AMERICAN IMMIGRATION LAWYERS ASSOCIATION

January 23, 2015

Thomas E. Perez, Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Modernizing and Enhancing the PERM Labor Certification Program

Dear Secretary Perez:

On November 20, 2014, President Obama announced a series of executive actions to help fix the nation's broken immigration system. As part of these efforts, the Department of Labor also announced that it would undertake a comprehensive examination of the permanent labor certification process and regulatory requirements in an effort to modernize the program and make it more responsive to changes in the national workforce.[1]

AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. As a result, our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government. In addition, through our national Department of Labor Liaison Committee, AILA has engaged extensively with the Office of Foreign Labor Certification (OFLC) over the years, and routinely raises issues and difficulties encountered by our members and their employer clients as they navigate the electronic permanent labor certification system known as PERM. As such, we are deeply familiar with the labor certification program, its developmental and regulatory history, and the intricacies of preparing and filing a PERM labor certification application. We submit these comments with an eye toward improving the PERM system for both OFLC and our employer clients, who represent the interests of a multitude of business sectors and industries, from small and emerging businesses to Fortune 500 companies, whom collectively contribute significantly to the global economy.

Promote Predictability and Fundamental Fairness in the PERM Labor Certification Process

It goes without saying that an agency should be held to the rules and standards encompassed in its regulations and current policy guidance. When agency interpretations change, fundamental

[1] *See* http://www.dol.gov/dol/fact-sheet/immigration/perm.htm.

fairness necessitates that the regulated community be given notice of the change, and the opportunity to adjust prevailing practices accordingly. While AILA commends OFLC for engaging regularly with the public through its quarterly stakeholder engagements and the provision of policy interpretations through "FAQs" and other guidance, it is critical that changes in regulatory interpretation or modification of OFLC internal practices not be applied retroactively to pending cases.

In recent years, we have observed two occasions where a new policy interpretation resulted in the denial of hundreds of pending PERM applications for a wide range of employers. In both instances, OFLC ultimately agreed to reverse the denials, but not before employers were required to expend significant resources on appeals, new applications, and other measures to address the uncertainty caused by these policy shifts. As the examples noted below make clear, OFLC must put in place a process through which new policy interpretations are announced, and ensure that those interpretations only apply to cases filed after the announcement.

The first example of an unannounced policy change occurred in July 2013, when OFLC began denying PERM applications on the basis that a requirement for a degree in "engineering" was not sufficiently specific for occupations such as software engineers, computer programmers, and similar positions. Many cases were denied without audit, so employers had no opportunity to explain why an "engineering" degree was in fact appropriate for the position. After substantial efforts by AILA and other stakeholder groups, OFLC ultimately agreed to reopen and reverse these denials, but not before the affected employers incurred substantial economic losses.

The second instance occurred in late 2013. The current version of the PERM Form ETA 9089 does not ask for or include a designated space to list a license, certification, or other non-experienced based qualification that the employee possesses that might be required for the position. For many years, in apparent recognition of this limitation, OFLC would approve cases with a non-experienced based requirement, presumably because the beneficiary's possession of the qualification could easily be inferred from other information on the application (for example: a medical doctor with several years' experience in the U.S. is presumed to have a medical license). However, in late 2013 OFLC began denying applications for failure to list the beneficiary's qualification, without providing any notice of an impending policy shift. This had a particularly negative effect on doctors, school teachers, and other licensed professionals. As with the "engineering" denials described above, OFLC ultimately reversed course, and in July 2014 posted a new FAQ explaining how to use Section K to address this issue.[2] However, by changing an interpretation without notice, the OFLC was forced to expend a substantial amount of resources to correct inappropriate denials, and employers likewise incurred economic losses.

In the interest of transparency, and to prevent problems such as this from happening in the future, OFLC should implement two simple process changes. First, OFLC should give advance notice to the regulated public of any planned policy changes. In doing so, policy announcements should be given an "effective date" of at least three to six months after the date of the announcement to allow employers sufficient time to comply with the change prior to filing their applications. OFLC should also consider taking an approach similar to USCIS, which several years ago began posting new policy guidance on its website and providing the public the opportunity to

[2] *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#alien8.

comment.[3] Second, when OFLC implements a policy change, it should ensure that the change is applied only to those cases filed on or *after* the effective date contained in the announcement. Given the lengthy processing times, fundamental fairness requires that new policy interpretations not be applied retroactively. By implementing these simple changes, OFLC will succeed in infusing far greater predictability and fairness into the PERM process, while continuing to further its mission to protect U.S. workers.

Eliminate "Harmless Error" as a Basis for Denial

Under the current PERM regulations, any error, no matter how small, is fatal to the labor certification. Even if the employer discovers the error, there is no opportunity to correct it. This "zero-tolerance" policy is found at 20 CFR §656.11(b) which states, "Requests for modification to an application will not be accepted for applications submitted after July 15, 2007."[4] The fall-out from this rule can be significant. Typically, by the time the case comes up for review and DOL processes the denial, the underlying recruitment is expired, and the employer must begin the process anew, often at great expense.[5]

Harmless errors can occur at two stages of the process. First, they can occur when preparing the ETA 9089, a very extensive, very detailed form with more than 150 fields. Typographical errors, letter or number transposition, and inadvertently leaving a field blank are typical of the errors that can and often do occur. Errors can also occur after filing during the audit process. An employer must respond to an audit request with detailed and significant evidence within a short period of time, often 30 days. An audit response can often require the employer to reproduce multiple portions of the file, execute affidavits, and develop letters and evidence to explain the technical requirements for the job, such as the need for experience in a particular computer application or fluency in a foreign language. In the process of responding to a detailed audit, the employer can easily overlook a minor detail.

While we recognize that not every error is harmless, many can be easily corrected. Real world examples where a harmless error led to an unnecessary denial include:

- **Section C, "Employer Information," Question 5, "Number of Employees."** The employer failed to complete this question and the case was denied without audit. The test of the labor market and the substance of the application are the same whether the employer has three or 3,000 employees. Accidentally omitting this information should not lead to a denial.

[3] *See* http://www.uscis.gov/outreach/feedback-opportunities.
[4] 20 CFR §656.11(b) was promulgated on May 17, 2007 as part of the final rule to "reduc[e] the incentives and opportunities for fraud and abuse" in the labor certification program, and codified DOL's position in the BALCA decision *Matter of HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc). In that case, the employer made a typographical error when entering the date of an advertisement into the form. The error was obvious because the employer submitted the newspaper tear sheets which reflected a different date. The Certifying Officer denied certification, and BALCA reversed holding that this type of harmless error should not be a basis for denial.
[5] The employer cannot simply correct a minor error and refile the case, because advertising "expires" after 180 days. Sunday advertising can cost thousands of dollars. Indeed, newspapers such as the *New York Times* typically charge $2,000 to $3,000 for two advertisements for a professional position.

- **Section H, "Job Opportunity Information," Question 6, "Is experience in the job offered required for the job."** The employer mistakenly forgot to check the "yes" or "no" box. The case was denied without an audit.

- **Section J, "Alien Information," Question 5, "Country of citizenship."** The employer accidentally indicated the foreign worker was a U.S. citizen and the case was denied without audit.

- **Failure to date the signature line.** In an audit response, the employer signed the ETA 9089 but failed to date the signature. The application was denied without audit.

- **Poor copies of advertising tear sheets.** The employer responded to an audit request by submitting copies of the newspaper tear sheets. While reproducing the copies, the corner of the page was turned so that the date of the advertisement was not visible. DOL denied certification for failure to adequately respond to the audit request.

In all of these examples, OFLC could have easily allowed the employer to offer clarifying information rather than denying the application. Put simply, no case should be denied for a typographical or harmless oversight on the ETA 9089 or when responding to an audit request without providing the employer an opportunity to provide evidence to show that all of the PERM regulatory elements have been met. The regulation at 20 CFR §656.20(d)(1) authorizes OFLC to request missing information in a PERM case, and due process and fundamental fairness require such a request be made to the employer when a typographical error or simple oversight is apparent. DOL can easily issue a "request for information" or an audit letter. Allowing employers the opportunity to provide evidence to address harmless errors will restore fundamental fairness to the process by permitting employers to proceed with an otherwise meritorious application without incurring the significant expense of starting the PERM case over again. A harmless error rule would also redirect DOL resources to considering and resolving applications on their merits.

Reduce the Backlogs for PERM Applications at OFLC and BALCA, and Shorten Processing Times for OES-Based Prevailing Wage Determinations

Though processing times fluctuate according to demand, the overall average processing times for PERM applications and prevailing wage determinations (PWDs) are too long and can create problems when delays lead to lapses in the employee's underlying nonimmigrant status and employment authorization.

When the PERM program was launched in 2005, the intent was that cases would generally be adjudicated within 45 to 60 days.[6] Indeed, during PERM's early months, cases were adjudicated in a matter of weeks, whether or not they were selected for audit. However, at present, the

[6] *See* 69 Fed. Reg. 77326, 77328 ("[w]e anticipate an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed.")

standard processing time for cases not selected for audit ranges from four to six months, while cases in the audit queue take approximately 18 months.[7]

The PERM system requires employers to conduct recruitment prior to filing the application. In order for employers and the American public to gain confidence in the system, it is essential that PERM applications be adjudicated closer to the time the actual labor market test took place. Moreover, many of the PERM process steps and evidentiary requirements that are built into the regulations assume a 45 to 60 day processing time. It is critical that DOL honor the time frame to which it committed when PERM was instituted. The processing time for audited cases should be no more than three months from the date of filing.

The backlog of appeals pending at BALCA is approximately three years. OFLC should focus on reducing this backlog to ensure that PERM denials are reviewed in a more timely and meaningful manner. We also encourage BALCA to publish and regularly update its processing times so that employers have a better understanding as to how long an appeal of an adverse PERM decision may take.

OFLC's stated goal for processing prevailing wage determinations for PERM applications is 60 days and experience dictates that processing generally falls within a six to eight week time frame. However, in most cases, wage data is readily available through the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) program. With this in mind, we urge OFLC to work toward a two-week standard processing time frame for OES-based prevailing wage requests.

Explore the Possibility of Charging Reasonable Filing Fees in Exchange for Faster, Reliable Processing Times

Though we understand that the imposition of a filing fee for PERM labor certification applications might require a regulatory or legislative fix, we encourage DOL to explore the feasibility of this option. Any fee analysis should also include an examination of a fee-based expedite service, similar to U.S. Citizenship and Immigration Services premium processing for certain employment-based applications and petitions. A fee-based system might allow OFLC to continue to process applications in the event of a future federal government shut down or sequester, or at least recover from a lapse in appropriations more swiftly and with less impact on employers. We note, however, that should DOL ultimately implement a fee for the PERM labor certification process, such fees should be reasonable and also include adequate provision for a fee waiver, perhaps for non-profit employers or employers who demonstrate financial need. Fees should also be dependent upon OFLC reducing processing times, as described above, for PERM applications and associated PWDs.

Update the Recruitment Regulations to Incorporate Real World, Modern Recruitment Practices

The PERM recruitment requirements run far afield from standard "real world" recruitment practices and are thus often confusing to employers. The regulations require employers to test the

[7] *See* https://icert.doleta.gov/#fragment-2?utm_source=InfoNet&utm_medium=referral&utm_campaign=Homepage_ContentBlock

labor market using recruitment methods that are uncommon or obsolete, while providing information (such as salary) that would not normally be disclosed until much later in the interview process. In addition, many of the regulatory recruitment methods are both expensive and unproductive. Noting that real world recruitment practices differ vastly between professional and non-professional positions, our comments are limited to recruitment for professional positions (20 CFR §656.17(e)(1)).

State Workforce Agency (SWA) Job Orders. This requirement [20 CFR §656.17(e)(1)(i)(A)] should be eliminated. Each SWA has different, and often confusing, posting requirements and are rarely used by professional job seekers. Furthermore, as SWAs upgrade their electronic platforms, issues have been raised as to whether a particular job order complies with the PERM regulations. A national job board, with data fields consistent with the regulations, could be a viable alternative.

Sunday Advertisements. For applications for professional occupations, the requirement to advertise the position on two different Sundays in a print newspaper of general circulation should be removed from the list of "mandatory steps" at 20 CFR §656.17(e)(1)(i)(B) and moved to the list of acceptable "additional recruitment steps" at 20 CFR §656.17(e)(1)(ii). This would create one set of options from which the employer must choose to conduct its recruitment. Sunday newspaper advertisements are extremely expensive, but are infrequently consulted by job seekers in today's economy. As a result, many employers rarely use such ads as a standard recruitment method for professional positions. By not requiring any mandatory recruitment steps, and permitting employers to choose all sources from a suggested list, the process is brought closer to the actual practices of modern employers, and thus, to the real world.

Notice of Filing (NOF). The primary purpose of the NOF is not as a method of recruitment, but rather to provide notice to the employer's workforce that the employer is submitting a labor certification application.[8] Because of this, information on the NOF should be limited to:

- The job title;
- A description of the job sufficient to apprise workers of the nature of the position; and
- The offered wage, which may be stated as a range as long as the bottom of the range is at or above the prevailing wage. If the offered wage is stated as a range, the wage offered to the foreign national at the time the application is filed must be within the stated range.

Under the current regulations at 20 CFR §656.10(d)(4), the NOF must also include all information required for advertisements under §656.17(f), including information as to how interested applicants can apply for the job. The use of the NOF to achieve both notice and recruitment goals is confusing and unnecessary. The regulations should be amended to limit the NOF to one purpose, namely notice to employees. For the same reason, DOL should

[8] "Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers." *See* 69 Fed. Reg. at 77338.

eliminate the requirement under 20 CFR §656.10(d)(1)(ii), that the NOF be posted "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions."

Honor and Incorporate Existing Real World Employment Practices into the PERM Process

The current PERM regulations also do not accurately reflect real world practices in the hiring and promotion of U.S. and foreign workers. DOL must close this gap between regulation and reality so that employers are not forced to make convoluted efforts to comport with the regulatory labor certification requirements while running afoul of their own internal practices. For example, DOL should:

- **Allow the use of experience gained in a same or a similar position at the sponsoring employer**. The current rule, at 20 CFR §656.17(i)(3), prohibits the beneficiary from qualifying for the position through experience gained in a same or similar position with the sponsoring employer. This encourages foreign nationals to "jump ship" to a new employer so that their U.S.-based work experience can be considered in the labor certification process. This can be very costly for U.S. businesses that have already invested significant time and money in training and employing the foreign worker, and disruptive to the remaining workers who must bear the brunt of the negative impact on day-to-day work as a result.

- **Recognize modern workplace practices such as telecommuting and other flexible work arrangements**. The PERM process must be amended to recognize that telecommuting and flex-work arrangements are now part of the fabric of our workforce.

- **Recognize the distinction between traveling and roving**. The PERM process must be amended to recognize the distinction between a position involving *travel* (e.g., a Sales Engineer who travels to client sites) versus a position involving *roving* (e.g., a consultant who is assigned long-term at one site, then moves to another site long-term). In the latter case, no travel is required once the employee is assigned to a particular worksite.

The PERM process and resulting DOL adjudications demonstrate little understanding or flexibility when it comes to these common work arrangements. Burdensome audits and unnecessary denials should not be imposed merely because a position does not involve a Monday through Friday, nine-to-five work schedule at the employer's physical premises. Moreover, the ETA 9089 is not designed to easily inform DOL of such arrangements. DOL should seek input from stakeholders on these and other developing issues, and issue clear guidance for advertising, prevailing wages, and how to complete the ETA 9089 for such positions.

Take Steps to Ensure that Prevailing Wage Determinations Accurately Reflect Current Market Wages

An important part of OFLC's mission is to ensure that the employment of a foreign national worker will not negatively impact the wages of a similarly employed U.S. worker. We strongly support these and other principles designed to protect all of those engaged in the U.S. workforce,

and believe that no one should be paid below-market wages. However, the current PWD process often results in wage requirements that are skewed in the opposite direction, thus requiring employers to pay a foreign national worker a wage that is well above the market rate. This increases employer costs substantially and can ultimately force employers who must rely on foreign national workers to move projects abroad. The following examples illustrate the problems with the current PWD process:

Misclassification of Jobs into the Wrong Standard Occupational Classification

Under the current system, employers submit a job description and list of educational and experience requirements to the National Prevailing Wage Center (NPWC), which reviews that information and assigns the position to a particular occupational code and skill level (ranging from entry-level to very experienced). This is typically done through the BLS OES system. Unfortunately, positions are often misclassified into incorrect occupational categories and assigned skill levels greater than that which is dictated by DOL's 2009 Prevailing Wage Determination Policy Guidance.[9]

This commonly occurs with positions in the information technology sector. For example, if a technology position involves even minimal supervision of junior workers or portions of projects, the NPWC will often classify the position as a Computer and Information Systems Manager (11-3021.00), an occupational category that is intended to encompass Chief Information Officers and other senior technology management positions. This error can result in a salary differential of $20,000 or more. This problem was acknowledged by BALCA in *Matter of Meltwater News US1*, 2014-PWD-0005 (July 16, 2014), where the board noted that the "occupational profile for Computer and Information Systems Managers suggests that a CI Systems Manager holds a relatively high-level managerial position." Nevertheless, the misclassification of positions as managerial or supervisory in the IT industry and others continues.

Many large companies spend hundreds of thousands of dollars annually on salary benchmarking to ensure that they are paying wages to all of their employees that are competitive within the market. These employers strive to pay each worker with similar background experience and job duties at the same salary level. The conclusion by the NPWC that these companies are significantly underpaying a foreign national worker is simply not based in reality.

Rejection of Valid, Industry-Standard Prevailing Wage Surveys

Under 20 CFR §656.40(g), employers are permitted to use scientifically-valid independent compensation surveys, such as Radford, Mercer, and Towers-Watson, as an alternative to the OES wage survey. Independent compensation surveys are extremely valuable tools for employers in setting employee wage levels because they tend to be based on very detailed data, with added levels of education, experience, and other relevant factors to allow differentiation between real-world career stages. Surveys such as these are so accurate and

[9] *See* Employment and Training Administration, "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs," (*revised* Nov. 2009), *available at* http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

reliable, many employers, especially in highly competitive geographic areas like Silicon Valley, pay thousands of dollars per survey to ensure that their compensation packages remain competitive.

Despite the fact that these surveys are permitted under the regulations, the NPWC frequently rejects them for what appear to be generalized and often ill-defined reasons, such as the conclusion that the job description in the survey is not a sufficient "match" for the job description provided by the employer. Companies use these surveys not to pay a foreign worker a below-market wage, but rather to treat all of their workers consistently, fairly, and in a manner that is competitive to the market. For these reasons, DOL should adopt a more generous approach in its acceptance of commercial wage surveys as a valid basis for justifying a prevailing wage.

Mismatch between the OES Survey and Modern Occupations

The occupational categories available in the OES wage survey are controlled by the Standard Occupational Classification (SOC) system which the BLS has not updated since 2010, and which is not scheduled to be updated until 2018. Meanwhile, modern business practices have continued to grow and evolve, and changing workplace realities have led to the emergence of job categories that did not exist in 2010. Though BLS periodically adds emerging occupations to the "All Other" SOC classification, and many times these new occupations have detailed descriptions that accurately depict the position in question, DOL often refuses to rely on the "All Other" classification for prevailing wage purposes, stating that such classifications lack adequate wage data.

If DOL is hesitant to rely on the "All Other" classification when issuing PWDs, BLS should, at a minimum, review the occupations listed under the "All Other" classifications on a regular basis and move such occupations to their own classification as soon as BLS is comfortable with the reliability of the data. This review should take place on an ongoing basis and should not be dependent on a revision of the entire SOC that occurs only every 8 to 10 years. By allowing these occupations to languish in the "All Other" category, employers are inappropriately being held to prevailing wage standards that are not reflective of the job duties the employee is actually performing. A frequent assessment and transition of "All Other" occupations to their own distinct category would greatly improve the degree to which the SOC reflects the modern U.S. workforce.

Unsubstantiated Wage Differentials for Positions Requiring a Foreign Language or Travel

If a position requires the employee to have knowledge of a foreign language or to travel, and such a requirement is not normal to the occupation, DOL generally adds a wage level to the PWD. In other words, if the position would normally be assigned a Level 2 wage, a foreign language or travel requirement increases the wage to a Level 3. For professional positions, it is not uncommon for each wage level to represent an increase of 20 percent or more. If the position requires knowledge of a foreign language *and* travel, DOL generally adds two levels to the PWD, representing a wage differential that is often 40 percent or greater. These wage differentials are not in line with the actual compensation practices of U.S. employers.

> Moreover, when surveying employers to collect wage data for the DOL's prevailing wage database, BLS does not ask whether employers pay higher wages for positions that involve a foreign language or travel. As such, the wage differentials are unsubstantiated by real world data and have a punitive effect on employers seeking to expand in the global marketplace. Unless and until DOL finds that foreign language and travel requirements not normal to the occupation actually result in wage differentials, employers should not be forced to pay significantly higher wages for these jobs.

By making adjustments such as these to the PWD process, DOL can ensure that PWDs accurately reflect market wages. Not only will this protect the interests of U.S. workers and foreign nationals, it will also allow employers to remain competitive in the global marketplace.

Amend the Methodology for Determining Degree/Experience Equivalency so that the Positions of DOL and USCIS are Consistent

DOL and USCIS use conflicting methods to equate experience to education which creates a great deal of confusion for employers. For example:

- Under USCIS regulations at 8 CFR §214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience is the equivalent of one year of college-level education. Therefore, under this interpretation, 12 years of experience would be the equivalent of a bachelor's degree. To demonstrate equivalence to a master's degree, USCIS requires the employee to have a bachelor's degree, plus five years of progressive experience in the specialty.[10]

- DOL takes the position that a four-year bachelor's degree program includes two years of general education and two additional years of specific education or vocational preparation. Therefore, under DOL's Specific Vocational Preparation guidelines, two years of experience is equivalent to a bachelor's degree and four years of experience is equivalent to a master's degree.[11]

These differing standards create complex issues when the foreign employee lacks a single source degree but has many years of work experience. Employers must try and reconcile the competing standards while shepherding the employee through the nonimmigrant visa, PERM, and immigrant visa processes. To comply with the different standards, the employer must often set forth illogical or inconsistent job requirements. DOL and USCIS should agree on a single consistent approach to the experience/education equivalency determination.

Expand the List of Designated Shortage Occupations under Schedule A and Establish a Regular Review Process

At present, only physical therapists, professional nurses, and aliens of exceptional ability in the sciences or arts or performing arts are included on Schedule A, the list of occupations for which DOL has determined there are not sufficient U.S. workers who are able, willing, qualified, and

[10] 8 CFR §204.5(k)(2) and 8 CFR §214.2(h)(4)(iii)(D)(5).
[11] 69 Fed. Reg. at 77332; SVP guidelines at http://www.onetonline.org/help/online/svp, Field Memorandum No. 48-94 (May 16, 1994); *Matter of Globalnet Management LC,* 2009-PER-00110 (Aug. 6, 2009).

available.[12] DOL should systematically review BLS data on an annual basis to determine whether there are labor shortages in additional occupations (or conversely, whether a shortage no longer exists) and amend Schedule A accordingly to reflect changes in the labor market. In doing so, DOL should also consider expanding the list based on specific skill sets. For example, DOL could designate Science, Technology, Engineering, and Mathematics (STEM) master's degree fields as Schedule A occupations. This could be accomplished through the addition of a third group of occupations to 20 CFR §656.5 (i.e., Schedule A, Group III).

Incorporate Changes to Improve the ETA 9089 Form

The ETA 9089 is designed to capture information essential to the labor certification application process, such as recruitment efforts, job description, and the beneficiary's work history, skill sets, and biographical data. Though an integral and necessary part of the PERM process, the form sometimes falls short when it comes to documenting unique aspects and particulars of a job. We provide the following suggestions to improve the ETA 9089:

- **Provide appropriate space for the employer to explain business justifications under Section H, "Job Opportunity Information."** Lacking any other appropriate space, most employers use H-14, "Specific Skills or Other Requirements" as a catch-all to explain unique issues and other special items.

- **Add another subsection to Section H, "Job Opportunity Information" for positions that involve third party worksites.** This subsection should be an open, descriptive field similar to H-14 so the employer can explain whether the placement is permanent or temporary, and provide any other necessary details. A separate field should be created to capture whether travel expenses will be reimbursed.

- **Add another subsection to Section H, "Job Opportunity Information" to account for worksites that are in a different geographic location than the employee's home address**. The new subsection should require the employer to provide a description of the commuting arrangement (e.g., employee travels to worksite Monday through Friday, all expenses paid by the employer). We also suggest adding a question as to whether the employee can live anywhere in the U.S. and if not, allow the employer to explain why residence in a specific geographic area is required. For example, some telework positions require the employee to live in a specific geographic region or in the employer's defined sales district so that the employee can be readily available to service clients in that geographic area.

- **In the drop down box list of countries in Section J, "Alien Information," Question 5, "Country of Citizenship" and Question 6, "Country of Birth," Move "United States" so that it appears in the alphabetical list of countries. "**United States" is currently listed first. An employer could easily slip up and select this option in error, which may result in an automatic denial, as the Immigration and Nationality Act prohibits the filing of a labor certification for a U.S. citizen.

[12] 20 CFR §656.5.

- **Remove or modify Question H-12 "Are the job opportunity's requirements normal to the occupation?"** This question is entirely too technical and cannot be assessed and answered by most employers. As an alternative to deleting it, the question could be modified to read, "Are the job opportunity's requirements normal to the employer's occupational requirements?"

- **Add a new section for the employer to include the employee's qualifications such as certifications, licensure, and other credentials.** The July 28, 2014 FAQ[13] would need to modified so that Section K could once again be used for employment experience.

- **Expand existing warning prompts to prevent inadvertent errors leading to denial.** For example, the following items, if input incorrectly, should, but do not currently prompt an error message. This list is not exhaustive.

    - **Question F-1**: Invalid PWD tracking number, e.g. fewer digits than the standard.
    - **Question F-7 and 8**: PWDs with dates showing less than a 90 day validity period.
    - **Questions F-2/I-1**: The SOC code is a professional classification (F-2) but the employer indicates the job is not professional (I-1).
    - **Section F/Section I**: The date entered in Section F shows that the PWD has expired but the dates of recruitment in Section I indicate that the recruitment began before the PWD was issued.

Improve Customer Service Communications and Ability to Assess Case Status

OFLC has a number of different telephone numbers and e-mail addresses for employers who require customer service or other assistance. However, our members who engage these services frequently report varying degrees of success in obtaining the answer they need or in resolving the underlying problem. We encourage OFLC to develop Standard Operating Procedures for its customer service, incorporating the following recommendations, and post the SOPs on its website.

- **Telephone**: OFLC contractors should accept telephone inquiries and inform customers that they will receive either a telephone response or e-mail response within a certain period of time (e.g., 15 days). OFLC contractors should also assign the inquiry a case number so that if customers need to follow up, there is a record of prior contact. If an adequate response is not received from OFLC within the designated timeframe, customers should have the means to follow up with a supervisor or other secondary level of inquiry via a different phone number and/or e-mail address.

- **E-mail**: Customers who contact OFLC by e-mail should receive an automatic response confirming receipt of the e-mail and the timeframe within which OFLC will respond. Like the proposed telephone system described above, if a response is not received within the designated timeframe, customers should have a means to follow up with a supervisor or other secondary level of inquiry. Although this is an important feature for customer

[13] *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#alien8

service inquiries in all OFLC product lines, it is of particular importance for inquiries on supervised recruitment cases, where employers are encouraged to communicate via e-mail. When an employer does not receive a timely response, they may be compelled to send duplicate e-mails to ensure that their response is received by the deadline, which can further clog the system.

- **Ombudsman Program**: We encourage DOL to expand the Ombudsman program, which is currently limited to H-2A and H-2B cases, to other product lines. The OFLC Ombudsman should be available to help customers resolve issues that could not be resolved through the normal customer service channels. Similar to the mandate of the CIS Ombudsman under the Department of Homeland Security, the OFLC Ombudsman could also make recommendations to improve OFLC programs based upon customer feedback.

- **PERM Sponsorship Verification**: Under current procedures, employers are required to verify the submission and sponsorship of PERM applications. OFLC sends an electronic questionnaire to the employer who has 7 days to respond. If the employer does not receive the questionnaire or is unable to respond within 7 days, an OFLC contractor will attempt to verify sponsorship by contacting the employer by telephone. If the contractor is unable to speak with the employer, he or she will not leave a message. If, after four attempts the contractor is unable to speak to the employer, the application is denied.

  Moreover, employers are prohibited from confirming sponsorship by affirmatively contacting OFLC and it may take 2 to 3 months before the OFLC contractor verifies sponsorship. Uncertainty as to whether the employer may have missed the contractor's telephone calls and whether the PERM application will be denied on a technicality is a cause for great concern for many employers. This practice has also been questioned by BALCA.[14]

  We recommend that OFLC modify the sponsorship verification process to avoid unnecessary denials. For example, if an employer is unable confirm sponsorship via the electronic questionnaire, the employer should be able to do so through a dedicated telephone line and/or e-mail address. The creation of a mechanism for employers to affirmatively verify sponsorship should reduce the number of applications that are denied unnecessarily while making the process more efficient by allowing OFLC contractors to focus on other areas of the program.

  OFLC Website/Case Status: At present, the OFLC website provides the following limited case status information: "In Process," "Certified," or "Denied." We recommend that this be expanded to provide more detailed case status information, such as "Sponsorship Verification" (if an employer has not yet successfully completed the sponsorship verification process described above), "Audit," "Supervised Recruitment," "Motion to Reopen," and "Appeal." Additionally, it appears that case status is not currently updated on a consistent and regular basis, particularly when a PERM

[14] *See Matter of Pickering Valley Contractors*, 2010-PER-01146 (BALCA 8/23/11).

application has been denied. If the website provided more detailed and accurate status information, the number of inquiries to the PERM Help Desk should decrease.

Conclusion

We thank you for taking the time to review and consider these comments as you look toward modernizing the PERM labor certification program and regulations. We look forward to a continuing dialogue on these and other issues.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

cc: Portia Wu, Assistant Secretary, Employment and Training Administration, U.S. Department of Labor
Seema Nanda, Deputy Chief of Staff, U.S. Department of Labor
William W. Thompson, Acting Administrator, Office of Foreign Labor Certification, U.S. Department of Labor
Lauren Bernstein, Acting Director of Policy, Office of Foreign Labor Certification, U.S. Department of Labor