



September 10, 2020

Brian Pasternak
Director of Program Services
Department of Labor
Washington, D.C. 20210

Submitted via email to: ETA.OFLC.Forms@dol.gov

Dear Mr. Pasternak,

These comments are submitted by NAFSA: Association of International Educators (NAFSA) in response to the Department of Labor's July 20, 2020 notice in the *Federal Register* concerning a proposed revision for the authority to conduct the information collection request (ICR) titled, "ETA Form 9089, Application for Permanent Employment Certification." With nearly 10,000 members at more than 3,500 colleges and universities, NAFSA is the world's largest nonprofit professional association dedicated to international education. Our membership includes many professionals who use ETA Form 9089.

Section A

We appreciate the U.S. Department of Labor's (Department's) more detailed Employer Information section, which has a more descriptive layout that is easier to follow. For example, it specifically asks for the Legal Business Name and has a separate section for the DBA. This will help ensure that the business/institution is consistently using the same, legally correct name across all of its PERM filings. Also, breaking the ownership interest and familial relationship question into two questions will help the preparer to process the question more readily.

We commend the Department on its usage of the term "foreign worker" in lieu of the antiquated term "alien."

We are concerned about the Department's changing the employee question from "number of employees" to "number of current employees on payroll in the area of intended employment?" See Question 14. The reason for this distinction is not apparent, and we are concerned that the new verbiage may not provide an accurate representation of the employer's size. We ask the Department to retain the current "number of employees" language.

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Section B

This Section will read much clearer to in-house counsel. Since there are some attorneys who file 9089s and who also serve as the point of contact for their businesses/institutions. The Department clarifies that these individuals can fill out both Section B and Section C, thus eliminating confusion.

Section C

This section is also clearer and more descriptive, allowing the preparer to distinguish between whether she or he is an attorney or agent. The attorney must provide additional information such as bar number and state where the attorney is licensed, which is consistent with most government immigration forms and could be helpful to reduce fraud and misrepresentations.

Section D and Appendix A

Here the Department creates Appendix A, apparently as a replacement for Sections J and K of the present ETA-9089.

Appendix A begins with the foreign worker's contact information, similar to the current Section J, except that the question about the I-94 number is eliminated, which is not an important concern for the ETA-9089 stage of a Lawful Permanent Residence process.

Next Appendix A provides a section for Educational Attainment Information. The present ETA-9089 only asks for the "highest level achieved as required by the requested job opportunity" but Appendix A asks for the "U.S. diploma/degree attained relevant to the job opportunity" and allows for several entries. This does help if the minimum requirements for a job are a few different degrees, but it could also be confusing to some as to whether all of the foreign worker's degrees must be listed. We would recommend the Department specify that only degrees that are being used to meet the minimum requirements should be listed.

Additionally, we recommend that the Department refrain from using the verbiage "U.S. diploma/degree attained", because many foreign workers have foreign degrees and will be confused as to how/where to insert that education. The instructions state that for foreign degrees, one should "mark the U.S. equivalent of the diploma/degree", but it could still be unclear to many as to how/where this marking is to be made. We would recommend changing the verbiage to "U.S. diploma/degree (or foreign equivalent) attained" or similar.

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We do appreciate the Department providing a parenthetical next to "Other degree" to specify its meaning.

Appendix A also provides new sections different from Sections J and K of the current ETA-9089 by allowing for "Training, Certification(s), and/or Licenses(s)" and "Skills, Abilities, and Proficiencies." This is a very welcome change that will help with some of the clumsy workarounds currently required to enter information about licensure and other credentials not tied to specific employment.

The "Work Experience" portion of Appendix A generously allows 3,500 characters to describe the details of the job, and it does not ask for contact information for the employer, which can be difficult to obtain for positions occupied a long time ago. Both of these improvements are appreciated.

Section E

Question 2 is appreciated in recognizing a supervised recruitment exception.

We also appreciate the Department stripping away questions about the particulars of the prevailing wage determination. As explained by the Department in the instructions for the proposed ETA-9089, "The job opportunity and wage information data will be directly imported in from the Form ETA-9141, Application for Prevailing Wage Determination associated with the PWD tracking number." This will result in certain areas of the ETA-9089 (employer/agent information, specific job requirements/skills/licenses/certifications, and specific worksite(s)) being pre-populated.

We commend the Department for this change, and we agree that this will reduce potential data entry errors that have historically led to requests for information, audits, or even denials. We would ask for clarification of the Department's statement that this update will limit "any modification between the approval of the PWD and the filing of the Form ETA-9089." We are trying to determine if the preparer can still modify the pre-populated data, which will be crucial, such as if there is any change in attorney/agent or a need to further clarify requirements in a way that is still consistent with the ETA-9141. We would urge that the pre-populated data still be modifiable by the preparer.

Section F

a. Worksite Information

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We appreciate that employers may now provide greater specificity as to the type of worksite. In the current proposed instructions, (Section F, Part a. 8) the Department provides a link (<https://www.census.gov/population/www/estimates/metroarea.html>) for the definition, codes and alphabetical list of MSA's. We found that this link is not valid and so would ask the Department to revisit it.

b. Additional Worksites and c. Other Definable Geographic Area

We are concerned that employers may be confused as they complete these parts of the proposed ETA-9089, particularly when 1 d. "No one specific worksite or physical location" is selected. The proposed instructions (Part b. 1) state that if "No one specific worksite or physical location" is marked in question F. a. 1 ..., mark "Yes". The instructions further state (Part b., 2) that if "Yes" is marked in F. b. 1 then the employer should indicate "Yes" if the employer has completed Appendix B and "No" if Appendix B is not completed. The instructions further state that "N/A" should only be marked if the answer to the previous question F. b. 1 is "No".

Employers may be concerned that marking "No" for Part b. 2 may result in an audit or summary denial. We suggest that the proposed ETA 9089 and instructions should clarify that employers that mark "No one specific worksite address or physical location" because some "Other Definable Geographic Area" is completed in Part c. 1 are not required to complete Appendix B.

An alternative strategy that may reduce confusion would be to modify the question in Part b. 1 by adding "**specific**". The new question would then read "Will work be performed in **specific** geographic areas other than the one identified in Section F. a. above?" Employers may then mark "No" for Part b. 1 then mark "N/A" for Part b. 2. Employers may then proceed with completing Part c. 1 with the assurance that Appendix B is not required.

We also suggest that in the proposed instructions Part a. 1, the Department also indicate that employers who mark "No one specific worksite address or physical location" should provide additional information in Part c. 1

A correction seems to be necessary in the Note for Part a. 1 in the proposed instructions. This note provides instructions when submitting the form non-electronically. The Note states that if "No one specific worksite address or physical location" is marked in question 1, enter "N/A" or "0" (zero), as appropriate, in

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questions 2-7, mark “N/A” in question 8, and continue to **Section H. b.**” We believe that the correct section should be “**Section F. b**”

c. **Worksite Information**

We appreciate that employers may now provide greater specificity as to the type of worksite. In the proposed instructions, (Section F, Part a. 8) the Department provides a link (<https://www.census.gov/population/www/estimates/metroarea.html>) for the definition, codes and alphabetical list of MSA’s. We found that this link is not valid and so would ask the Department to revisit it.

Section G

We commend the Department for addressing many of the issues that are currently raised during an audit in the new Form ETA 9089 in order to potentially reduce the number of audits. The Department has divided Section G into two parts, one which requires an explanation for certain answers and one that does not. In order to further reduce the number of audits, we would encourage the Department to indicate in the final instructions that certain answers to Questions 1 to 5 may result in an audit or denial and that the employer should complete one section of Appendix C in order to explain the answer that may result in the audit or denial.

In the proposed instructions, the Department provides two Notes for Numbers 4 and 5. In the Note for Number 4, the Department provides a citation to a BALCA decision and informs the employer to read it for additional information about the issue. In the Note for Number 5, the Department does not provide a citation to a BALCA decision but informs the employer of its interpretation of substantially comparable. We would encourage the Department also to include its interpretation of the “Kellogg language” in the Note for Number 4 so that employers are clearly aware of the consequence if they select “I **DO NOT** ACCEPT” when answering this question.

In the proposed instructions, the Department indicates that if the employer answers Yes to any of the Questions 6 through 12, the employer “must” complete one section of Appendix C. The Department does not specify the consequences for failure to do so. Will the result be an audit or a summary denial? Specifying this would be helpful. Also, similar to the current PERM system, we would encourage Department to include warning indicators in the FLAG system when an employer fails to complete (or improperly completes) a question on the new form. Finally, the Department should allow up to 3500 characters (not 1500 characters) for each answer in Appendix C. It appears that the goal of Appendix C is to

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reduce the number of audits. However, employers will not be able to provide sufficiently detailed answers to these potentially complex business necessity questions in 1500 characters. Therefore, this character limitation may actually result in an increase in the number of audits due to incomplete answers, negatively impacting the Department's goal of efficient adjudications.

In the proposed instructions, we would encourage the Department to include in Number 9 the citation for the O*Net and the citation to the page that explains SVPs. The Department should also further explain that the O*Net Job Zone and SVP are based upon the occupational classification assigned for the job opportunity in the prevailing wage determination.

In the current proposed instructions, the Note to Number 10 is confusing and should be clarified. The third sentence states that "work experience must be attainable in the U.S. labor market and must be stated on the application." The instructions do not state on which application (e.g. ETA 9141 and/or ETA 9089) this information must be stated and where it must be stated. Additionally, the Department does not indicate if employers must now include a special sentence on the application and in the PERM recruitment that work experience must be attainable in the U.S. labor market or if "work experience accepted" alone is still acceptable in the PERM process. Also, unlike the third sentence, the fourth sentence states that if the employer is willing to accept an equivalent foreign degree, "it must be clearly stated on the Application for Permanent Employment Certification form." Because the Department is indicating that the foreign degree equivalent only has to be indicated on the Form ETA 9089, it is clear to employers that this information is not required to be included on the Form ETA 9141. However, the Department should modify this instruction to indicate where on the Form ETA 9089 this information should be indicated, namely Section G Number 3.

Section H

In the current proposed instructions, Section H Part E correctly indicates that the employer must provide notice of the filing of the Form ETA 9089. Therefore, it is confusing why the Department would provide employers with option 1f – Employer DID NOT post the notice of filing. The Department has indicated that it is revising the Form ETA 9089 to reduce user error. Option 1f will potentially only increase user error if the box is incorrectly checked because this could result in an erroneous summary denial.

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Section I

The proposed Form ETA 9089 in Section I changes one of the Employer Labor Condition Statements. On the current Form ETA 9089, the first statement reads “The offered wage equals or exceeds the prevailing wage and I will pay at least the prevailing wage.” On the proposed Form ETA 9089, the first statement would read “The offered wage equals or exceeds the prevailing wage determined pursuant to 20 CFR 656.40 and 656.41, and the wage the employer will pay to the foreign worker to begin work will equal or exceed the prevailing wage that is applicable at the time the foreign worker begins work or from the time the foreign worker is admitted to take up the certified employment.” The Department has not explained why it is changing this statement when the applicable regulation has not changed. The Department has also not clarified if it will, through a change to the form, require employers to obtain a new prevailing wage determination and adjust the offered salary based upon the prevailing wage determination before the foreign worker completes the adjustment of status process through the U.S. Citizenship and Immigration Services (USCIS) or is admitted by Customs and Border Protection (CBP) on an immigrant visa.

Appendix D

We commend the Department for allowing up to 3500 characters in Appendix D Number 5 to allow colleges and universities to fully explain all other recruitment used as part of the Special Optional Recruitment Procedure for University/College Teachers. As previously stated above, we would also encourage the Department to allow for a similar 3,500-character option in the other text fields contained in final version of the Form ETA 9089.

Thank you for the opportunity to submit these comments.

Sincerely,

[Signature Redacted]

Tatiana Mackliff
Deputy Executive Director,
NAFSA: Association of International Educators

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