to the occupation in question, rather than rely on a system where education, training and experience are lumped together without reference to the type of education, experience or training required, as stated through the legacy SVP system.

With regard to the proposed Form ETA 9089, the DOL wishes to include the specific language contained in the regulation at 20 CFR §656.20(h)(1), which states “The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones.” The SVP level assigned to any occupation shown in the O\*NET Job Zone, is not a specific level, but is rather stated as a range between 2 levels. For example, the SVP for occupations in Job Zone 4, is stated as “7 < 8.” DOL has yet to define the exact meaning of this range and how it relates to the description of normal requirements stated elsewhere in the Job Zone. As stated, the Job Zone describes a range of experience and a range of training and a range of education requirements to describe occupations which fall within each Job Zone. However, the range of SVP stated in the Job Zone has the least meaning of all, because DOL has not specifically defined what the range, as stated, is to mean.

In addition, as per the instructions contained in the *Guidance* and the OES prevailing wage guidance sheet at Appendix A, education and experience are to be considered separately when making a prevailing wage determination. This guidance, which should be utilized by all State Workforce Agencies and the Department of Labor when making prevailing wage determinations, specifically partitions education and experience, while the legacy SVP levels do not. Since the State Workforce Agencies and the Department of

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<sup>2</sup> F. Oswald, et al., *Stratifying Occupational Units by Specific Vocational Preparation (SVP)*, National Center for O\*Net Development, Employment Security Commission, 1999.

<sup>3</sup> O\*NET® Database Questions, O\*NET Resource Center (<http://www.onetcenter.org/faqDatabase.html>), 24 Apr. 2008.

Labor are specifically mandated to utilize the prevailing wage *Guidance*, as revised May 9, 2005, and the O\*NET Job Zones to make prevailing wage determinations, and to gauge what is normally required for certain occupations, it is puzzling why the DOL continues to focus solely on the SVP level, when practice is to take all factors contained in the Job Zone separately when making prevailing wage determinations and applying normal requirements to a particular occupation. While 20 CFR §656.20(h)(1) specifically states “The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones,” the Department of Labor is clearly using two incompatible methods when attempting to define normal requirements for any particular occupation.

We would suggest that DOL amend the question at H.h.27. to state, “Are the job requirements normal for the occupation?,” and provide a box for the employer to either affirm or deny. This will allow employers to utilize the current O\*NET system, as it was intended, and as DOL has instructed to State Workforce Agencies when making prevailing wage determinations. In addition to the proposed changes to the current Form, we would also suggest that DOL propose an amendment to the regulations at 20 CFR §656.20(h)(1) to state, “The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the maximum education, experience or training requirements assigned to the occupation as shown in the O\*NET Job Zones.”

Finally, we understand that DOL may have the impression that this comment should have been provided during the first comment period regarding the Proposed Rule, Certification for Permanent Employment of Aliens in the United States; Implementation of New System (67 Federal Register 30466, May 6, 2002). While this comment may seem untimely, the reliance on the O\*NET and Job Zones in their current format were not implemented at the time the proposed rule was published for comment. DOL did not specifically instruct employers and State Workforce Agencies to utilize O\*NET in its current state until May 9, 2005. Furthermore, we would like to reiterate that the aforementioned comments and suggestions are meant to address the issues which the proposed Form ETA 9089 appears to bring forth, and consequently are solely expressed in order to amend the proposed Form ETA 9089 as currently drafted.

- **I.a.1a. and I.a.2a.: Please provide additional space for explanations.**

We would lastly request Department of Labor to conduct extensive and exhaustive beta testing before making the new ETA 9089 available for use by U.S. employers. During the first several months starting April 2005, many “bugs” existed within the new electronic submission system software that resulted in erroneous labor certification denials.