

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

> Tel: 202.507.7600 Fax: 202.783.7853 www.aila.org

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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 E-mail: ETA.OFLC.Forms@dol.gov

RE: Information Collection for 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

> 77 Fed. Reg. 40383 (July 9, 2012) OMB Control Number 1205-0310

Dear Dr. Carlson:

The American Immigration Lawyers Association (AILA) submits these comments on the above-referenced information collection published at 77 Fed. Reg. 40383 on July 9, 2012. This notice of information collection proposes new changes to ETA Forms 9035, 9035E, 9035CP, and WH-4 and their accompanying instructions.

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. 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. 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 form revisions and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

Introduction

The U.S. Department of Labor (DOL) is proposing extensive changes to the labor condition application (LCA, ETA Form 9035) and related forms (ETA Form 9035E, 9035CP) and instructions. The proposed changes exceed DOL's statutory authority, are contrary to the legislative history of the Immigration Act of 1990 (IMMACT 90), and should instead be promulgated by regulation in accordance with the full notice and comment rulemaking requirements of the Administrative Procedure Act (APA). If adopted, the standard LCA form would expand from its current five pages to nine pages, and the burden on employers in collecting information and completing the form, would increase substantially. In addition, DOL proposes to break with decades of practice by requiring employers to identify the beneficiary on the form itself, and collect and make public a substantial amount of sensitive personal and other information, thereby implicating numerous privacy concerns. The most significant changes in the proposed LCA are that it:

- Permits up to 10 positions per LCA (previously unlimited);
- Requires new and extensive information on each beneficiary, including: full name, date of birth, country of birth, country of citizenship, nonimmigrant status, PERM application number (if pending), and a new OFLC H Number;
- Requires new information on the employer, including: NAICS industry name, year business was established, number of employees in the U.S., gross and net annual income, and country of business headquarters;
- Requires new information on the work site, including detailed information on third-party/end-client placement;
- Requires new LCA statements including information on similarly employed U.S. workers, and new questions for H-1B dependent employers and willful violators;
- Requires new "Declaration of Employer" on the form with "Yes/No" options (previously included in the instructions).

The Proposed Changes Require Full Notice and Comment under the Administrative Procedure Act

DOL states that as a result of recommendations from the Government Accountability Office (GAO) and the DOL Office of Inspector General (OIG), it seeks "to revise the scope of information collected in the context of H-1B, H-1B1 and E-3 applications in order to enhance [DOL's] integrity review for obvious errors, omissions and inaccuracies under 20 CFR §655.730(b)." However, the proposed changes go far beyond simply revising the scope of information collected and instead represent an inappropriate attempt by DOL to create new substantive rules and to amend existing regulations regarding an employer's LCA obligations.

AILA InfoNet Doc. No. 12090743. (Posted 09/07/12)

¹ 77 Fed. Reg. 40383 (Jul. 9, 2012).

Any attempt to change agency practice or procedure that impacts substantive law is a change that must be promulgated through the appropriate notice and comment provisions contemplated by the APA. The circumstances in which the APA permits an agency to implement a rule change without notice and comment are extremely limited. DOL must explain why it has "good cause" to conclude that notice and comment would be "impracticable, unnecessary, or contrary to the public interest." DOL has set forth no compelling public policy reason to abrogate notice and comment and instead attempts to implement comprehensive substantive changes to the LCA process under the guise of a simple form change.

The Proposal Directly and Substantially Affects Small Businesses and Is a "Major Rule" under the Small Business Regulatory Enforcement Fairness Act of 1996

Under the Small Business Regulatory Enforcement Fairness Act of 1996, a "major rule" is a rule that the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) finds is likely to result in adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets."

Small businesses are recognized as the engine of U.S. economic growth. The Small Business Administration (SBA) reports that small businesses were responsible for the creation of 65 percent of net new jobs over the past 17 years, and that small businesses employ 43 percent of the country's high tech workers (scientists, engineers, computer programmers, and others). Despite their critical importance to our economy, DOL dismisses out of hand the effect that the proposed form revisions will have on small businesses, stating, "the burden on small business concerns is minimal." This is simply not correct.

As employers of 43 percent of the country's high tech workers, small businesses have been and will continue to be substantial users of the H-1B program. Indeed, USCIS reports that in FY 2010 more than 34,000 H-1B petitions were filed by companies with fewer than 25 employees. Unlike large companies, however, which can spread the cost of implementing a compliance system across multiple LCA filings, small businesses are more likely to employ only a single H-1B worker (often judiciously chosen to fill a key need) and must design and implement compliance procedures to accommodate that particular hire. For this reason, a proposal that would nearly double the length of the LCA, that would require public disclosure of personal information regarding key hires and private financial information, and that would require precise phrasing of the answers

² 5 USC §553(b)(B).

³ Small Business Regulatory Enforcement Fairness Act of 1996 §804(2)(C).

⁴ See http://we<u>b.sba.gov/faqs/faqIndexAll.cfm?areaid=24</u>.

⁵ Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995: 1205-0310, p. 9.

⁶ See http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/FY10H-1BPetitions.pdf.

to a variety of questions to avoid a denial for an "obvious inaccuracy," most certainly places a substantial burden on small businesses.

Unfortunately, these extra-regulatory burdens may well be enough to force a small business to forego expanding or seeking a business opportunity that would necessitate the hiring of an H-1B, E-3, or H-1B1 worker. The net impact of such a decision includes the elimination of payroll taxes that would otherwise be paid by that employer and a missed opportunity to infuse money into the community as the worker pays for housing, purchases a car, and shops for food, clothing, and entertainment. In addition, less obvious but more severe consequences would present themselves, such as the elimination of additional jobs for U.S. workers that naturally flow from business and community growth. Ironically, in its apparent effort to protect U.S. workers, DOL may manage to achieve the exact opposite by placing undue burdens on small businesses.

Given the obvious impacts the proposed LCA changes will have on small businesses, as explained in greater detail below, DOL should withdraw the notice of information collection and resubmit the changes in the form of a proposed rule to OMB for review.

DOL Has Failed to Provide a Suitable Explanation of the Need for the Extensive New Data Collection

The Paperwork Reduction Act of 1995 requires agencies to provide "the reasons the information is being collected" and "the way such information is to be used …." In its supporting statement, DOL includes a chart which purports to provide a reason for each of the proposed form revisions. However, a close reading of these explanations reveals that DOL has failed to justify the imposition of significant new burdens that will be placed on employers as a result of collecting this additional information.

DOL states that the name, date of birth, country of birth, visa status, PERM application number, and the new OFLC H Number for each beneficiary is needed to "better track the LCA" at DOL and DHS. However, DOL neither explains how this additional data improves tracking, nor demonstrates a problem with tracking the current LCA. AILA is not aware, through either information provided by the government or the practical experience of our members, of any LCA tracking problems at DOL or DHS. Indeed, USCIS's Fraud Detection and National Security directorate, which has been conducting H-1B site visits for the past several years, appears to have no difficulty associating an LCA with a particular H-1B worker using its own records. Although DOL states that tracking beneficiary information will also assist the DOL Wage and Hour Division (WHD) in its enforcement activities, WHD already has full regulatory authority to gather such information from employers during an LCA investigation.

⁸ Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995: 1205-0310, at p. 9-13.

⁷ Paperwork Reduction Act of 1995, §3506(c)(1)(B)(iii)(I) and (II). *See also* Exec. Order No. 13563, requiring an agency to justify any new burdens placed on the public.

DOL's rationale for gathering information on pending PERM applications is similarly vague and troubling. Stating that it will enhance the integrity of the PERM program, it appears that DOL may intend to cross-check information on PERM forms with the LCA information. If that is the case, it is not clear what value that would have, given that an employer may file a PERM application for an employee in a different occupation and at a different salary level than the H-1B occupation. For businesses, the major concern is the delay and damage that will be caused by unwarranted investigations into perceived inconsistencies between the LCA and the PERM application, when such inconsistencies may be completely innocuous and indeed, lawful.

DOL's justification for gathering other new data points is even weaker. In explaining why employers must list the company's gross and net annual income and country of headquarters, DOL vaguely states that this information is needed "for statistical purposes and integrity measures." However, neither the statute nor the regulations include a mandate for DOL to collect statistics or conduct extensive integrity measures prior to certifying an LCA. DOL's role is clearly and succinctly limited to certifying the LCA unless the form is incomplete or contains obvious inaccuracies. 9 Moreover, as DOL is aware, an employer is required to give a copy of the certified LCA to the beneficiary and must provide public access to the LCA and supporting documentation to anyone who requests it. For private companies, and small businesses in particular, financial information is often closely guarded. A small independently owned business with 10 workers may very legitimately not want its employees to know its net annual income, and certainly would not want its competitors to have easy access to that information. Claiming a need for disclosure of such information for "statistical purposes and integrity measures" is insufficient under the Paperwork Reduction Act and unwarranted under the applicable statutes and regulations regarding the scope and purpose of the LCA.

DOL Has Significantly Underestimated the Data Collection Burdens and Costs to Employers

DOL estimates that the proposed revisions would add only 25 minutes to the time needed to complete the LCA. DOL has vastly underestimated the regulatory burden the proposed LCA would create.

The Increase in the Volume of Data by Itself Is a Major Administrative Burden

DOL begins with the assumption that the existing LCA form takes 35 minutes to complete and compliance with the recordkeeping requirements takes just five minutes. While this assessment is both unsupported and inconsistent with reality, DOL's assessment of the recordkeeping burden associated with the new form is even more outlandish. If the changes are implemented, the form would increase from five pages to nine pages, nearly doubling in length. Moreover, the form requires significantly more information and data, including the number of hours of planned overtime, and detailed information about the beneficiary including an "OFLC H Number," an undefined term that appears to be yet another tracking number to be retained with the employee's

⁹ 20 CFR 655.740(a)(1).

personnel data. It is unclear why DOL would require an "H" number that would follow the H-1B worker from employer to employer, but the requirement that the employer obtain such a number from each prospective H-1B worker prior to filing the LCA adds significant time and effort to the LCA process. It also may result in delays and confusion if the employer or employee unwittingly makes an error with respect to this number. In addition, the form requires new information about the business, such as the NAICS industry name, the year the business was established, the current number of employees in the U.S., gross and net annual income, and the country of the employer's business headquarters. The sheer volume of additional data that must now be gathered is by itself a substantial increase in administrative burdens that will most certainly exceed 25 minutes.

The Likelihood of Denial of the LCA Increases Substantially With the Proposed Additional Data Points

Several of the new data items pose further problems. For example, under "Type of Business," it appears that employers will be required to look up the NAICS business category, rather than simply describing the type of business as they do on Form I-129. If the category is listed incorrectly or is viewed by DOL as inconsistent, will this be considered an "obvious inaccuracy" warranting denial of the LCA? Listing the number of employees in the U.S. can also be problematic, particularly for large companies where this figure often changes on a daily basis. The gathering and listing of gross and net annual income and other information is a further burden that will slow the entire process. As with the other business data points, it is unclear if DOL will compare this data to other information maintained in DOL records, and whether a perceived inconsistency will result in a denial, both slowing the process and adding an additional paperwork burden of completing and resubmitting a second LCA.

Similarly, new data points such as the SOC code and area of intended employment/MSA for the OES wage survey, as well as the publisher of a private wage survey and the survey title add to the burden of completing the proposed form. Users of the existing LCA system are painfully aware that even the slightest variation in the name of a private wage survey from the way it is listed in DOL's database causes the LCA to be denied for an "obvious inaccuracy." Employers must then complete the entire form again, and wait another seven days for the form to be processed with no assurance that it will not be denied a second time. It is not difficult to imagine LCAs regularly being denied because the name of the publisher is listed incorrectly, or the area of intended employment is phrased incorrectly or has the wrong code.

The Proposed Changes Will Virtually Eliminate the Use of Multiple-Slot LCAs Thus Increasing the Administrative and Recordkeeping Burdens

As described in more detail below, requiring beneficiary information will have the effect of virtually eliminating the use of multiple-slot LCAs. It is a rare occasion when an employer knows in advance the names of 10 employees who will be placed at a single location. As a result, H-1B employers will be forced to file individual LCAs for each employee and with each LCA come exceptionally important recordkeeping requirements.

An LCA violation can result in thousands of dollars in penalties and, in severe cases, debarment. Employers must, therefore, employ significant resources to ensure compliance including maintaining records, periodically auditing LCA public access files, and monitoring the timeline following the departure of an H-1B employee for file retention. With the effective elimination of multiple-slot LCAs, the administrative resources required to monitor compliance will increase exponentially, particularly for large users of the H-1B program.

Data Requested Regarding End-Clients Adds Additional Burdens and May Violate Contractual Confidentiality Obligations

For employers placing an H-1B worker at a third party site, new information is required, including the name of the end-client business. Listing this information may well violate confidentiality agreements between the H-1B employer and the end-client. To comply, an employer will be required to investigate any contractual restrictions and if necessary, obtain consent from the end-client to disclose this information on the LCA. It is not clear whether a change to a different end-client in the same MSA will require a new LCA filing, thus further increasing the amount by which DOL has underestimated the paperwork burden.

Additional Burdens to H-1B Dependent Employers are Similarly Underestimated

H-1B dependent employers face additional administrative burdens under the proposed form. An H-1B dependent employer will be required to list its total number of employees and number of H-1B employees each time it completes an LCA, even if the employer is clearly H-1B dependent. This requirement directly contravenes 20 CFR §655.736(c)(1), which states that a readily apparent H-1B dependent employer "would require no calculations" to that affect. An H-1B dependent employer would also be required to provide a description of its efforts to recruit U.S. workers, instead of simply maintaining documentation of those efforts in the public access file. As with wage survey information, it is not clear what DOL intends to do with this information or how it intends to evaluate it, nor is it clear whether the answer to this question may trigger an "obvious inaccuracy" denial.

The Estimate of the Value of the Regulatory Burden at \$25 per Hour Is Unfounded and Unreasonably Low

DOL calculates the regulatory burden associated with the proposed revisions at \$25 per hour. DOL routinely utilizes this rate in calculating regulatory burden, but has never justified how it has reached that number. Most importantly, DOL ignores the fact that in completing the LCA, many, if not most employers are represented by legal counsel. The LCA regulations provide for the imposition of very substantial fines and penalties for violations, including potential debarment from utilizing the H-1B and other programs for future job applicants. As such, an H-1B employer must have a thorough understanding of the rules and must ensure that it has procedures in place to achieve full compliance. Implementing and maintaining a strong compliance program cannot be done without

advice from legal counsel (in-house counsel, external counsel, or both), and the addition of so many additional data points only adds to the importance of legal advice in this process. To assume otherwise ignores reality. At \$25 per hour, DOL has vastly underestimated the cost of compliance with the regulatory burdens of this new form.

The Proposed Changes Create Significant Additional Burdens on Employers Not Contemplated by DOL

In addition to the data collection burdens, the proposed changes will have the effect of further complicating the recruiting and hiring process, and will significantly impact the ability of U.S. employers to compete in a global market and recruit and retain key talent.

The Proposed Changes Will Further Complicate the Already Chaotic H-1B Cap Filing Process

In its attempt to justify the collection of information on the beneficiary, DOL states, "this should cause employers little extra burden because employers generally know who the beneficiaries are before filing the LCA except possibly for the 2.6 percent of employers who file LCAs for more than 10 employees." ¹⁰ However, this fails to tell the entire story. In assessing business burdens, DOL neglected to take into account other external factors that H-1B employers must contend with and the way they have adapted their business practices accordingly. The H-1B cap is the clearest example of this problem. Each year, the H-1B cap represents a moving target. In some years, the cap has been reached within the first few days of the filing period, while in other years H-1B numbers have remained available for months. Even when H-1Bs are available for a longer period of time, employers must often rush to file for new hires as the cap approaches.

Under the current process, where it knows the position will be filled, an employer may obtain an advance LCA (multiple-slot or single use) which eases the pressure and uncertainty when filing close to the cap. An investment firm, for instance, may know that it will hire five Quantitative Analysts with master's degrees in mathematics, but may not yet have received acceptances of the offer of employment from those candidates. Since the employer knows the planned dates of employment, the position requirements, the work location, the salary range, and the prevailing wage, the employer can take proactive steps by obtaining an LCA for the open positions while it waits for the employment offers to be accepted and/or continues to seek applicants. Under the proposed form, the employer would be unable to proceed since the individual beneficiaries must be identified prior to filing. At best, this unnecessary delay will result in a mad rush to get LCAs filed and approved as soon as the H-1B filing period opens. At worst, the delay will result in employers missing the H-1B cap for critical prospective employees, forcing them to move work opportunities abroad or lose their ability to compete effectively with global competitors.

¹⁰ Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995: 1205-0310, at p. 10-11.

The Proposed Changes Will Harm the Ability of U.S. Employers to Remain Competitive in a Global Marketplace

In the increasingly competitive global marketplace, business opportunities require immediate action. A single day can mean the difference between landing a new customer or contract and watching that new business go to a U.S. or foreign competitor. As a result, U.S. businesses must plan in advance, particularly at key times of the year, to ensure access to the high skilled talent they need to respond to business opportunities. Strategic planning many times includes obtaining a single use or multiple-slot LCA for a position at a location where a job opportunity will soon exist. Obtaining an advance LCA is a legitimate business strategy employed by both traditional companies with employees working at company-owned facilities, and by consulting companies where employees are placed onsite at client locations. Combined with the H-1B portability provisions of the American Competitiveness in the 21st Century Act (AC21), ¹¹ this practice allows companies to quickly respond to business opportunities by rapidly deploying critical H-1B workers.

By requiring beneficiary information on the LCA, DOL will make it impossible for employers to make reasoned strategic business decisions and maintain their competitive advantage. Instead, with each new opportunity, employers will be required to wait until specific workers are located to submit an LCA for urgently needed and often hard-to-fill positions. While DOL states that the seven day processing time is a "relatively quick turnaround," it is the timing and not the total time that presents the problem. The proposed LCA eliminates a process that can be performed concurrently with recruitment or negotiation of a work contract, and replaces it with a process that can only be initiated after these tasks are completed. This unnecessary delay can literally mean the difference between a U.S. employer's success and failure in securing a new contract or introducing a new product.

The Proposed Changes Will Harm the Ability of U.S. Employers to Attract and Retain Critical Global Talent

The proposed revisions would also directly harm the ability of U.S. employers to attract and retain critical global talent by creating a serious invasion of privacy for H-1B workers. In requiring the collection of the beneficiary's personal information and making it accessible to the public, DOL fails to recognize that the United States is but one of many options for the world's best engineers, scientists, investment analysts, and other professionals. When choosing between U.S. career opportunities and opportunities in other countries, it is not at all a stretch of the imagination to conclude that some of this critical global talent will choose careers in countries with immigration policies that respect their privacy, particularly given the uncertainty of the H-1B cap and the growing problem of lengthy backlogs for permanent resident status. Depriving employers of critically needed global talent by bringing privacy concerns into the process reduces the ability of U.S. employers to compete globally and serves as further encouragement for employers to send work abroad where these additional burdens do not exist.

¹¹ Pub. L. No. 106-313, 114 Stat. 1251; 106-311, 114 Stat. 1247 (Oct. 17, 2000).

Moreover, requiring the disclosure of the beneficiary's biographical data is completely at odds with the underlying purpose of the LCA statute and regulations. The purpose of that statute is to protect the wages and working conditions of U.S. workers by preventing the underpayment and mistreatment of H-1B workers. Workplace violence and violent acts against immigrants take place routinely in the United States. Rather than protecting H-1B workers, the proposed LCA changes expose such workers to potential mistreatment and retribution by malicious co-workers and anti-immigrant members of the public.

The Proposed Changes Contravene the "Area of Intended Employment" Definition Set Forth in 20 CFR §655.715

While the Federal Register notice only describes revisions to the ETA Form 9035 and related forms and instructions, it in fact imposes practical changes that appear to contravene the LCA regulations. Under 20 CFR §655.734(a)(2), an employer may place an H-1B worker at a worksite not contemplated at the time the LCA is filed as long as the employer posts notice of the LCA at the new worksite. This, combined with the definition of "area of intended employment" as an area within normal commuting distance, ¹² has long been understood to provide employers with the flexibility to move an H-1B employee to a new location within the same MSA without obtaining a new LCA. This provision is of great importance to consulting companies, information technology companies, and other employers whose employees periodically move from one worksite to another. It is unclear whether this practice will be allowed if the revised form is implemented, now that Section F.2b requires the name of the end-client where the worker will be placed. Faced with this confusion and considering the serious penalties associated with an LCA violation, employers will likely file a new LCA for each location change, even if the change involves moving just a block or two down the street in the same city. Under current USCIS policy, this may also mean that the employer would be required to file an amended H-1B before the employee may work at the new site, thus adding tremendous expense to the process of moving an employee within the same MSA. By essentially changing the regulation with this form revision, DOL is adding yet more unreasonable burdens to businesses without the required justification and without notice.

The Collection of the Beneficiary's Biographic Information, End-Client Information, and Employer Financial Information Exceeds the Scope of DOL's Authority

Section 212(n) of the Immigration and Nationality Act (INA) sets forth an employer's obligation to file an LCA with DOL prior to filing an H-1B petition. INA §212(t) specifies the information that must be included in the LCA and provides DOL with the authority to investigate an employer's failure to meet a condition specified in the LCA. When the LCA was introduced as an additional element of the H-1B process in the Immigration Act of 1990 (IMMACT 90), it was viewed by Congress as an attestation-driven document that would be promptly adjudicated. IMMACT 90 mandated an efficient

¹² 20 CFR §655.715.

and speedy certification process to allow the admission of urgently needed H-1B talent while providing appropriate protections to U.S. workers.

The regulations at 20 CFR §655.760 set forth the documentation that is to be kept in the public access file as well as documentation that must otherwise be "retained" in the event of an audit. The regulations also set forth the LCA information that DOL is required to compile and make public. ¹³ In recognition of the privacy and related concerns that would be raised by making certain information public, the regulation excludes from disclosure certain proprietary information as well as employee payroll records. Notably, however, a copy of the LCA must be kept in the public access file and therefore, all information contained in the LCA is public.

As proposed, the new LCA form would demand an unprecedented level of information from employers including detailed information about the H-1B employee, end-client, and the employer's financial status. The collection of this information exceeds DOL's statutory and regulatory authority and violates the fundamental premise of the attestation-based LCA system. Nowhere does the statute or regulations mention the disclosure of beneficiary information, or information about the end-client or the employer's financial status. Moreover, as an attestation-based system, there is no reason to require employers to provide such nuanced information. The purpose of the public access file is to allow concerned individuals to verify that the employer is not using H-1B labor to disadvantage the U.S. workforce or exploit the H-1B employee. Disclosure of the position title, salary and job location as currently required is sufficient for this purpose. The public access file is not meant to be a receptacle for all information that DOL might require an employer to produce in an investigation.¹⁴

With the inclusion of this new information in the LCA, DOL has seemingly set aside any privacy concerns it demonstrated by excluding proprietary information and payroll records from the public access file. In addition, DOL is expanding the potential basis for complaints beyond what Congress intended and is impermissibly attempting to bypass the regulatory process and usurp congressional authority.

The Collection of the Beneficiary's Biographic Information Raises Serious Privacy Concerns

In its attempt to justify the collection of substantial personal information about the intended H-1B, E-3, or H-1B1 worker, DOL rather weakly states that it "appears to be

¹³ The employer must disclose the "...occupational classification, wage rate(s), number of nonimmigrants sought, period(s) of intended employment, and date(s) of need for each employer's application..." 20 CFR §655.760.

¹⁴ In addition, the beneficiary's name, date of birth, country of birth, and country of citizenship are already collected by DHS on the I-129 Petition for a Nonimmigrant Worker. This data is compiled and made available to the public. *See e.g.*, Yearbook of Immigration Statistics: 2011, Temporary Admissions (Nonimmigrants), available at: http://www.dhs.gov/yearbook-immigration-statistics-2011-2. *See also*, DHS Annual Flow Report, Nonimmigrant Admissions to the United States: 2011 (July 2012).

necessary to prevent the abuse of [the] LCA." ¹⁵ No further explanation is provided or examples given of situations in which the LCA process was abused because the specific worker information was not included. This explanation is patently insufficient, particularly when the collection of this information exceeds the scope of DOL's authority and raises deep concerns regarding privacy issues that would require more rather than less justification.

The proposed LCA implicates numerous privacy rights of the beneficiary including his or her national origin, date of birth (age), worksite address, and financial and personal security. ¹⁶ Specifically, the inclusion of this information on the LCA directly impacts the beneficiary's protected privacy rights under federal law and as established by employment law principles and policies. For purposes of national origin protection, to pass constitutional muster, a law must be specific to the purpose for which it was intended, must be narrowly tailored and, if it implicates the protected interests of a class of people, must achieve a compelling government interest. ¹⁷ DOL has not given any reasonable explanation for requiring disclosure of the beneficiary's country of birth or country of citizenship, much less expressed a compelling interest. Additionally, federal law protects certain classes of persons from discrimination based on national origin or citizenship. 18 The DOL's proposal to include the country of birth and country of citizenship on the LCA is likely to result in a significant risk of national original discrimination claims because internal managers and other employees who may have the authority to impact hiring, firing, and make other employment- related decisions will have access to this otherwise private information. According to the Department of Justice Office of Special Counsel, a process that asks applicants to identify their citizenship status may be facially discriminatory in that it creates an unnecessary barrier to potential noncitizen applicants. 19

Moreover, the name of the beneficiary coupled with his or her date of birth is generally classified as protected information for purposes of preventing identity theft. 20 Rather than preventing LCA abuse, disclosure of the beneficiary's personal information (including salary) will put the beneficiary at great risk of financial loss or other harm. Financial loss may include identity theft or fraud by unscrupulous individuals who are able to acquire the information through the public access file. In addition, the disclosure of the employer and worksite location could put the beneficiary at risk of physical harm and hate crimes

¹⁵ Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995: 1205-0310, at p. 2.

¹⁶ As explained above, a privately-held petitioner/employer also has a strong privacy interest in protecting its financial information.

¹⁷ Korematsu v. U.S., 323 U.S. 214 (1944).

¹⁸ Pub. L 99-603 Immigration Control and Reform Act of 1986; Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352).

¹⁹ Office of Special Counsel Letter to Janet Sun dated August 21, 2012 (citing Eze v. West County Transportation Agency, 10 OCAHO No. 1140, at 3 (2011)), published on AILA InfoNet at Doc. No. 12082344 (posted 8/23/12).

²⁰ See Identify Theft and Assumption Deterrence Act as amended by Pub. L. 105-318 (1998). This law makes it a crime to knowingly transfer or use, without authority, a means of identification of another person with the intent to commit, aid, or abet any unlawful activity. Section 3(d)(3)(A) includes the name and date of birth in the definition of "means of identification."

by individuals with anti-immigrant ideologies. This is not mere speculation. Non-U.S. citizens are routinely victimized by fraudulent actors and criminals.²¹ Disclosure of this information in a public access file will make H-1B workers easier to target.

The Collection of the Beneficiary's Biographic Information Runs Contrary to State Data Protection and Identity Theft Laws

In addition to numerous rules promulgated to by the Securities and Exchange Commission, Federal Communications Commission, and other federal agencies to limit the disclosure of personal information, 46 states plus the District of Columbia and Puerto Rico have enacted stringent laws designed to protect personal information. ²² In many states, professional licensing boards such as the Texas Medical Board have, either voluntarily or through administrative rulemaking, also removed licensees' birthdates from their publicly posted materials to guard against identity theft. ²³

Most of the state data protection and anti-identity theft laws cover not only customer information but also personal information respecting employees. These laws are not identical, but all restrict public access to personal information including name, date of birth, and social security numbers. Some, including Massachusetts, ²⁴ also require employers to develop specific protocols to protect and prevent unauthorized access to sensitive information. While we acknowledge that DOL is not asking employers to post social security numbers, the combination of a full name and date of birth is also generally protected in that this is often enough information to allow an identity thief to acquire additional personal information about the subject. The required sharing of this information to any member of the public through a public access file is at odds with the employers' obligation to maintain the confidentiality of this same information pursuant to protective statutes.

The Collection of the Beneficiary's Biographic Information Will Expose the Employer to Tort Liability in Many States

²¹ For example, AILA recently received several reports from members whose clients had received a call from an individual claiming to be a USCIS officer who was in possession of verified personal information. After asking the client to verify other data, such as an I-94 number or "A" number, the client was told that there was a penalty to clear up a purported discrepancy. The client was then asked to wire funds via Western Union. This type of scam could easily flourish with the disclosure of detailed beneficiary information under the DOL's proposed form changes. *See* "Warning: A New Telephone Scam," *published on* AILA InfoNet at Doc. No. 12071935 (*posted* 7/19/12).

²² *See* Alaska Stat. §§45.48.010 *et seq.* (2008); Iowa Code §715C.1 (2008); S.C. Code Ann. §§39-1-90 *et*

²² See Alaska Stat. §§45.48.010 et seq. (2008); Iowa Code §715C.1 (2008); S.C. Code Ann. §§39-1-90 et seq. (2008); Va. Code §18.2-186.6 (2008); W.Va. Code §\$46A-2A-101 et seq. (2008); California Constitution, Article 1, Declaration of Rights; Cal. Civil Code §1798.92, Cal. Penal Code §530.5 (identity protection and theft codes). Notably, California was the first state to enact an "anti-breach" law designed to protect the privacy of consumers and employees. Cal. Civil Code §1798.29, 1798.82 et seq. (SB 1386). Like Texas, California also has an established Office of Privacy Protection. See www.privacy.ca.gov.

http://www.tmb.state.tx.us/professionals/physicians/applicants/profilecontents.php.

In many states, ²⁵ employers could also face tort liability for making the information available to the public. The tort of "publication of private facts" allows individuals to sue if anyone, including an employer, publicly discloses private facts about the person. There is an exception for facts that are otherwise publicly available and/or the publication of which is in the public interest. ²⁶ In addition, the publication must be of a kind that would cause an ordinary person to be offended. ²⁷ The definition of "private facts" includes, *inter alia*, financial information such as salary. Most of the applicable statutes do not contain a consent exception. We are concerned that the retention of the LCA in the public access file of the LCA under the current proposal would fall within the ambit of this tort.

Two cases have considered whether the publication of an employee's salary in conjunction with identifying information such as the employee's name would constitute a tortious publication of private fact. Both concluded that it could. In *Health Central v*. Commissioner of Insurance, 28 though the court dismissed the case (which was filed by the employer) for lack of standing, it acknowledged that publication of employee names and salaries could form the basis for a tort claim. In Purdy v. Burlington Northern and Santa Fe Railway Company, an unpublished case, the court granted a temporary restraining order to prevent the publication of employee names, social security numbers and salary information. After addressing the unquestionable unlawfulness of publishing employee social security numbers, the court noted that "[i]f, for example, [plaintiff] sought to publish the salaries by job description only-without reference to individual names or other identifying information-then the [c]ourt might conclude either that the information was not private or that there was a legitimate public interest to be served in its publication. Coupled with employee names (and social security numbers), however, that information becomes private." ²⁹ Given that the proposed LCA, which must be made publicly available in the employers' public access file, contains salary information coupled with identifying information including name, date of birth and birthplace, it would appear to constitute a breach of the prohibition against publication of private facts, thus exposing the employer, or even potentially DOL, to tort liability.

Other Issues and Concerns Raised by Specific Sections of the Proposed Form

• Part B, Items 4 and 4a: Full-Time Position/Number of Hours per Week. In question 4, the employer must specify whether the position is a full-time position. Then in question 4a, the employer is required to state the number of "basic" and "overtime" hours per week that the employment entails. Unexplained, however, is how DOL intends to use this information. Does disclosure of this information create an obligation on the part of the employer to abide by these numbers? For instance, if an employer indicates that the position involves 10 overtime hours per week, yet in practice the employment actually entails fewer hours, has the employer obligated itself to paying the nonimmigrant for the stated number of

²⁵ Including Florida, Georgia, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Washington, and the District of Columbia.

²⁶ See e.g. Hitchner v. Cape Publication, Inc., 549 So. 2d 1374, 1377 (Fla. 1989).

²⁷ *Id*.

²⁸ 152 Mich. App. 336, 393 NW 2nd 625 (1986).

²⁹ 2000 WL 34251818 (D.Minn.) (emphasis added).

hours? This does not comport with the realities of business needs which can fluctuate on a daily basis.

- Part B. Item 8.h—If PERM Application Is Currently Pending. DOL has not adequately explained the reason for requiring this information beyond the vaguely stated desire "to enhance integrity review efforts" between the LCA and DOL's PERM program. We note that PERM applications are often filed for future positions and future wages (or by different employers) such that data on a PERM application will often be different from that which is indicated in the LCA. If the data does not match, the LCA may be at risk for denial based on an "obvious inaccuracy."
- Part B, Item 8.i—OFLC H Number. The proposed LCA also includes a new data point, "OFLC H Number." This number will apparently be generated for the nonimmigrant by the OFLC upon submission of an initial LCA, and must be included on all future LCAs filed on behalf of the employee. It is easy to envision numerous data collection and tracking problems associated with this new number. Prospective employees may have been previously issued an H number but were never informed by their prior employer. If the new employer files an LCA without the H number, a second H number will likely be generated. In addition, during the transition period, it will be extremely difficult for employers to know for sure whether or not a prospective employee has been issued an H number.

Moreover, an H number that a foreign worker is required to carry with them from employer to employer is dehumanizing and, coupled with the disclosure of detailed personal information about the beneficiary, will undoubtedly have a chilling effect on the H-1B program as a whole. Without a sound explanation of the need for this new tracking device, backed up by concrete data to support the stated need, we strongly urge DOL to abandon its efforts to implement this misguided plan.

- Part C, Item 17—Employer's Annual Income. As discussed above, private companies may have legitimate reasons for keeping this information private. Small companies justifiably may not want to disclose annual income to their employees and competition.
- Part C, Item 18—Country of Employer's Business Headquarters. The country where an employer's business headquarters are based does not have any relevance to the certification or enforcement of the LCA. More specifically, the attestations contained in the LCA must be made by a U.S. employer, and aside from collecting information to incite individuals or organizations with some sort of protectionist agenda, it is unclear why DOL feels compelled to add this new data field to the LCA. Distinguishing employers based on the country of their business headquarters seems to strike the tone that our country does not welcome foreign-based businesses or afford them a level playing field. Should DOL insist on including this data field, it should be optional.

- Part F, Items 2a and 2b—Worksite and End Client Information. DOL states that it is collecting new information on the worksite "to enable [the] employer to demonstrate regulatory compliance regarding changes in worksite." Here we reiterate our concern that the proposed LCA changes contravene 20 CFR §655.734(a)(2) which permits an employer to place an H-1B worker at a worksite not contemplated at the time the LCA is filed as long as the employer posts notice of the LCA at the new worksite.
- Part F. Items 14-17—Prevailing Wage Source Information. DOL indicates that this portion of the new LCA "[r]equests more detailed information about the prevailing wage to enable employer to demonstrate regulatory compliance." This, however, flies in the face of Congress' desire that the LCA function as an attestation-based document. Congress never envisioned the LCA as a document, that itself requires the employer to demonstrate regulatory compliance.
- Part G. Item 2 and Item 3—Similarly Employed U.S. Workers. DOL failed to provide any explanation for the addition of two new questions regarding similarly employed U.S. workers. There is no obligation for employers to examine their workforce to determine if there are similarly employed U.S. workers. Employers are only required to provide the same wages and working conditions for all similarly employed individuals.
- Part H—H-1B Dependent Questions. DOL states that it has added new questions for H-1B-dependent employers "to ensure their compliance with statutory requirements." However, it is unclear how asking the employer for an "approximate" number of H-1B workers and an "approximate" number of the total U.S. workforce helps achieve that goal. As noted in the instructions, 20 CFR §655.736 provides detailed guidance as to what constitutes an H-1B dependent employer. It requires the employer to determine the number of full-time equivalent employees in the U.S., not just a rough approximation of the total workforce.
- Part H, Subsection 1, Item 6b—Basis for Exemption of Nonimmigrant Workers. It is unclear why DOL needs to collect this information, as any H-1B dependent employer or willful violator who files an LCA for exempt workers bears the burden of establishing exemption in the course of an investigation. Providing this information at this juncture serves no purpose as to the integrity review conducted by DOL since it does not have, at the certification stage, any information to determine whether an employer's statements are obviously inaccurate.

Conclusion

In summary, despite the many additional burdens the proposed LCA places on businesses, DOL has failed to provide a legitimate explanation for this extensive form revision. The need to "clarify certain elements of the information collection and enhance the integrity of the labor attestation process" is insufficient. Moreover, absent any data to indicate any substantial "abuse" under the existing form or an explanation as to why the

current LCA is insufficient from an enforcement perspective, the justification of a need "to prevent the abuse of [the] LCA, and to "effectively ensure compliance with the employer's obligations contained in the LCA..." is also deficient. The tenor and tone of the proposed changes convey to the public the impression that all employers that hire H-1B, E-3, and H-1B1 workers are in some way abusing the legal system, when in fact the reality is that employers often hire these workers because they have a unique or special set of skills unavailable to the employer through the American workforce. The creation of tremendous administrative burdens through the proposed LCA revisions, which in several instances change the H-1B regulations, is simply not justified. The proposed form revision should be withdrawn.

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

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

³⁰ Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995: 1205-0310, at p. 2.