



AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.5600
Fax: 202.783.7853

www.aila.org

Jeanne A. Butterfield
Executive Director

Susan D. Quarles
Deputy Director, Finance & Administration

Crystal Williams
Deputy Director, Programs

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Chief, Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Ave. NW
Washington, D.C. 20529-2210

RE: OMB Control No. 1615-NEW (Compliance Review Worksheet)

Dear Sir or Madam:

The American Immigration Lawyers Association (“AILA”) submits these partial comments on the proposed Compliance Review Worksheet, notice of which was published on April 8, 2009, at 74 Fed. Reg. 15999. Although USCIS has requested that comments be provided concerning the worksheet, USCIS has not released the actual proposed worksheet for evaluation. (“USCIS has requested and OMB has agreed to not display the information collection for public view as required under 5 C.F.R. 1320.14.”).

The nondisclosure of the Compliance Review Worksheet, makes it very difficult to properly address the four points identified in the Comment Request: 1) evaluate necessity and utility; 2) evaluate the burden estimate; 3) enhance the quality, utility and clarity of the information to be collected; 4) minimize the burden on respondents. The only available information on the Worksheet is the limited information in the Supporting Statement published at www.regulations.gov/search/index.jsp.

AILA is a voluntary bar association of more than 11,000 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. We appreciate the opportunity to comment on the proposed Compliance Review Worksheet (Worksheet) and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer

views that we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in seeking immigration benefits, including lawful admission to the United States, and in complying with U. S. immigration laws and regulations.

AILA has submitted on April 13, 2009, a FOIA request to USCIS to obtain a copy of the proposed form, and requested an expedite to enable a complete response, but to date the Worksheet has not be produced. We therefore request that the agency extend the comment period so that the Compliance Review Worksheet can be obtained and a meaningful comment be provided.

I. Supporting Statement Explanation

The Supporting Statement for the Compliance Review Report, OMB Control No. 1615-NEW at paragraph A.1, explains that the agency seeks to use the process to verify that the applicants and petitioners are complying with the applicable laws that govern immigration benefits, including through contact with petitioners and applicants and on-site inspections “when there is an indication of fraud in individual cases or class of cases.” According to the Supporting Statement, “on-site inspections allow for observation and collection of facts that would not be available to an adjudicator.” It is not clear from the Supporting Statement what types of “individual cases or classes” would be the subjects of the site visits, although in paragraph A.5 there is an implication that the types of cases are religious worker or employment-based visa cases, but there is nothing in this explanation that would limit the use to such cases.

USCIS is implementing an expanded Administrative Site Visit and Verification Program (ASVVP) through the use of contract personnel, who will be using a Compliance Review Report that is apparently the same Worksheet that is the subject of the Federal Register notice. The form will be completed electronically and submitted electronically. According to USCIS (Supporting Statement at paragraph A.4), the agency is not duplicating any effort, and there is no other similar information available.

According to the Supporting Statement at 2, paragraph A.5, most of the affected organizations are small entities; thus, per this statement, the cost to respondents is allegedly only \$9 (based on thirty minutes for the onsite inspection at \$18.04/hr.).

II. Necessity/Utility of the Information Collection

AILA agrees that appropriately-conducted investigations are necessary to insure that benefits are only granted to applicants who are entitled to those benefits. Whether the specific information proposed for collection here will be useful in protecting the integrity of the adjudications process cannot be evaluated in the absence of the actual Worksheet. AILA does have several concerns, which we address below:

From the Supporting Statement, it appears that the Worksheet is contemplated as a one size fits all form, perhaps for all employment based immigrant and non-immigrant visas. Given the tremendous range in types of employers in the United States and the diversified types of immigration petitions, a standardized form that would work for the vast majority seems unlikely. For example, a worksheet for a

Buddhist temple (R-1) would likely be very different than one for an opera company (O-1), or a cultural performing arts group filed by its agent (P-3), or a computer services staffing company (H-1B), or a school district (teacher—EB-3), or a research institute (EB-1). If the information sought is exceedingly limited, e.g. is there a functioning business at this address that has employees of a certain type, this might be less of an issue, but then the utility of the Worksheet would also be much reduced. A low level of inquiry might still be problematic, for example if the business hours are in the evening, or the relevant type of employee is only at the company central office certain days/times and works offsite the balance of the time. AILA suggests that any worksheet should be tailored specifically to particular visa/employer types, unless the scope of the inquiries is very limited.

AILA is also concerned that a poorly drafted Worksheet, without clear standards/training, could lead to improper conclusions that fraud exists in the application process. Our members have considerable experience where agency investigators have erroneously determined that there was some kind of fraud in the process, only to have the determination later reversed on appeal. These erroneous conclusions can arise because of poor training of investigators, miscommunication with witnesses, jumping to conclusions from partial information, reliance on unqualified/biased witnesses, or lack of a clear fraud definition in the context of the particular type of program. *See, e.g.* Office of Inspector General, DHS, *Review of Benefit Fraud Referral Process* (OIG-08-09, April 2008)(FDNS had no written standards regarding what constituted fraud specific to each visa type, and no specific test for the standard. FDNS improperly projected results of one fraud assessment to another visa type). If the Worksheet requests fraud evaluation, it should only do so where there are written standards defining fraud for that visa type, and training as to those standards.

A significant problem is presented in site visits if an individual who is questioned by a contract investigator lacks the knowledge, training, and authority to answer accurately as a representative of the entity. For example, if the investigator questions the first person he encounters, e.g. a temporary receptionist, that person may lack the knowledge to accurately answer questions about the company activities or the names/locations of types of employees. He would also lack the authority to speak for the company about its application. The receptionist or some other company contact may not be fluent in English, nor have a significant level of education. Will some of the investigators be bilingual? Many companies are owned by nationals of various nationalities who have limited bilingual skills. Lacking accurate communications, the information collected may be erroneous or distorted, resulting in limited utility. The goal of determining whether the business is bona fide and whether the applicant is entitled to the benefit would be thwarted. Any Worksheet should require the investigator to address this issue by inquiring and recording data about the qualifications /duties of any company employee or representative that responds to inquiries. Serious consideration should be given to providing advance notice to the employer so that an appropriate individual will be present to respond to inquiries. Notice should also be given to the attorney of record if the application was prepared with the assistance of an attorney, as discussed below.

We also have due process concerns with how interviews will be conducted using the proposed Worksheet. Agency regulations provide for representation by counsel, 8 C.F.R. § 292.5(b), whenever an examination is provided under the regulations. The regulations provide for site visits including interviews of the entity's officials and others. *E.g.* 8 C.F.R. § 204.5(m) ; §214.2(r)(16). The Supporting Statement clearly contemplates that employer representatives will spend at least 30 minutes responding to site visit inquiries. The Worksheet should insure that entities who are represented by

counsel have a reasonable opportunity for counsel to assist at any interview. It should also insure that respondents are informed that the interview is voluntary and that they may seek assistance of counsel; failing to so advise may lead to allegations that the interview was coerced and violative of Due Process. *Ali v. INS*, 661 F.Supp. 1234, 1245 (D. Mass. 1986).

III. Evaluation of Burden Estimate

Evaluating the burden estimate of the proposed Worksheet is an almost impossible task given that we have not been provided with any information about the length or content of the Worksheet, i.e. whether it is a two page form or a twenty page form. However, AILA believes that the estimate is substantially below the actual cost to the entity, as we explain below, even without knowing how many pages or how complex the questions are.

If the site visit contemplates an interview with a knowledgeable employer representative, as opposed to a clerk without useful information, the average hourly rate for such a knowledgeable person is surely more than \$18/hr. as used in the burden calculation.

The burden calculation, also in ¶A.14, ignores the possibility that many employer representatives will seek the assistance of counsel at a much higher hourly rate to assist with the site visit.

The burden calculation ignores the potential that some percentage of the site visits will generate inaccurate information and adjudications, leading to significant expense responding to a NOID or appeal. The magnitude of this problem will be related directly to the sharpness of focus of the questions on the Worksheet, and to the adequacy of the training of the contract personnel who will use these Worksheets to report the results of their observations.

The burden estimate also fails to consider potential duplication of inquiries by other DHS or DOL components also investigating benefits fraud issues., e.g. FDNS, eVerify, ICE and DOL. The Worksheet should consider whether the same employer has already been subject to review/site visit.

IV. Enhancements to Quality, Utility Clarity

Our suggestions, given the absence of the Worksheet for review, are limited to those made in the prior sections.

V. Minimizing Burden on Respondents

Without the form, we cannot provide a detailed response, other than those suggestions mentioned above -- specifically providing advance notice to represented clients to allow counsel to participate, insuring that only qualified employer officials are interviewed as employer representatives, and coordinating investigations with other DHS and DOL entities to reduce duplication.

VI. Conclusion

AILA believes that a mechanism providing for the accurate collection of information and reporting of same in a standardized manner is vital to the proper adjudication of applications. An

appropriate mechanism can also provide policy makers with usable metrics for the shaping of future policy. But given our inability to review the proposed Worksheet, we have no useful way to provide substantively beneficial comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION