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September 28, 2017

William W. Thompson II
Administrator
Office of Foreign Labor Certification
Box #12-200
Employment & Training Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Subject: NASSCOM Comments on "Information Collection for Form ETA-9035, Labor Condition Application for Nonimmigrant Workers (OMB Control Number 1205-0310)"

Dear Administrator Thompson,

The National Association of Software and Services Companies (NASSCOM) is a global trade association with over 1800 members, including 500+ member companies doing business in the United States. NASSCOM's member companies are leaders in the information technology and business process management industry, providing software development, software design and system analysis, software products, IT-enabled/business process services and e-commerce services to clients in every business sector throughout the global economy. In the United States alone, more than 75% of Fortune 500 companies rely upon NASSCOM member companies for operational support and to assist in navigating the digital transformations that are sweeping the business world.

NASSCOM members serve clients in the banking, finance, insurance, medical, retail, transportation, infrastructure, energy, manufacturing, software, social media, government services, military and homeland defense sectors.

NASSCOM is submitting its comments to the above-captioned notice in the August 3, 2017 Federal Register. We believe that the proposed addition of new fields to ETA Form 9035 is not authorized by the H-1B visa statute, is not necessary for the Department of Labor's proper performance of its Labor Condition Application responsibility, will have no practical utility and could inadvertently harm innovation and competitiveness in key segments of the economy.

National Association of Software & Services Companies

Plot Number: 7-10, Sector – 126
Noida – 201303
India

T: + 91 120 4990111
F: + 91 120 4990119
E: rc@nasscom.in

www.nasscom.in

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CONGRESS HAS NOT AUTHORIZED THE ADDITION OF THE NAME OF THE "SECONDARY EMPLOYER" TO THE LABOR CONDITION APPLICATION AND THE ADDITION IS NOT NECESSARY FOR THE DEPARTMENT OF LABOR PERFORMANCE OF ITS STATUTORY RESPONSIBILITY

The H-1B visa statute defines and limits the content of the Labor Condition Application as follows:

The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

Section 212 (n)(1)(E) of the Immigration and Nationality Act, 8 U.S.C. Section 1182 (n)(1)(E).

Section 212 (n)(1)(G) of the INA specifies the Department of Labor's Labor Condition Application information collection responsibility:

The Secretary shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of employment, and date of need.

The Department of Labor proposes to add to ETA Form 9035 the name of the "secondary employer" (in those instances where the H-1B visa worker will not be located on the premises of the petitioning H-1B employer) and the university, field of study and the date when the "masters or higher degree" was bestowed on the H-1B worker (in those instances when an "H-1B dependent" employer is filing an "exempt petition" based on the H-1B worker's education). Congress did not empower the Department of Labor to collect this data when it enacted the H-1B visa statute.

The proposed additions to Part F (a) of the Labor Condition Application are:

1) Indicate whether the worker(s) subject to this LCA will be placed with a secondary employer at this place of employment.

2) If "Yes" to question 2, provide the legal business name of the secondary employer.

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The fourth LCA attestation, the "notice" attestation contemplates that sometimes the H-1B worker will not be located on the premises of the petitioning H-1B employer. The regulation requires notice of the LCA's filing to be posted:

… at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity).

20 C.F.R. Section 655.734 (a)(1)(ii)(A). The regulation makes no mention of any "secondary employer."

In fact and in law, the placement of an H-1B worker at a worksite other than that of the employer does not create a "co-employment" or a "secondary employer" relationship. It is a gross error to label such a placement – a long accepted business practice in the consulting and other industries – as "secondary employment."

As noted above, the H-1B visa statute does not grant the Department of Labor the authority to add the proposed items to ETA Form 9035. Furthermore, the addition of the erroneously titled "secondary employer" provides the DOL with no information required to execute its statutory responsibility. An "other person or entity which owns or operates a place of employment" has absolutely no responsibility and no liability in the H-1B visa statute. Responsibility and liability reside exclusively with the petitioning employer.

The proposed addition of the erroneously titled "secondary employer" to ETA Form 9035 has no lawful, legitimate purpose. The effect will be the generation of negative publicity for our clients, all of whom are valuable contributors to the U.S. economy.

The identity of a company's client base has long been recognized and protected by the common law of business competition. NASSCOM members and our clients will be unfairly disadvantaged in a highly competitive marketplace by a requirement to name the "secondary employer" in the LCA, compelling the disclosure of proprietary commercial information.

Also, naming the client on ETA Form 9035 is a violation of the client's right to privately contract with the IT services provider of its choice. Congress could have required the disclosure of this information when it enacted the H-1B visa statute. Congress decided not to do so; the Department of Labor is not authorized to override this decision.

Part F (a)(2) and (3) of the proposed new ETA Form 9035 should be deleted in their entirety.

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THE ADDITION OF THE EDUCATION DETAILS OF THE H-1B WORKER IN THE PROPOSED "APPENDIX A" IS INFORMATION WITH NO PRACTICAL UTILITY

In the case of an "exempt" petition filed by an "H-1B dependent" employer, the proposed new "Appendix A" to ETA Form 9035 requires the listing of the name of the H-1B worker's graduate university, his/her field of study and the date when the "masters or higher degree" was bestowed. This information is of no practical utility to either the Department of Labor or the public. The name of the H-1B worker does not appear on ETA Form 9035. There is no basis or process in place for anyone to verify whether the education data is accurate. Furthermore, the U.S. Citizenship and Immigration Services (USCIS) has been given the responsibility to confirm the H-1B worker's education when it adjudicates the H-1B visa petition.

This collection of information also would duplicate the USCIS's data aggregation mission. A data collection form must be submitted to USCIS with each H-1B visa petition; this form requires, among other items, details about the H-1B worker's highest level of education. USCIS already distributes this information to the public. Thus, Appendix A would be wasteful, duplicative and would add no value to any party.

Appendix A should not be added to ETA Form 9035.

CONCLUSION

Because Congress has not given the Department of Labor the authority to collect the proposed new data, because this information is not necessary for the DOL to discharge its LCA responsibilities because reference to "secondary employer" is a legal misrepresentation and because the additions to ETA Form 9035 have no practical utility, NASSCOM opposes adding these new fields to the Labor Condition Application.

Sincerely yours,

R. Chandrasekhar

President
NASSCOM

National Association of Software & Services Companies

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Noida – 201303
India

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