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October 2, 2017

William W. Thompson, II
Administrator, Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

By electronic submission: www.regulations.gov

**RE: Form ETA 9035, Labor Condition Application for Nonimmigrant Workers
82 Fed. Reg. 36158 (August 3, 2017)
OMB Control Number 1205-0310
Information Collection Under Review**

Dear Administrator Thompson:

We are writing in response to the Department of Labor's (hereafter "the Department" or "DOL") request for comment concerning its proposal to revise Form ETA 9035, the Labor Condition Application (hereafter referred to as either the "LCA" or the "ETA 9035").

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

While the notice in the Federal Register, promulgated under the Paperwork Reduction Act ("PRA"), is deceptively simple in its two pages, to grasp the reach of the proposed changes, one has to cross-reference the proposed changes to ETA 9035 through multiple documents, proposed forms, tables, and supporting statements, which were not contained in the actual notice itself. Unfortunately, our analysis of the proposal, which layers questionable subparts upon each other, leads us to conclude that many of the changes, while couched as mere collections of information, in fact constitute substantive changes to legal requirements. These can only be accomplished through the notice-and-comment process under the Administrative Procedure Act ("APA"), or in some cases, amendments to the Immigration and Nationality Act ("INA"). Furthermore, certain new requirements appear to create privacy

issues with regard to both employee information and company information. These changes will impose significant new burdens on our members, and in some cases, have a serious adverse impact on their business operations. The four general areas of concerns can be summarized as follows:

- (1) **Movement Within a Metropolitan Statistical Area (MSA)** – The proposed changes to Part F Employment and Wages for all employers filing an LCA incorrectly implies DOL’s *existing* regulation limits an employer’s ability to assign an H-1B nonimmigrant to more than one job site within a single MSA.
- (2) **Intended Place of Employment** – The proposed changes to Part F Employment and Wages redefine a regulatory term and the new definition has highly troubling implications for all employers who hire H-1B nonimmigrants that provide, or might provide, services at another employer’s job site, other than a qualifying “short-term placement,” where that second employer has “indicia” of an employer-employee relationship even where the other employer has no employment relationship, by law, with the H-1B nonimmigrant.
- (3) **Client Information** – The proposed changes to Part F Employment and Wages for all H-1B employers that provide, or might provide, services at another employer’s job site necessitate unworkable logistical changes to the LCA process as well as disclosure of more information about such secondary employers, some of which may be commercially protected.
- (4) **Educational Documentation and Appendix A** – The proposed changes to Part H Statements for Dependent Employers require submission of copies of educational documents of exempt H-1B nonimmigrants to DOL when seeking a LCA certification. This is an unworkable logistical change that suggests the possibility of public disclosure of protected employer information. Furthermore, these changes necessitate that H-1B dependent employers complete a new Appendix A, listing college degree information for specifically sponsored H-1B nonimmigrants at the time the LCA is filed, which is also unworkable for employers.

I. Proposed Form Creates New Substantive Obligations Inconsistent with the Current Regulations Governing the Labor Condition Application

The proposed changes to the information DOL collects on the LCA create substantive new requirements in several important ways. These requirements relate to issues currently detailed in, and governed by, the Department’s regulations at Part 655 of Title 20 of the Code of Federal Regulations. It would appear that the agency is seeking to amend the regulatory obligations announced at Part 655, through the vehicle of a form revision. Obviously, no executive agency has authority to change the substantive obligations of the regulated community that are articulated in federal regulations without amending the regulations themselves and affording the public the protections of the Administrative Procedure Act. Among the new substantive changes created by the proposed form revision are the following,

each unauthorized by current regulatory text.

Movement within an MSA

Current regulations¹ establish that employers have the flexibility of moving an H-1B employee to a new location within the same MSA without obtaining a new LCA. This is the Department's long-held policy, which was explained, as follows.

