



October 23, 2007

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Via e-mail: ETA.OFLC.Forms@dol.gov

Re: FR Doc. E7-16800 Agency Information Collection Activities: Revision and Extension of a Currently Approved Information Collection; Application for Permanent Employment Certification; Form ETA-9089, OMB Control No. 1205-0451.

Dear Dr. Carlson:

The American Immigration Lawyers Association respectfully submits the following comments to the proposed revised 9089 form published in the Federal Register on August 24, 2007.

We appreciate the opportunity to comment on the proposed rule and believe that we are particularly well qualified to do so. AILA is a voluntary bar association of more than 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

Our comments are organized by Section and we indicate suggestions to the "FORM" and "INSTRUCTIONS" section-by-section.

Section A

Form

We thank the DOL for putting the foreign worker's name first in Section A-1. This is very helpful.

Instructions

There is a typo in last sentence of the paragraph – J-11 should be J-1

Section B - Schedule A and Shepherders

Instructions

The instructions direct an employer to submit a “completed” ETA 9089 form to the USCIS. We recommend that you elaborate on whether the employer should print out a form from your website (and the DOL should provide the link) and type the form or whether the employer can/should register under the PERM system and complete the form online and print out a hard copy to submit to the USCIS.

Section C

Form

C-2 -- Allowing the employer to place a “DBA” on the form is quite helpful, as some delays in PERM adjudication have resulted from difficulty in verifying the corporate existence of companies that use “DBA” names.

C-9 asks for the number of employees currently on the employer's payroll in the area of intended employment. We find this question is likely to be burdensome to employers with multiple worksites who do not track the number of employees based on area of intended employment. There is no regulatory requirement to have a specific number of employees in the area of intended employment, so the question is not relevant to the adjudicatory function and should be removed. However if the question is retained, it is reasonable to ask for the number of employees within the US.

C-12 asks for the NAICS code (must be at least four digits). The NAICS provides codes containing 2-6 digits. The form should allow NAICS codes that contain 2 to 6 digits.

Section D

No comments

Section E

Instructions

E-10 – the instructions should state: “Enter the *firm*’s nine-digit FEIN as assigned by the IRS.”

E-12 – The instructions should provide guidance on what to do if the attorney is licensed in multiple states. E.g. add: “If licensed in more than one state, provide only one state bar number.”

Section F

Instructions

The Note in the instructions states that the employer needs to obtain a PWD from the SWA “*responsible for the state in which the work will be performed.*” This instruction should be modified to reference the determination of the location of the worksite as stated in Section H, as follows: “*responsible for the state in which the work will be performed as indicated in Section H ‘worksite information.’*”

Section G

Instructions

There is a typo in item 1. The 3rd sentence should read: “If the wage offered is *a* range...”

Section H

We recommend a reordering of the sections of H to put the job description just before the requirements section.

Item “a” should be Worksite Information (current Item “b”) and Item “b” should be Job Description (current Item “a”).

a. Job Description

Form

H-4 - It does not flow well to have Question 4, which asks the user to “list other specific skills” and “other requirements” (emphasis added), before asking for the primary requirements for the position. We recommend that this question be placed after the Alternative Requirements sub-section and be labeled sub-section **e. Other specific skills, licenses/certifications.**

b. Worksite Information

Form

We appreciate that the DOL has added a section to Form 9089 to address compliance with advertising, notice posting, and prevailing wage requirements for employees who work out of their homes, or do not work in one location for at least 50% of the time, or who have no specific worksite address. However, the proposed DOL revision to Section H, subsection “b” is unnecessarily complicated and fails to provide sufficient guidance to employers regarding the proper location for the posted notice, the proper location for the advertising, and the proper SWA for obtaining the prevailing wage determination.

It is our recommendation that the company headquarters is the proper location for the posted notice, advertising, and prevailing wage in three scenarios: (1) when the employee works out of company headquarters at least 50% of the time; (2) when there is no specific worksite, or (3) when the employee works out of multiple worksites (which can include his or her home) but does not spend the majority of the time at any single worksite. If there is no single location where the worker spends at least 50% of the time, there is no specific worksite.

Where an employee works out of his or her home at least 50% of the time, notice should be posted at company headquarters. However, the advertising and prevailing wage determination may be based EITHER on company headquarters or the employee's home address, in which case, the employer may choose either locale, but the advertising and prevailing wage determination must for the same locale.

When there are multiple worksites but, work is performed in one worksite (other than the employee's home) most of the time (more than 50% of the time), the worksite where the majority of the work is performed is the location for posting, recruitment, and the prevailing wage determination.

Therefore, Section H, subsection b, of the 9089 can be simplified as follows:

H-5 Primary worksite address (where work will be performed more than 50% of the time).

