NAFSA: Association of International Educators

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William L. Carlson, Ph.D.
Administrator, Office of Foreign Labor Certification
Room C–4312
Employment & Training Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via Electronic Mail to ETA.OFLC.Forms@dol.gov

Re: "Comment Request for Information Collection Labor Condition Application and Instructions for H–1B, H–1B1, and E–3 Nonimmigrants; ETA Forms 9035, 9035E, 9035CP; and WHD Nonimmigrant Worker Information Form WH–4, Extension With Revisions" published at 77 *Fed. Reg.* 40383-40384 (July 9, 2012)

Dear Dr. Carlson:

I write today on behalf of NAFSA: Association of International Educators with respect to the notice of request for public comments published at 77 *Fed. Reg.* 40383-40384 (July 9, 2012) and concerning ETA Forms 9035, 9035E, 9035CP, and WHD Nonimmigrant Worker Information Form WH–4. NAFSA is the world's largest nonprofit association for international education professionals, with nearly 10,000 members at approximately 3,500 colleges and universities throughout the United States and around the world. Our membership includes many professionals who complete and submit Labor Condition Applications to the United States Department of Labor (the Department). For this reason, NAFSA is well situated to provide comments addressing the proposed changes and to evaluate the necessity of the changes, evaluate the accuracy of the Department's estimated burden associated with the changes, and assist you in enhancing the forms and minimizing the associated reporting burden.

NAFSA's comments will focus on the proposed changes to ETA Forms 9035 and 9035E, the Labor Condition Application (LCA). The Department proposes a substantial expansion of both the amount of information and the kinds of information that the revised LCA would collect, nearly doubling the size of the

form to nine pages and adding more than 50 new information fields. The Department has not offered a clear justification for the proposed changes, there is no regulatory basis for them, and the Department seems to have exceeded both its stated goal in proposing the changes and its regulatory role in processing LCAs.

While we respect the fact that "the Secretary uses the collected information to determine if employers are meeting their statutory obligations and regulatory obligations," the Department offers no explanation of how the proposed changes to the forms will aid the Secretary in doing so. The Department states in the notice that, based on recommendations from the Government Accountability Office, the Department's Office of Inspector General, and "sister agencies," the Department seeks to revise the forms "in order to enhance its integrity review for obvious errors, omissions and inaccuracies under 20 CFR 655.730(b)." The notice provides no description of the recommendations, though, and no explanation of how the proposed changes would accomplish the stated goal. Throughout its supporting statement to the Office of Management and Budget the Department offers only vague and overly general justifications for the proposed changes, such as "to cure operational issues that are better served by this frequency and level of data collection" or "needed for statistical purposes." Since it has failed to state precisely the reasons for the changes, to demonstrate that they are necessary for the proper performance of the agency's functions and have practical utility, and to explain the way the information is to be used, the Department has failed to meet its obligations under sections 3506(c)(1)(B)(iii)(I), 3506(c)(1)(B)(iii)(II), and 3506(c)(3)(A) of the Paperwork Reduction Act of 1995. Until it meets its obligations, the Department should not revise the LCA.

The Department adds two new questions in section G of the proposed LCA that are either extraneous or inaccurate and should be eliminated. We recognize that the four "labor condition statements" listed in section G closely parallel the four attestations described in the Department's regulations at 20 CFR 655.730(d). Therefore item G.1 requiring the employer to attest that it has read and agrees to these statements is appropriate. There is, however, no regulatory basis for item G.2, "has the employer looked at its workforce to determine . . . whether there are similarly employed U.S. workers in its workforce", or item G.3 "the approximate number of U.S. workers similarly employed by the employer." An employer may establish that it meets its regulatory obligations with regard to U.S. workers at 20 CFR §655.730(d) (1) and (d) without completing a review of the citizenship or residency of workers or counting the U. S. workers. For example, if all employees are offered the same benefits, then the employer can attest that H-1B workers and U.S. workers are offered benefits on the same basis. If all employees are afforded the same working conditions, then the employer can attest to the fact that it affords similarly employed H-1B workers and U. S. workers working conditions on the same basis and in accordance with the same criteria and that there is no adverse effect upon the working conditions of the U.S. workers. Items G.2 and G.3 are extraneous, then, since an employer can answer "no" to item G.2 and provide no answer to item G.3 and still have met its regulatory obligations and make the required attestations. These items are inaccurate if they are intended by the Department to ensure that employers understand the obligations and the attestations, a fact that employers affirm at item G.1.

The proposed LCA also expands significantly the personal information of nonimmigrant workers that will be collected and made available to the public, including full name, date of birth, country of birth, country of citizenship, "most recent nonimmigrant visa status," job title, and salary. The Department seems to have considered only the burden on the employer of collecting this information and overlooked the potential risks that may be created by public disclosure of the information, required by the Department's regulations at 20 CFR §655.760 and 20 CFR §655.705(c)(2). The risks associated with collecting and disclosing this information are not justified by the perceived benefits to the department, described as better tracking of the LCA within the Department and at Department of Homeland Security and less effort expended by the Department in gathering information during enforcement activities.

The regulations do not indicate any need for these expansions of the LCA, nor do they provide any basis for them. In fact, the regulations indicate that a narrow range of information is to be collected, and they provide the Department a limited role in reviewing it. The regulatory definition of *certification* at 22 CFR §655.715 is "the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies." The Department seems to acknowledge this in the notice, stating that its proposed revisions to the forms are intended "to enhance its integrity review for obvious errors, omissions and inaccuracies under 20 CFR 655.730(b)." The proposed expansions, however, do not comport with either the regulatory role of the Department or this stated goal. Concerning item G of the LCA, the Department fulfills its role and meets its goal by having employers make the four attestations required by the regulations. The Department exceeds its mandate and varies from its goal by requiring additional attestations concerning U. S. workers. The Department also exceeds its mandate, varies from its goal, and exposes nonimmigrant workers to additional risks by collecting and requiring the public disclosure of extensive additional personal information about them.

We strongly urge the Department to reconsider this unjustified, unnecessary, and burdensome expansion. Thank you for the opportunity to provide these comments.

Sincerely,

Judy Judd-Price
Deputy Executive Director for
Professional Development Services
NAFSA: Association of International Educators