“The Department recognizes that it could take the position that an employer may employ H-1B nonimmigrants only at worksites where notice had been given, and therefore could require an employer to take two steps before placing H-1B nonimmigrants at a new worksite within the same area of intended employment: post a notice and file a new LCA. However, such a dual requirement appears to the Department to be burdensome. The protections intended by Congress can be afforded by having a notice posted by the employer at each new worksite within the same area of intended employment at the time the H-1B nonimmigrants are sent there to work, *without the employer being required to file new LCAs*. The Final Rule, therefore, imposes a less burdensome but equally worker-protective standard, by providing that the employer shall provide such worksite notices on the first day of work by an H-1B nonimmigrant at that worksite which will remain posted for at least ten days.”² (emphasis added)

Contrary to the policy set forth in current regulations, the proposed form, as explained by the Supporting Statement, envisions a system where an employer may not move individual H-1B employees within an MSA to locations not identified on the initial LCA associated with those individual employees. The decision by DOL in the development of the 1994 rule governing placements within the MSA reflects the agency's judgment that requiring a new LCA would be unnecessarily burdensome when an employer is moving professional H-1B workers within the same MSA. Thus, the Department cannot change this policy absent a rulemaking.

The Department's new requirement is far from being merely ministerial. Any employer that moves an H-1B nonimmigrant to a different office of the employer within the same MSA might be challenged by DOL as having a responsibility to document future business plans or past business experience at the time of the LCA's filing. Businesses operating in the modern economy establish new offices quite often, acquire new companies and office space in the same MSA as their current location, and move employees based upon

¹ 20 CFR §655.715 (area of intended employment) and 20 CFR §655.734(a)(2) (movement of H-1B worker upon posting of LCA).

² 59 Fed. Reg. 65646 (December 20, 1994).

these corporate decisions. In essence, this form change is imposing a requirement upon H-1B employers to possess a level of clairvoyance that even the most conscientious of business owners could never hope to possess. Subjecting well-meaning businesses to potential liability for decisions they could not reasonably foresee would create needless uncertainty with no ability for these businesses to ameliorate it. Moreover, any firm providing consulting services will, by practical necessity, be providing some services at end-client locations. Those firms will be impacted by this change if that end-client moves their office location within that MSA or if a new client is obtained in a given MSA and certain H-1B employees working in that MSA are placed at the new site. There are many careful and responsible consulting firms with end-client users who will be restricted in their ability to move H-1B workers, in direct contradiction to current regulatory provisions.

The companies impacted by this aspect of the form revision are not only firms who happen to operate or open multiple offices within one MSA or those whose primary business is the provision of professional services. In the past, the Chamber has conducted an internal survey of its member companies regarding the hiring of key, high skilled professionals and learned that in any number of industries, there are firms that provide services to customers at customer sites. In the Chamber's internal member survey, approximately 15 percent of respondents were companies whose principal business was providing strategic, advisory, or professional services, which include various types of engineering, management consulting, and information technology services. Interestingly, though, another 8 percent of the companies in the survey complement their principal business with the provision of consulting services at end-client locations. These were firms in the publishing, energy, consumer goods, and specialized manufacturing industries.

We can see no policy justification for why the Department would impose such a burdensome requirement that would limit the ability of employers to move H-1B nonimmigrants within the same MSA covered by an LCA. This new requirement would be applicable to all employers that file H-1B petitions, and more importantly, such a change is inconsistent with the current regulations where that specific approach was considered and rejected. These types of moves will not require an employer to pay that H-1B worker more than it otherwise would, as the prevailing wage requirements within an MSA are uniform. In other words, the prevailing wage protections provided to American workers are not enhanced by this proposed change.

Intended Place of Employment

Current regulatory requirements regarding the intended place of employment for an H-1B worker focus on ensuring that employers provide the actual job site and the geographically specific (street address) information on the job site. This is evident from both the current LCA form and the FAQ issued by DOL on the subject. Current regulations establish that employers are obligated to identify intended places of employment on the LCA,

stating that “All intended places of employment shall be identified on the LCA.”³ The current LCA states that “It is important for the employer to define the place of intended employment with as much geographic specificity as possible.”⁴ The latest FAQ on the subject,⁵ in place since 2008, discusses “the worksite or physical location where a H-1B nonimmigrant worker actually performs his or her work” and instructs that “the employer need not obtain a new LCA for another worksite within the geographic area of intended employment where the employer already has an existing LCA for that area.”⁶

The Department’s Supporting Statement for the revised LCA announces a completely new obligation, which goes well beyond what is contemplated in the current regulations, for identifying places of employment:

“A worksite location must be identified as an “intended place of employment” [on revised Part F Employment and Wage Information] if the employer knows at the time of filing the LCA that it will place workers at the worksite, or *should reasonably expect that it will place workers* at the worksite based on: 1) an extant contract with a secondary employer or client, 2) past business experience, or 3) future business plans. If the employer has more than three (3) intended places of employment at the time of filing this application, the employer must file as many additional LCAs as are necessary to list all intended places of employment.”⁷ (emphasis added)

By requiring employers to now predict where they will place needed workers in the future, DOL is creating a new regulatory burden on employers through a form change. There is no authority for DOL to change, through a form revision, its current focus on geographic specificity, to a new focus on including all potential job sites within one MSA that might possibly occur during the life of the LCA. The language in the Department’s Supporting Statement will cause businesses to expend significantly more resources filing multiple LCAs for H-1B workers, even in cases where that worker may never be placed anywhere outside of the initial place of employment. These changes will create substantially more paperwork for various businesses across the country.

Client Information

DOL proposes to require all employers sponsoring H-1B workers to be obligated to designate “secondary employers.” DOL is not authorized to draft a new, broad regulatory definition that currently only applies to H-1B dependent employers hiring non-exempt H-1B

³ 20 CFR §655.730(c)(5).

⁴ Current LCA Part G at the beginning of the Important Note for that Part.

⁵ DOL Fact Sheet #62J, <https://www.dol.gov/whd/regs/compliance/FactSheet62J.pdf> (last revised July 2008).

⁶ Id.

⁷ See Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act, OMB Control No. 1205-3010 (the Supporting Statement from DOL for the proposed LCA changes, available at regulations.gov, hereafter referred to as “Supporting Statement”) at p. 15.

nonimmigrants,⁸ to apply to all H-1B employers. The definition of a “secondary” employer is very broad, but it is broad only with regard to the *specific purpose* for which it was crafted. The concept of “secondary” employment, and by extension, “secondary displacement,” is only applied to DOL enforcement efforts concerning H-1B dependent employers; this concept has no application to any other H-1B employers. Current regulations provide that an H-1B dependent employer hiring a non-exempt H-1B nonimmigrant is obligated to verify there is no secondary displacement of U.S. workers at “secondary” employers wherever:

“There are indicia of an employment relationship between the nonimmigrant and the other/secondary employer. The relationship between the H-1B-nonimmigrant and the other/secondary need not constitute an “employment” relationship (as defined in § 655.715), and the applicability of the secondary displacement provision does not establish such a relationship.”⁹

There are any number of situations where U.S. workers, and thus, by definition, H-1B workers, are present at another employer’s premises, but *no* employment relationship exists between the worker and the other employer. It is unworkable for all H-1B employers to take on the responsibility to identify all employer entities where a worker might appear and might raise “indicia” of an employment relationship. Moreover, there is no legal obligation to do so under current law. The Department’s regulations in no way utilize the definition of “secondary employer”¹⁰ for any purpose other than the regulation of H-1B dependent employers hiring non-exempt H-1B workers. Effectuating this policy change requires a change in the underlying regulations and cannot be accomplished through mere form revisions.

II. Proposed Form Changes Attempt to Tie a Labor Condition Application to a Specific Individual Without Statutory Authorization

The Department’s LCA revisions propose to mandate that an LCA must identify a specific H-1B worker at the time of the LCA’s filing, as well as requiring the employer to make an attestation regarding this individual’s educational credentials. No provision in §212(n) of the INA mandates that an LCA identify a particular H-1B worker at the time of filing a LCA or suggests that an employer is or should be providing an attestation concerning a named individual’s educational credentials. The Department’s proposal to impose new Educational Documentation requirements and a new Appendix A to the LCA form is not authorized by the statutory provisions applicable to the LCA process.

⁸ See 20 CFR §655.738(d), which is the only section of current immigration regulations where the concept of “secondary” employer exists.

⁹ 20 CFR §655.738(d)(2)(ii). One indicator is “The work is performed on the premises of the other/secondary employer” although the regulations specifically state this indicia alone would not trigger the secondary displacement provision. See 20 CFR §655.738(d)(2)(ii)(C).

¹⁰ *Id.*

Educational Documentation and Appendix A

INA §212(n), 8 USC §1182(n), prohibits admission of an alien in H-1B status unless the employer has filed an application with DOL making certain attestations designed to protect the domestic labor market and avoid abuse of H-1B workers. The attestations specifically identified by Congress, are not necessarily tied to any specific H-1B nonimmigrant, and relate solely to four *occupation-related* issues which may be summarized as follows (although there are some exceptions):

1. Wages. The employer must attest that it is paying the greater of actual wages paid internally to its own similarly situated staff in the occupation and the prevailing wages in the Metropolitan Statistical Area as determined by DOL or an alternative legitimate source.
2. Terms. The employer must attest that it is providing the same terms and conditions of employment including benefits to both U.S. workers and H-1B workers.
3. No strike. The employer must attest that it does not have a strike or lockout in the occupation.
4. Notice. The employer must attest that it has provided notice of the filing of a Labor Condition Application to its own employees who are similarly situated in the same occupation, and that it will provide the H-1B worker a copy of the certified LCA itself on or before the H-1B worker's first day.

The statutory language is written with the expectation that the employer is identifying the number of future workers sought in the occupational classification, *not* that the employer is identifying a specific individual or individuals who are being sponsored.¹¹ In fact, the system Congress envisioned in the Immigration Act of 1990 required employers, for the first time, to be required to assemble data, available for review by DOL or the public, concerning occupational wages, terms, strike conditions, and notice. This attestation-based system meant that any H-1B employer would be required to assemble documentation to be shared with the public verifying its compliance with the four LCA elements, and DOL was given authority to investigate and audit H-1B employers to ensure compliance. This system did *not* contemplate the verification of any other information to be shared with the public.

Simply put, the statutory text governing the LCA process does not require an employer to enumerate a specific employee on the form that matches specific educational documents, nor does the process require the employer to provide copies of a particular employee's educational documents at the time of the LCA's filing. While DOL suggests that its current regulatory text implies or suggests that an employer must have already collected and reviewed such educational documents at the time of filing a LCA, this is incorrect. DOL

¹¹ See e.g. §212(n)(1)(D)

has never suggested this interpretation of its codified regulations, in either the preamble to the final rule or in any of the many FAQs issued in the last 20 years. Instead, the regulation is clear that any H-1B dependent employer has the opportunity to designate its *intention to seek to hire* only exempt H-1B nonimmigrants on a particular LCA, meaning that DOL's regulations contemplate an employer obtaining an LCA for future use for not-yet-identified H-1B nonimmigrants.¹² Imposing an educational documentation requirement for potential workers that an employer has not hired would make the program unworkable, as an employer cannot provide documents for a worker that it has not hired, let alone interviewed, at the time of the LCA's filing.

In sum, the proposed requirements of Educational Documentation and the new Appendix A are beyond the Department's statutory authority and must be deleted.

III. Proposed Form Creates Potential Privacy Issues

DOL is proposing that any time an H-1B dependent employer seeks an exemption to the unique requirements that only apply to these types of companies, the employer must provide copies to DOL of educational documents when the exemption is based on education. The exemption is currently available by statute if the H-1B nonimmigrant is paid at least \$60,000 per annum or has earned a master's degree or above. The PRA filing by DOL does not clarify whether the newly required Educational Documentation will be held in confidence or be part of the public LCA records that can viewed by virtually anybody. Public disclosure of this information would be highly problematic because it would force companies to share private information with the public about their employees.

Educational Documentation

When establishing the new Educational Documentation requirement, the Department relies on the fact that the information it is requesting "is not identified from any other source at the time of filing" the LCA, even though the information is already required to be provided to U.S. Citizenship and Immigration Services (USCIS) as part of the H-1B nonimmigrant visa petition.¹³ Moreover, DOL is requiring the filing of educational documents "in order to provide greater transparency" only with respect to the *newly fabricated* Appendix A listing of education data justifying an exemption.

¹² See 20 CFR §655.736(e), which says in relevant part "An employer which marks the designation of "H-1B-dependent" may also mark the designation of its *intention to seek* only "exempt" H-1B nonimmigrants on the LCA." (emphasis added). The Department has issued 30 separate FAQs on the use of LCAs for H-1B workers and none of them state or imply the new novel suggestion in DOL's form change proposal that an LCA is tied to a specific H-1B nonimmigrant. See <https://www.dol.gov/whd/regs/compliance/FactSheet62/NumH1BIndex.htm>.

¹³ See Summary Statement at p. 8 ("Although H-1B dependent employers submit copies of educational credential documents at the time of filing the petition with the USCIS, the Department is proposing to require submission of these educational credential documents at the time of LCA filing.")

INA §212(n), 8 USC §1182(n), requires that any employer filing an LCA create a public access file with a copy of the ETA 9035 and supporting documentation verifying the employer's compliance with the four aforementioned occupational attestation elements.

The statute states, "the employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary)." ¹⁴ The statute also requires that a list be maintained by DOL of the wage rate, number of H-1B workers sought, period of intended employment, and the date for every LCA. Currently, the list is provided online, accessible through DOL's website. We understand DOL may be contemplating creation of an internet registry of all of the LCA information it collects. Public disclosure of this information serves no purpose.

While there is no question that the government is indeed entitled to know personally identifiable information (PII) regarding H-1B workers, businesses cannot support creating public access to that information. The government already has access to each H-1B employee's educational documents, which of course include the individual's name and might provide clues as to his or her country of citizenship or at least prior places of residence. This information, along with other PII, is required for each and every H-1B petition filed with USCIS.

Many employers have their own internal company policies that would bar them from sharing the PII identified on the proposed form. These policies are part of the trend in the last decade to afford special protection for PII. Companies use employees' personal information for many reasons, including benefit plan record keeping, applicant evaluation, among others. In 2017, it is not unusual for employers to have enterprise-level information management systems, which have led to an explosion of PII being shared regularly within an employer's organization. Moreover, many employers outsource certain human resources functions, e.g. benefits administration, which further illustrates the proliferation of employee PII being shared. For all these reasons, most of our members have policies governing the protection of employee PII to ensure that this employee information is not misused. There is a potential for conflict with these policies if the PII provided on educational documents is made public.

It should be noted that the Department's Employment and Training Administration issued a Training and Employment Guidance Letter in 2012 on handling and protecting PII (dated June 28, 2012), ¹⁵ which the Department would not be complying with if the H-1B employee educational documentation information would, by law, be shared by DOL or made part of the statutorily mandated public access file.

¹⁴ Text codified after §212(n)(1)(G)(ii) of the INA.

¹⁵ Guidance on the Handling and Protection of Personally Identifiable Information, TEGL 39-11.

In the absence of statutory changes, DOL cannot propose these changes to the LCA. Congress would need to repeal the mandate that a public access file include the LCA form and all supporting documents because the connection to a named individual violates the need to protect all employees' PII.

IV. Proposed Form Collects Data Not Required for the Agency to Fulfill its Obligations, Including Information that Employers Treat as Proprietary

One of the fundamental protections of the PRA is to ensure that executive branch agencies collect only the information that is necessary to its mission and do so in the least burdensome way possible. Based on the feedback from both small and large businesses in a number of sectors, it appears the Department has not complied with this PRA requirement with regard to the proposal to add Client Name data to the LCA form.

Client Information

Employers that provide services at end-client sites are asked to identify the name of the client.¹⁶ Client names are commonly held in confidence by businesses, as valuable commercial or financial information. There is no need for companies to provide this type of business intelligence as a matter of public record. Again, any data on the LCA is available to the public and accessible by competitors and others. To have this information made public does not add to the labor market protections offered by the LCA, given that current regulations and the current LCA form already require the employer provide the address where services will be provided (without identifying the client name). No explanation is provided as to how client names might be related to the Department's review for LCA completeness or its investigation or audit of any particular employer's LCA compliance.

Furthermore, there are many instances where our member companies choose to enter into contractual arrangements where a firm is hired by a client with an agreement that the firm will not publicly divulge the existence of the contractual relationship with a client. Forcing a company to publicly list their client on an LCA would violate this common contractual relationship. There was no indication that Congress sought to force companies to disclose this sensitive company information to the public through the LCA. The Department of Labor cannot propose form changes that are clearly inconsistent with the current statutory requirements.

¹⁶ Proposed Section F, question 3.

Recommendation

We understand that in order to request agency revisions to a proposal published in the *Federal Register*, commenters must explicitly and precisely direct the agency's attention to the challenged provisions. Specifically, the form changes the Chamber asks to be dropped are those that go beyond simply clarifying current regulatory requirements, and the changes of particular concern to Chamber members are:

- (1) Employment and Wages, Part F. Changes to the Employment and Wages part of the LCA form redesignated as Part F (which on the current LCA form is Part G) are beyond the authority of the current regulations, including three aspects of what the Department shared in its Paperwork Reduction Act notice:
 1. The new "Important Note" on the form guiding the completion of Part F (at p. 3 of ETA 9035),
 2. The new instruction #2 concerning place of employment on the instructions (at p. 6 of ETA 9035CP – General Instructions), and
 3. The explanation of these changes that identifies DOL's interpretation of these changes to Part F (at p. 15 of the Supporting Statement).

- (2) Additional Labor Condition Statements for Dependent Employers, Part H. Changes to the H-1B Dependent Statements part of the LCA form redesignated as Part H (which on the current LCA is Part I) are beyond the scheme described to the public in the current regulations and statute, including two aspects of what the Department shared in its Paperwork Reduction Act notice:
 1. The new instruction for completing Appendix A marked as a "Note" at the last line of instructions (at p. 13 of ETA 9035CP – General Instructions), and
 2. The explanation of these changes that identifies DOL's interpretation of these changes to Part H (at p. 16 of the Supporting Statement).

As discussed above, the proposed changes to Part F and Part H create revisions that are very burdensome to stakeholders and beyond the Department's current authority, specifically: revisions to Movement within an MSA, Intended Place of Employment, Client Information, Educational Documentation, and Appendix A.

Conclusion

The Chamber asks the Department to reconsider its proposed revisions to the LCA form. In particular, the Chamber requests that the Department withdraw the proposed collection of additional data, and proceed through APA notice and comment rulemaking. Alternatively, the Chamber asks that the Department withdraw the specified proposed changes to the LCA process that are beyond DOL's current regulatory or statutory authority.

U.S. Department of Labor
Office of Foreign Labor Certification
Comment on Form ETA 9035, Labor Condition Application
OMB Control Number 1205-0310
October 2, 2017
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The Chamber appreciates the opportunity to share the concerns of the business community with U.S. Department of Labor regarding the LCA. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson". The signature is fluid and cursive, with a large initial "R" and "K".

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

A handwritten signature in black ink, appearing to read "Jonathan B. Baselice". The signature is fluid and cursive, with a large initial "J" and "B".

Jonathan B. Baselice
Director
Immigration Policy