Note: The primary worksite address must be a physical location and cannot be a P.O. Box. If there is no single location where work will be performed more than 50% of the time, or if there is no specific worksite address, write N/A. (If N/A is checked, the system should have a pop-up warning that the employer should check only the last box in question 9, below).

H-9. The address listed in question 5 is (choose only one):

- Business premises. (Advertising, posted notice, and prevailing wage must be based on location of business premises).
- Employer's private household (includes live-in). (Advertising, posted notice required only when employer has other US workers.) Prevailing wage must be based on location of employer's private household).
- Employee's private household (only when work is performed directly from residence). (Advertising and prevailing wage may be based on location of employee's private household or employer's headquarters. Notice posting must take place at location of employer headquarters).
- No single location where work will be performed more than 50% of the time or no specific worksite address (advertising, prevailing wage and posted notice must be based on location of employer headquarters).

H-9-a. If you checked "no single location/no specific worksite address," please provide a brief explanation of where the work will be performed.

Instructions

The instructions should also be revised to provide information as to the proper location for advertising, posted notices, and prevailing wage determinations.

Part b on page 9 of the instructions, “NOTE,” has a typo – “mush” should be “much.”

c. Primary Requirements

Form

H-13. Please replace text with: *Is experience required?*

Removing the word “employment” before “experience” allows for employers who may accept other forms of experience such as volunteer, unpaid internship, etc.

In addition, we recommend that you add more space to respond to Question H-13b.

Instructions

Part c 13. The instructions for this question should just refer to “experience” rather than “experience in the job offered.”

d. Alternative Requirements

Form

Delete the parenthetical sentence “Whether or not a portion of the listed Alternative Requirements is duplicate of portions of the listed Primary Requirements, the information must be reentered below.” The sentence is confusing and unnecessary.

Immediately below “Alternative Requirements” insert the following question:

Do you have Alternative Requirements?
 yes no

If yes, please complete the following section.

H-14: The field in which to place the answer H-14a should be larger than it currently appears on the form.

H-16: Please remove the word “employment” before the word “experience,” so the question reads: “Is alternative experience accepted?”

There should be an answer field for H-16a to permit the insertion of text beyond insertion of a number, to allow an explanation in H-16-b if there is no specific number of months required. (For example, an employer could state in H-16a “varied; see 16b below.”) Allowing text in H-16a will permit an employer who has flexible job requirements to explain them. In addition, the text for H- 16b should be modified to state, “If YES in question 16, indicate the alternative requirements accepted.”

e. Suitable Combination

Form

H-17 Rewrite to say: Is the foreign worker currently working for the employer?

yes no

If yes, does the foreign worker qualify for the job opportunity only based on the employer’s alternative requirements?

yes no

If yes, please confirm the employer’s willingness to accept any suitable combination of education, experience, or training by writing the applicable statement below:

Write “I accept.”

Write “I do not accept.”

Instructions

Part e – Note – The DOL should remove reference to “magic language” terminology.

g. Business Necessity

Form

H-22. The text should be revised to state: Do the employer’s job requirements assigned to the occupation identified in Section F, Item 4 exceed those as shown in the ONET Job Zone (SVP level)?

Instructions

Part g 22 – the instruction should read as follows: “If the employer’s requirements for the job opportunity exceed those assigned to the occupation *by the SWA on the PWD* using the O*NET Job Zone....”

Section I – Recruitment Information

a. General Information

Instructions

The ETA-9089 instructions indicate that if question I-a-1 is marked “No,” then in question I-a-1a an entry of “NA” must be made. Entering “NA” really seems unnecessary. What happens if it is left blank? What happens if instead of “NA” an entry of “N/A” or “Not Applicable” or some other such similar language is made?

b. Occupation Type

Form

I-4 -- The fourth option is “None of the above apply”. However, we are not aware of a situation where one of the first three doesn’t apply. If this box is marked, will the system kick the employer out of the form and not allow them to move forward with the application? Having this fourth option would seem to only have a confusing effect on employers.

c. Professional/Non-Professional Recruitment Information

Instructions

I-6 -- We suggest that you add to these instructions that ‘if the job order runs for more than 30 days, you can enter an ‘end date’ which reflects a 30 day period.’”

I-10 -- Note - The instructions in the "NOTE" does not accurately depict when an employer can use a journal ad. Currently the text leaves the impression that it is permissible for the employer to simply use a professional journal rather than a newspaper as the source of the required second print advertisement. This NOTE should be more specific and incorporate the language from 20 C.F.R §656.17(e)(1)(i)(B)(4): “If the job involved in the application requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday advertisements, place an advertisement in the professional journal most likely to bring responses from able, willing and qualified available U.S. workers.”

d. Special Recruitment and Documentation Procedures for College and University Teachers

Instructions

I-24 -- While the form indicates appropriately that this section need only be completed if the recruitment was conducted in accordance with 20 C.F.R §656.18, the instructions are confusing in that they direct the employer to enter “NA” in blocks 22, 23, 23-A and 24. If the employer did conduct recruitment under 20 C.F.R §656.18, then none of these blocks would ever be “NA.” And, if they conducted recruitment under 20 C.F.R. §656.17 rather than 20 C.F.R. §656.18, why should they now have to enter “NA” in each block, when in this event the instructions and the form both direct the employer to skip subsection e.

f. General Information

Form

I-25 -- The fourth option is “None of the above apply”. However, we are unaware of a situation where one of the first three doesn’t apply. If this box is marked, will the system kick the employer out of the form and not allow them to move forward with the application? Having this fourth option would seem to only have a confusing effect on employers.

The text in the second option should be modified as follows: “There is no bargaining representative, so a notice of this filing has been posted for 10 consecutive business days in a conspicuous location at the place of employment *as determined in Section H.b. Worksite Information.*”

Instructions

The instructions for I-25, second paragraph, should be modified as follows: “If there is no bargaining representative for workers in the occupation in which the foreign workers will be employed, and the employer posted the notice of filing of this application for 10 consecutive business days in a conspicuous location at the place of employment *as determined in Section H.b. Worksite Information...*”

Section J

We were unable to determine whether the start and end date fields in Section J were modified to allow for just month/year instead of month/day/year. We recommend this modification be made on the new form.

a. Foreign Worker Contact Information

Form

Items 11, 12 & 13 should be removed from the form. This information is not required by the regulation.

c. Foreign Worker Employment and Qualifying Experience

Form

J-16 is self-contradictory. The matter after the question says that if you answer “Yes,” the position in which the experience was gained was in fact “substantially comparable,” then you must provide documentation that the position was not “substantially comparable” (or that it’s infeasible to train).

We recommend that J.16 be broken down into sub-parts as follows (or leave it as it is on the current ETA-9089):

J.c.16 - Did the foreign worker beneficiary gain any of the qualifying experience with the employer? Y/N

J.c.16.a - If the answer to Question 16 is “Yes,” was the foreign worker beneficiary’s experience gained in a position that was substantially comparable to the job opportunity identified in section H? Y/N

J.c.16.b - If the answer to Question 16 is “Yes,” is it no longer feasible for the employer to train a worker to qualify for the position? Y/N

The clarifying language currently in J.c.16 can state as follows: “If the answer to questions J.c.16.b is ‘Yes,’ the employer must be prepared to document that it is no longer feasible to train.”] No language should be needed for J.c.16.a, since if it is “yes” and 16.b is “no,” the PERM system should detect an audit issue or an automatic denial.

J-17: This section asks whether the employer has paid for any of the foreign worker’s education or training. We propose that this section should include a question J-17a and state:

17a. If yes to 17, Does the employer provide similar education or training to domestic worker applicants per 20 C.F.R. §656.17(i)(4). Y/N

d. Foreign Worker Education

Form

We recommend the form allow for the employer to add an additional education section when applicable. There are specific positions where an employer may require TWO specific degrees as a minimum requirement (e.g. undergraduate degree in Engineering and a graduate degree in Business). Presently the form does not provide the ability to document the employee meets such a requirement.

e. Foreign Worker Work Experience

Form

We recommend that the Note under Section J.e. be amended to read: “*List all experience (other than training) including paid and unpaid work experience...*”

This is a more clear statement that Section J.e. relates to employment experience only, including unpaid employment experience, apprenticeships, and internships. Section J.f. relates to any “training” *other* than employment experience. For example, training and licenses should be included in Section J.f. which follows the employment experience section, and should more clearly differentiate between experience (including paid or unpaid internships, etc) and training. (This is a confusing paragraph)

f. Foreign Worker training

Form

We recommend that the Note under Section J.f. be amended to read: *“If applicable, list all training program and coursework (other than employment) completed that qualify...”*

Sections L & M

Form

Sections L and M. We appreciate DOL adding fields for substitute preparers and substitute employer representatives. The Note in each section allowing for substitute signers contains the same typo—the reference to USCIS should be to U.S. Citizenship and Immigration Services.

Section M (1)—We recommend the following change: *“The offered wage equals or exceeds the prevailing wage from the time U.S. permanent residence status is granted through adjustment of status within the U.S. or from the time the foreign worker is admitted to the U.S. pursuant to an immigrant visa to take up the certified employment.”*

Your consideration of these comments is appreciated.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION