AMERICAN IMMIGRATION LAWYERS ASSOCIATION

April 15, 2019

Thomas M. Dowd,
Deputy Assistant Secretary
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW
Box PPII 12-200
Washington, D.C. 20210

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

Re: OMB Control Number 1205-0508
Department of Labor 60-Day Notice and Request for Comments:
Form ETA-9141, Application for Prevailing Wage Determination

Dear Mr. Dowd:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day notice and request for comments published in the Federal Register on February 12, 2019.[1]

AILA is a voluntary bar association of more than 15,000 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, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to Form ETA-9141, Application for Prevailing Wage Determination, and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

I. Introduction

We appreciate the Department of Labor's (DOL) efforts to develop forms that are easily accessible by the public and that are clear and concise in their use and instructions. We note that there have been some marked improvements in the proposed Form ETA-9141. However, we would like to raise some items that we believe require further clarification as well as highlight other areas where

[1] 84 Fed. Reg. 3494 (Feb. 12, 2019).

further adjustments are encouraged in order to assist DOL in its efforts to achieve clarity and accessibility in its forms.

II. Comments

Part B. Employer Point-of-Contact Information

Instructions: The DOL indicates that this section is "for an employee authorized to act on behalf of the employer **in labor certification matters**." Given that prevailing wage determinations (PWDs) are sought not only in labor certification matters, but also in other matters, for example when preparing an H-1B petition, we recommend broadening the language to include other impacted filings.

Part E. Wage Source Information

Item 1.a.

We believe that it is helpful to list the ACWIA eligibility classification and applaud DOL for this addition.

Item 1.b.

It is helpful for employers to be able to specify clearly on the Form ETA-9141 if there has been a change in ACWIA eligibility since last receiving a PWD. However, there are many instances where DOL fails to find ACWIA-eligible employers eligible pursuant to 20 §CFR 656.40(e), despite clear eligibility. This in turn impacts the database DOL uses when issuing a prevailing wage. We encourage DOL to provide a clear point of contact within the National Prevailing Wage Center (NPWC) with ACWIA expertise in order to assist in instances where employers are ACWIA-eligible, but DOL fails to recognize them as such. Having an ACWIA expert in the NPWC available to answer employer inquiries would increase efficiencies by reducing the number of submissions NPWC receives with employers marking "yes," to question 1.b and having to explain ACWIA eligibility for every Form ETA-9141 submission.

Moreover, we encourage DOL to add a specific and defined step within the prevailing wage redetermination process for eligible ACWIA employers to challenge a determination made by DOL deeming the employer to not be ACWIA-eligible. These redetermination requests should be processed expeditiously and should be handled by an ACWIA expert within the NPWC. Employers should be provided with an opportunity to have the question of ACWIA eligibility addressed quickly in the redetermination process, when it is the only question at issue. This would ensure that PWDs are accurate and may be timely obtained by all employers, including those that qualify for ACWIA classification.

Part F. Job Offer Information

Section a. Job Description

Item 3.a.

We understand that the answer to this item will help determine the level of responsibilities that the job opportunity will carry and thus help determine the wage level that a prevailing wage analyst would assign. In addition to asking the occupation(s) of the individuals over whom the employee will have supervision, we recommend including a free-form section under this item to allow for a further description of the type of supervision involved. We believe that supervising interns or more junior team members, over whom the individual may have very little personnel authority, is markedly different than when there is personnel authority, such as hiring, firing, coordinating employee activities, authorizing leaves, and making salary recommendations.

Section b. Minimum Job Requirements

Item 4.

Often the Form ETA-9141 is used in connection with a labor certification application (Form ETA-9089) where an employer must also provide the minimum job requirements for a position. Such requirements include experience in the job offered (*See* Form ETA-9089, H.6) and experience in an alternate occupation (*See* Form ETA-9089, H.10). In the proposed Form ETA-9141, there is only one question regarding "employment experience." We recommend including questions that capture both experience in the job offered and experience in an alternate occupation to mirror the Form ETA-9089.

Item 5.a.(i.)-(iv)

We encourage DOL to ensure that each of the sub-items, (i) - (iv) provide for an addendum as the space provided on the proposed form to specify requirements is too small to adequately address each of the requested information.

Item 5.a.(iii).

In the proposed Form ETA-9141, DOL has broken out Residency/Fellowship as a separate "special skill." Previously, for physicians, DOL has instructed employers to list Residency/Fellowship under "training." We encourage DOL to update its FAQs to clarify that medical residency and fellowship training are now appropriately classified in this section of the form.

Section c. Alternative Job Requirements

The DOL is proposing to change how it determines prevailing wages through this proposed form revision. In the instructions to the proposed revisions to the Form ETA-9141, the DOL states that it will begin to issue prevailing wages based upon the "highest wage between the minimum and alternative requirements." This is contrary to how DOL has been issuing prevailing wages for at least the past nine (9) years. Under the current system, the DOL does not consider alternative requirements when issuing prevailing wages. As stated in the Frequently Asked Questions (FAQs) on DOL's Office of Foreign Labor Certification (OFLC) website[2]:

1. **Must I list alternative job requirements on the Form ETA-9141? Is there a section on the Form ETA-9141 where I can list the alternative requirements?**

   If an employer intends to accept alternative job requirements and to list such requirements on the Form ETA-9089, the employer must list its alternative job requirements on the Form ETA-9141. Specifically, the employer should list its alternative job requirements in either the Special Requirements block (D.b.5) or the Job Duties block (D.a.6) of the Form ETA-9141. This is to reflect a line of BALCA decisions affirming our ability to require the same information on the job opportunity on both forms.

   It should be noted, as will be indicated in a note on the prevailing wage determination, that the NPWC will not consider the alternative job requirements when making the wage determination; prevailing wage determinations will be based ONLY on the job requirements listed by the employer in the Minimum Requirements block (D.b) of the Form ETA-9141. Nor does the NPWC make any evaluation of the substantial equivalence of the alternative job requirements to the primary minimum job requirements listed. That evaluation will continue to be made in the adjudication of the Application for Permanent Employment Certification. **(Emphasis Added).**

This proposed change to the prevailing wage system will have a significant impact on U.S. employers. For example, under the current prevailing wage system, an employer with a Software Developer position in Chicago, Illinois requiring a Master's Degree and one year of experience as its minimum requirement and that will accept a Bachelor's Degree and five years of experience, in lieu of the minimum requirement, would be assigned a Level 2 prevailing wage of $80,912 per year. This is an appropriate outcome, as the prevailing wage should be based on the employer's primary requirement and not what the employer would accept as an accommodation for individuals who may not meet the minimum requirement. Under the new system being proposed through this

[2]*See* U.S. Dept. of Labor, OFLC Frequently Asked Questions and Answers, Prevailing Wage (PERM, H-2B, H-1B, H-1B1, and E-3), PERM Prevailing Wages, *available at* https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!574.

form change, a Level 4 prevailing wage of $112,403 per year would be assigned. This example would result in approximately a 40% increase in the wage that would be required to be paid by the employer. DOL is not factoring in this additional financial burden to the form's cost burden that will be required to be assumed by U.S. employers. In addition to being a significant burden on U.S. employers, these additional costs will most significantly impact small businesses.

Instead of modifying the current well-established prevailing wage system through this proposed change to Form ETA-9141, DOL should comply with the Administrative Procedures Act (APA) and provide its stakeholders with a notice and comment period on this major proposed change to the prevailing wage system. Such notice and comment would allow stakeholders the opportunity to provide DOL with additional information about why the current system should not be changed and allow DOL to answer questions about how the new system (if adopted) will be implemented. Through such a notice and comment period a stakeholder may raise questions that have not been addressed in the proposed documents, such as "Will this new system be applied retroactively?".

Additionally, OFLC has not explained whether it will be issuing PWDs in the future to the Wage and Hour Division (WHD) as part of Labor Condition Application (LCA) investigations based upon the current system for employers who filed LCAs relying upon the current system, or whether it will be using the new system (assuming that it is adopted) when employers relied upon OFLC's well-established prevailing wage guidance regarding alternative requirements for at least the past 9 years. As part of a LCA investigation by DOL's WHD, it can request that OFLC issue a PWD to assess whether an employer that determined its own prevailing wage as part of the LCA process was correct in its assessment. If the prevailing wage that OFLC provides to WHD is different than the wage relied upon by the employer, WHD may order the employer to pay back wages and assess a civil monetary penalty, all of which may substantially impact the employer financially (and in the case of a small employer, may cause the employer to go out of business, depending on the extent of the fine).

Therefore, for this and other reasons that could be raised by stakeholders during a formal notice and comment period, DOL should avoid making a major change to the prevailing wage system through this form change. Instead, it should follow the procedures outlined in the APA and issue a proposed regulation regarding the change so that employers may fully provide comments on the change, DOL may respond to the comments, and the Office of Management and Budget (OMB) may fully consider the significant financial impact that the proposed change will have on U.S. employers (in particular small businesses).

Section d. Other Information

Item 1.

We applaud DOL for revising the form to permit an employer to be able to provide not only the first six digits of the Standard Occupational Code (SOC) but also the seventh and eighth digits in the code, to ensure that the most accurate SOC is assigned to the job opportunity. We recommend that, if possible, these items be drop-down menus to ensure the most accuracy for employers when completing the form.

Item 3. And Item 4.

We recommend that DOL combine Items 3 and 4. As drafted, it is unclear how employers should complete Items 3 and 4 if both domestic and international travel is required. Further, employers should not be penalized and be given an increase of two wage levels if both domestic and international travel are required. By merging Items 3 and 4, but providing space in Item 3.a. for employers to clarify whether travel is domestic, international, or both, this will ensure the greatest transparency and ease of completing this form with precision.

Item 5.

In Item 5., DOL questions whether "relocation" will be required. AILA request that DOL please provide further clarification as to what circumstances to which it is referring. Is DOL seeking to understand if an individual must relocate to commence working for the job opportunity, or whether relocation is required throughout the job opportunity? If the latter, we recommend providing a free-form space for an employer to provide specific details of any relocation requirements.

Section e. Place of Employment Information

We support DOL's efforts to ensure that the place of employment is appropriately listed in order to ensure that an accurate prevailing wage can be assigned. However, we have concerns that the revisions to the form may contravene existing regulatory requirements and definitions. We therefore request that DOL make clear on the form itself, or at least in the accompanying instructions, that "place of employment" continues to have the same definition as provided in the regulations and that certain exceptions or changes to work being performed at the specific street address listed in this section of the Form ETA-9141 do not affect the validity of a PWD.

Item 2.

Item 2. asks employers to provide the "apartment suite floor and number" for the work location. The specific floor of a multi-story building on which an individual works has no effect on the prevailing wage and should not be requested. Requesting this information may cause employers to unnecessarily seek a new PWD should the floor number change, adding to the work of the NPWC and wasting resources. The Form ETA-9141 should ask for only the information needed

to determine and assign the prevailing wage. Item 2. is unnecessary to such a determination and therefore should be eliminated from the proposed form.

Item 7. and Appendix A

The new Appendix A to the Form ETA-9141 would require employers to list the specific street address for any and all locations where work will be performed that are known at the time the PWD request is filed if those locations are outside the BLS area of the primary work address listed in Section e. of the Form ETA-9141, or if those locations are in a county where there are multiple county-level prevailing wage rates within the specific BLS area. We understand that in circumstances where a worker spends significant amounts of time at a different work address where there would be a different prevailing wage rate, this information should be included as part of the prevailing wage request process. However, 20 §CFR 655.715 provides a variety of examples of "non-worksite" locations that reflect the modern day-to-day realities of many types of positions. These examples include healthcare workers who provide staffing at a variety of hospitals or clinics around a town or city, sales representatives who visit multiple customers, or individuals conducting research at libraries or other locations. Under the proposed Form ETA-9141, employers may be confused as to whether such additional locations must be listed in Appendix A despite the fact that they would be viewed as non-worksite locations under the terms of 20 §CFR 655.715. We would therefore request that DOL specifically clarify on the form or in the instructions that locations where work is performed that meet the definition of a "non-worksite" location under 20 §CFR 655.715 need not be listed in Appendix A. Otherwise, DOL will have essentially modified the regulatory definition provided in 20 §CFR 655.715 without going through the mandatory notice and comment process under the APA.

We would also encourage DOL to confirm within the instructions to the Form ETA-9141 that a change in place of employment within reasonable commuting distance to the originally intended address, which occurs after a PWD is submitted, but before that PWD is utilized in the filing of a LCA, Form ETA-9089, or other application, does not require that the employer obtain a new PWD. As businesses become increasingly mobile and adaptable to business needs, and utilize shared office space and co-working facilities, it not uncommon for an employer to add workspace that is nearby a primary address but that is not the same specific street address that had been provided under this item of the Form ETA-9141. Similarly, employers from time to time choose to move their offices across town or to a neighboring town to take advantage of better leasing opportunities, to accommodate a need for additional space, or to provide more convenience and amenities for the employer's workforce. At present, the instructions to the proposed Form ETA-9141 do not provide clarity as to whether a new PWD would be required under these circumstances. Such a change in work location would have no substantive effect on the required wage, and the PWD request would have provided accurate information at the time that it was submitted.

20 §CFR 655.715 defines "area of intended employment" as the area within the normal commuting distance of the place of employment where the individual will be employed. The regulation further specifies that there is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area. This definition recognizes that there can be changes to a street address that do not affect the prevailing wage requirement. Indeed, in the context of H-1B workers, for which wage requirements are closely regulated, 20 §CFR 655.734(a)(2) specifically contemplates that an employer might place H-1B workers at a worksite not contemplated at the time of filing the LCA containing the employer's specific attestations regarding wage and other obligations. The regulation permits the use of an existing LCA not listing this specific new work address as long as notice of the LCA is posted at the new street address and as long as the new work location is within the area of intended employment. Because such a change has no substantive effect on the prevailing wage, and because "area of intended employment" is defined in 20 §CFR 655.715 more broadly than a specific street address, such changes should not necessitate the need for a new PWD. Therefore, to ensure consistency in policy, DOL should specifically confirm in the instructions to the Form ETA-9141 that a change in work location to a new address within the area of intended employment does not necessitate that the employer obtain a new PWD anymore then such a change would necessitate that the employer obtain a new LCA. Making this clarification would help to recognize and modernize the prevailing wage process to reflect the realities of today's increasingly mobile workforce and ensure consistency between the prevailing wage process and the rules surrounding location changes for H-1B workers.

Finally, we would encourage DOL to specifically confirm within the instructions to the Form ETA-9141 that in situations where an employee periodically telecommutes from a home-office located within reasonable commuting distance of the street address listed in this item of the Form ETA-9141, the employer need not obtain any sort of separate PWD for that home office location. Working from home on an intermittent basis is typically provided as a benefit to employees and should not affect the employer's wage obligation. Under the proposed language regarding additional work locations in Appendix A of the proposed Form ETA-9141, it is unclear whether such home office work locations would need to be disclosed if they are in a separate BLS area. We would request that DOL clarify that such work locations need not be included in Appendix A.

III. Conclusion

We appreciate the opportunity to comment on the proposed changes to the Form ETA-9141 and instructions and look forward to a continuing dialogue with DOL on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION