

**SUPPORTING STATEMENT FOR REQUEST FOR OMB APPROVAL
UNDER THE PAPERWORK REDUCTION ACT OF 1995: 1205-0451**

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Attachment A – Form ETA 9089

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Title 8 U.S.C. § 1182(a)(5)
Title 8 U.S.C. § 1153(b)(3)
Title 20 CFR Part 656
Title 8 CFR § 204.5(k)

SUPPORTING STATEMENT

APPLICATION FOR PERMANENT ALIEN EMPLOYMENT CERTIFICATION

FORM ETA 9089

A. Justification

A.1. Circumstances that make the collection of information necessary.

The information collection is required by sections 203(b)(3) and 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1153(b)(3) and 1182(a)(5)(A)). The Department of Labor (Department) and the Department of Homeland Security (DHS) have promulgated regulations to implement the INA. Specifically for this collection, Title 20 CFR Part 656 and Title 8 CFR § 204.5 are applicable. The INA mandates the Secretary of Labor to certify that any alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is not adversely affecting wages and working conditions of U.S. workers similarly employed and that there are not sufficient U.S. workers able, willing, qualified, and available to perform such skilled or unskilled labor. Before any employer may request any skilled or unskilled alien labor, it must submit a request for certification to the Secretary of Labor containing the elements prescribed by the INA and the CFR or, in limited circumstances, apply for a waiver thereof with DHS. The CFR requires employers to document their recruitment efforts and substantiate the reasons no U.S. workers were hired. The Department recently amended its regulations to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States. The final Rule was published in the Federal Register May 17, 2007 (72 FR 27904).

The Department collects the necessary information in order to make the certification on Form ETA 9089. The form can be found on-line at <http://www.foreignlaborcert.doleta.gov/pdf/9089form.pdf>.

The Department is requesting an extension of a current collection, but with modifications to the form ETA 9089 in order to better implement the requirements of the INA and the goals of the program. In addition, modifications necessary for clarity and accuracy have been included in the instructions to the form.

A.2. How, by whom, and for what purpose the information is to be used.

By the Federal Government

In order to meet its statutory responsibilities under the INA, the Department needs to extend an existing collection of information pertaining to employers seeking to import foreign labor. The form used to collect the information is used not only by the

Department, but also other federal agencies in furtherance of meeting the requirements of the INA. The Department uses the information collected to provide labor certifications for permanent residency applications of aliens seeking to enter in the U.S. through employment. DHS utilizes the form for its National Interest Waiver of the Job Offer Requirement application process (NIW) and other employment based positions that have been determined by the Department as shortage occupations not requiring certification by the Department. Employers and individuals wishing to utilize one of the above mentioned programs submit a completed form either on-line or manually to the appropriate regional office of the Department or to the DHS directly.

For those categories, which require labor certification, an employer submits the application to the Department. Once submitted, either electronically or manually, an analyst will make the final determination on whether the employer performed its recruitment as required under the regulations and whether any U.S. workers who applied were rejected for lawful job related reasons. If the form is submitted to DHS directly, DHS will utilize the form to analyze the alien's background and experience for the NIW or Schedule A occupations (known shortage occupations).

If the Certifying Officer denies certification, the regulations provide the employer the ability to apply for reconsideration or appeal. The information previously collected is made part of the record on reconsideration or appeal. If the employer appeals to the Board of Alien Labor Certification Appeals (BALCA), the request must be in writing, must clearly identify the case number from which review is sought, must set forth the particular grounds for the request, and must include all documents which accompanied the Final Determination issued by the Certifying Officer. The request for review, statements, briefs and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence which was collected to complete the ETA 9089.

By the Employer

The employer is required to submit evidence of its recruitment efforts to recruit U.S. workers. The Department has codified at 20 CFR § 656.17(d) and (f) the type of recruitment that should be performed to test the U.S. market. The regulations require employers to recruit for able, willing, qualified and available U.S. workers at prevailing wages and working conditions. Without such a test of the labor market the Secretary would not be in a position to issue the certification required under the law. Employers are required to test the labor market during the 180 days preceding the filing of the ETA 9089.

Employers are required to prepare a report of their recruitment activities. The regulations state that the employer must prepare a summary report signed by the employer describing the recruitment steps undertaken and the results achieved, including the number of U.S. workers who applied for the job opportunity, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. The Certifying Officer, after reviewing the

employer's recruitment report, may request the U.S. workers' resumes sorted by the reasons they were rejected.

In any case where the Certifying Officer determines it to be appropriate, post-filing supervised recruitment may be ordered. This includes cases selected for audit and cases where serious questions arise about the adequacy of the employer's test of the labor market. At the completion of the supervised recruitment efforts, the employer is required to document that its efforts were unsuccessful, including documenting the lawful job-related reasons for not hiring any U.S. workers who applied for the position.

By the Public

The anti-fraud measures in the regulations allow any person to submit documentary evidence bearing on any allegation of misrepresentation or fraud committed by the employer. The information can include proof of discrepancies between what was filed with the Department or DHS and what was attested to on Form ETA 9089 such as the actual number of available U.S. workers, information on wages and working conditions, and information on the failure to meet terms and conditions with respect to the employment of alien workers and co-workers. The statutory requirement concerning submission of documentary evidence is reflected in 20 CFR § 656.10(e)(1) and (2). The Department uses this information to investigate the employer and, if necessary, debar the employer from the ability to apply for labor certification in the future.

A.3. Extent to which collection is automated, reasons for automation, and considerations for reducing impact on burden.

In compliance with the Government Paperwork Elimination Act, the form can be found on-line at <http://www.foreignlaborcert.doleta.gov/pdf/9089form.pdf> for manual typewritten submissions or can be filled in and submitted on-line at <http://www.plc.doleta.gov>.

The regulation provides employers the option to utilize an electronic filing system which permits employers to fill out their applications for permanent employment certification on a Department of Labor website and submit them electronically to the Department's Employment and Training Administration (ETA). Because the electronic filing system includes guidance to employers completing their applications on line, there are fewer incomplete or inaccurate entries. The website includes detailed instructions, prompts, and checks to help employers fill out the Application for Permanent Employment Certification. In order to file electronically, the employer must become a "registered user" by creating an account having secure files within the ETA electronic filing system that can be accessed by password. Each time a registered user accesses the website to file an application, the information common to all its applications is entered automatically by the electronic filing system, thereby reducing the burden.

A.4. Efforts to identify duplication – why similar information already available cannot be used for purpose described in A.2.

The procedures and documentation requirements are sufficiently specific to avoid duplication of activities.

A.5. Efforts to minimize burden on small businesses.

The information collection is required of small businesses who want to import foreign labor. However, the recordkeeping requirements largely involve information, which already exists in payroll and other records kept by most employers for other purposes. The Department contends that the recruitment requirements are those that any business would utilize to legitimately recruit workers. The only difference is that the employer must keep proof of such recruitment for a period of five years after submitting the form to the Department.

There are questions on the form that require the employer to perform some research in order to answer the questions, but the Department has eased the burden on the employer by making links to the appropriate websites easily accessible from the Department's website at <http://www.foreignlaborcert.doleta.gov>. For example, the employer must:

- categorize its business utilizing the NAICS code system
- obtain a formal determination of the prevailing wage in the area of employment
- understand and list the Metropolitan Statistical Area of the job opportunity
- understand and answer questions about "O*Net Job Zone (SVP level)

A.6. Consequences to Federal program if collection not done or done less frequently and any technical or legal obstacles to reducing the burden.

The Department would be in direct violation of law and regulations if this information was not collected.

A.7. Special circumstances for conducting information collection.

There are no special circumstances that would require the information to be collected or kept in any manner other than those normally required under the Paperwork Reduction Act except the regulatory requirement that employers retain applications for permanent employment certifications and all supporting documentation for 5 years after submission. (20 CFR § 656.10.(f)) Employers must maintain supporting documentation because no time limit is placed on the authority of the Certifying Officer (CO) to revoke a

labor certification, and because DHS may want to review the employer's supporting documentation in the course of processing the Form I-140 petition to which the ETA 9089 is attached. Either Department may want to review the information for the purpose of investigating possible violations of the Immigration and Nationality Act.

A.8. Summary of public comments.

[To be completed upon receipt.]

A.9. Explanation of decision to provide any payment or gift to respondents.

No payments or gifts will be made to respondents.

A.10. Assurance of confidentiality provided to respondents.

The information collected is not exempt from disclosure under the Freedom of Information Act.

A.11. Justification for any sensitive questions.

The information collections do not involve sensitive matters.

A.12. Estimated hourly burden.

The Department estimates approximately 120,000 submissions a year will be submitted either to the Department or to DHS. The Department estimates that more than 100,000 applications will be submitted per year to ETA, and DHS has estimated that approximately 13,000 will be submitted to DHS for its National Interest Waiver application process and 7,000 for Schedule A and Shepherdher applications. This figure has increased over the last two and a half years since the form was first introduced because DHS has begun allowing NIW applicants to use the ETA 9089 in addition to the older ETA 750B (an additional use of the instrument that the Department did not anticipate 2.5 years ago).

A. Application for Permanent Employment Certification (Form ETA 9089)

Employers submit an Application for Permanent Employment Certification when they wish to employ an immigrant alien worker. The form takes approximately 1.25 hours to complete. The Department estimates, based on its operating experience, that in the upcoming year employers will file approximately 100,000 applications for basic alien employment certification (not including college

teachers) with the Department and an estimated 20,000 applications will be filed with the DHS on behalf of aliens who qualify for NIW, Schedule A or who are immigrating to work as shepherders for a total burden of 150,000 hours (120,000 applications x 1.25 hours = 150,000 hours).

B. Submission of Inculpatory Evidence to the Department -- 20 CFR §656.10(e)

The regulations allow any person to submit to the Certifying Officer documentary evidence bearing on an application for permanent labor certification that is filed with the Department of Labor. The Department estimates that 50 individuals or organizations will avail themselves of the opportunity to provide such evidence and each filing of documentary evidence will take approximately 1 hour for a total annual burden of 50 hours.

Individuals or organizations may provide to the appropriate DHS office documentary evidence of fraud or willful misrepresentation in a Schedule A application filed under 20 CFR § 656.15 or a shepherd application filed under § 656.16. The Department estimates 15 individuals or organizations will avail themselves of the opportunity to provide such evidence and each filing of documentary evidence will take approximately 1 hour for a total annual burden of 15 hours.

The total annual burden for submission of evidence to Certifying Officers and INS offices would come to 65 hours.

C. Recruitment -- 20 CFR § 656.17(d) and (f)

Recruitment activities, including advertising for workers and placing job orders is a usual and customary activity of employers. Therefore, under the regulations of the Office of Management and Budget at 5 CFR §1320.3(b) the resources expended by employers to comply with the recruitment provisions at § 656.20(d) of the proposed rule is excluded in compiling the paperwork burden estimates under the proposed rule.

Similarly, since the records required to be kept by the employer to demonstrate compliance with the advertising requirements or to prepare the required recruitment report must be retained by employers under the regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR §1602.14 (OMB Control No. 3046 -- 0040), promulgated pursuant to Title VII of the Civil Rights Act and the American With Disabilities Act, and 29 CFR §1627.3(b)(3) (OMB Control No. (3046 -- 0018), promulgated pursuant to the Age Discrimination in Employment Act, at 29 CFR §1627.3(b)(3), the burden to maintain such records can be excluded in compiling the paperwork burden under the proposed rule. For example, § 1602.14 requires the employer to keep "(a)ny personnel or employment record made or kept by an employer (including but not limited to requests for reasonable accommodation, application forms submitted by

applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be kept for a period of one year from the date of making of the record or the personnel action involved, whichever occurs later. . . .”

The records that employers must maintain pursuant to 29 CFR §1627 (b)(3)(a)(1) that was promulgated pursuant to the Age Discrimination in Employment Act, includes but are not limited to the following:

- o Job applications, resumes or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual.
- o Promotion, demotion, transfer, selection for training, layoff, recall or discharge of any employee.
- o Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel and job openings.
- o Any advertisement or notice to the public or to employees relating to job openings, promotions, training programs, or to opportunities for overtime work.

However, the time required to prepare the required recruitment report is not excludable in compiling the burden under the regulation. Section 1602.14 does not require an employer to create any records, but rather requires an employer to preserve all personnel or employment records which the employer “made or kept”. Once made or kept (i.e., records received from others which are not immediately discarded) EEOC regulations requires that these records be preserved.

All employers that file applications under the basic process at 20 CFR § 656.17 must prepare a summary report under § 656.17(f) signed by the employer describing the recruitment steps undertaken and the results achieved, including the number of hires, and if applicable the number of U.S. workers rejected, summarized by the lawful job related reasons. Further, the Certifying Officer, after reviewing the employer’s recruitment report, may request the resumes or applications of U.S. workers sorted by the reasons they were rejected. The Department estimates that it will take an average of 1 hour for an employer to prepare a recruitment report for each application it files, and, if requested by the Certifying Officer, sort the resumes or applications it received by the reasons they were rejected. Since the Department anticipates that 100,000 applications for permanent labor certification will be filed under the basic process, which requires advertising, with the Department of Labor, the total annual burden for

preparing recruitment reports is estimated to amount to 100,000 hours.

D. Retention of Supporting Documentation

The Department estimates that employers will spend about 5 minutes per year per application to retain an application and required supporting documentation in the four years following the mandated retention under Title VII. This results in an annual burden of 8,333 hours (100,000 applications X 5 minutes ÷ 60 minutes = 8,333 hours).

E. Optional Special Recruitment and Documentation Procedures for College and University Teachers – 20 CFR § 656.18

The Department consulted with representatives of major universities in developing the documentation requirements for the competitive recruitment and selection process. The employers agree that the requirements are reasonable and can be easily documented by colleges and universities. See 45 FR at 83931.

Information available to the Department indicates colleges and universities customarily advertise for faculty positions. Therefore, placement of such advertisements can be considered usual and customary under OMB regulations at 5 CFR §1320(b)(2). Accordingly, the resources expended by employers to prepare and place the required advertisements in professional journals are excluded in compiling the burden required by 20 CFR § 656.18 of the regulation. Additionally, colleges and universities are required to maintain the records and documents received pursuant to their recruitment activities under the EEOC regulations cited above at 5 CFR § 1602.14 and § 1627.3. Based on program experience, the Department estimates that employers will file about 2,100 applications under the optional recruitment and documentation procedures for college and university teachers and will expend on average 1 hour filling out the form that can be included in compiling the burden for a total annual burden of 2,100 hours.

F. Supervised Recruitment – 20 CFR § 656.21

In a case where the Certifying Officer determines it to be appropriate, post-filing recruitment may be required of the employer. The Department estimates that employers will be required to conduct supervised recruitment with respect to 5,000 applications and the time required to conduct such recruitment will average 2.2 hours per application for an annual burden of 11,000 hours. Some employers will expend 10 hours, while the majority will expend one hour to place the advertisement, receive and analyze resumes and interview candidates. Employers will also be required to provide a recruitment report to the certifying officer that on average will take about 1 hour to prepare for an annual burden of 5,000 hours. Therefore, it is estimated that the total annual burden associated

with conducting supervised recruitment will amount to 16,000 hours.

G. Labor certification determinations -- 20 CFR § 656.24 and Board of Alien Labor Certification Appeals review of denials of labor certification -- 20 CFR § 656.24

Employers may request reconsideration of a denial by the Certifying Officer of an application for permanent labor certification. If the reconsideration is denied, they may appeal to the Board of Alien Labor Certification Appeals. The Department estimates that 5,000 employers will request reconsideration and or appeals and that it will take two hours on average to prepare the requests for an annual burden of 10,000 hours.

H. Determination of prevailing wages for labor certification purposes -- 20 CFR § 656.40(g)(6) and (h)

In order to complete the ETA 9089, an employer must obtain a prevailing wage from the State Workforce Agency (SWA) in the state where the alien will work either by asking the SWA to determine the correct wage or by submitting its own survey and asking the SWA to validate it. If the SWA finds the survey provided by the employer to be unacceptable, the employer may submit supplemental information for the SWA's consideration. Program experience has shown that the majority of employers will accept the SWA's determination and will, therefore, only spend 30 minutes preparing and submitting the Prevailing Wage Request form to the appropriate SWA. The Department has found that employers challenge the SWA's determination and submit supplemental information in approximately 7,500 prevailing wage determination requests and that it will take employers 45 minutes to prepare such requests. The total annual burden of the prevailing wage determinations is $(100,000 \times .5 \text{ hours}) + (7,500 \times .75 \text{ hours}) = 55,625 \text{ hours}$.

I. Certifying Officer Review of Prevailing Wage Determinations

Employers may request review of a SWA's prevailing wage determination by filing a request for review within 30 calendar days of receiving the SWA's determination. The request for review must clearly identify the particular wage determination (PWD) from which review is sought, set forth the particular grounds for the request, and include all materials pertaining to the PWD submitted to the SWA up to the date of the PWD received from the SWA. Program experience has shown that approximately 750 requests for review will be filed with the ETA prevailing wage panel and it will take employers 45 minutes to prepare each request for a total annual burden of 563 hours.

TOTAL ANNUAL BURDEN HOURS FOR ALL INFORMATION COLLECTIONS –
342,686 HOURS

Employers filing applications for permanent alien employment certification may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at \$25 an hour. Total annual respondent hour costs for all information collections are estimated at \$8,567,150 ($342,686 \times \$25.00 = \$8,567,150$).

A.13. Estimated cost burden to respondents.

There is no filing fee involved with filing a Form ETA 9089. However, there are other costs involved with preparation of the form and filing fees charged by DHS for the principle application to which the ETA 9089 is attached as supporting documentation. The Department assumes that employers would incur the preliminary costs such as advertising even if they were not filing for labor certification since they are required to make good faith efforts to recruit U.S. workers and it is assumed that advertising their job openings is a normal cost of doing business. Therefore, the Department is not including any out-of-pocket expenses as part of its burden estimates for the majority of cases. However, as indicated in item A12F above, the Department estimates that 5,000 employers will be required to conduct supervised recruitment. The Department estimates that cost of an advertisement over all types of publications and geographic locations will average \$500.00 for a total annual burden of \$2,500,000.

A.14. Estimated cost burden to the Federal government.

The average Federal Government cost for a year of operation is estimated on an hourly basis multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, otherwise known as Fully Loaded Full Time Equivalent (FLFTE). The index is derived by using the Bureau of Labor Statistics' index for salary plus benefits and the Department's internal analysis of overhead costs averaged over all employees of OFLC. The total cost to the Federal Government is estimated at \$13,729,165, calculated as follows:

The Department estimates SWA staff spend one (1) hour on average to process job orders and determine the prevailing wage. The average hourly rate for SWA staff is estimated to be \$30.57 per hour for a total cost burden of \$5,166,330 ($\$30.57 \times 1.69 \times 1 \times 100,000$).

The Department estimates that 70 percent of the applications are "clean" and do not raise any audit flags. "Clean" applications require 0.25 hours of DOL staff time. The

average hourly wage of the reviewer is estimated to be \$30.57 (GS 12, step 5) for a total cost burden of \$904,108 ($\$30.57 \times 1.69 \times .25 \times 100,000 \times 70\%$).

The Department estimates the 30 percent of the application will be audited and will require, on average, four (4) hours of DOL staff time. An analyst will spend three hours reviewing an application that is being audited and a manager will be spend an hour. The average hourly wage of an analyst is estimated to be \$30.57 (GS 12, Step 5) and for a manager is estimated to be \$42.96 (GS 14, Step 5) for a total cost of \$6,827,769 [$(\$30.57 \times 1.69 \times 3 \times 100,000 \times 30\%) + (\$42.96 \times 1.69 \times 1 \times 100,000 \times 30\%)$]

The Department estimates DOL staff spends one (1) hour on average to analyze a request for reconsideration of a denial. An Analyst will spend 45 minutes reviewing a request and a manager will spend 15 minutes. The average hourly rate for an analyst is estimated to be \$30.57 per hour (GS-12 Step 5) and for a manager is estimated to be \$42.96 (GS 14, Step 5) for a total cost burden of \$284,490 [$(\$30.57 \times 1.69 \times .75 \times 5,000) + (\$42.96 \times 1.69 \times .25 \times 5,000)$].

The Department estimates DOL staff spends three (3) hours on average to prepare a case for transfer to BALCA. The average hourly rate for DOL staff is estimated to be \$14.60 per hour (GS-6 Step 3) for a total cost burden of \$333,099 ($\$14.60 \times 1.69 \times 3 \times 4,500$).

The Department estimates DOL staff spends one (2) hour on average to analyze the inculpatory evidence received. The average hourly rate for DOL staff is estimated to be \$30.57 per hour (GS-12 Step 5) for a total cost burden of \$6,716 ($\$30.57 \times 1.69 \times 2 \times 65$).

The Department estimates USCIS staff spends twelve minutes (.2 hours) on average to read and analyze the information contained in the form, which will be attached to applications for permanent residency. The average hourly rate for USCIS staff is estimated to be \$30.57 per hour (GS-12 Step 5) for a total cost burden of \$206,653 ($\$30.57 \times 1.69 \times .2 \times 20,000$).

A.15. Reasons for any program changes reported in Items 13 or 14 of the OMB Form 83-1.

The annual burden for these information collections is expected to increase from 264,243 hours to 342,686 hours, resulting in an increase of 78,443 hours. The increase in burden hours is attributed to DHS now utilizing this form for their NIW program and the increase in petitions for reconsideration and appeals.

A.16. Method for publishing results.

No collection of information will be published.

A.17. If seeking approval not to display the expiration date for OMB approval, explain why display would be inappropriate.

The Department will display the expiration date for OMB approval on the form and instructions.

A.18. Explanation of each exception in the certification statement identified in Item 19 "Certification for Paperwork Reduction Act Submissions" on OMB Form 83-1.

The Department is not seeking any exception to the certification requirements.

B. Collection of Information Employing Statistical Methods

No statistical methods are employed.