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Room C–4312
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Submitted via Electronic Mail to ETA.OFLC.Forms@dol.gov

Re: Comment Request for 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; published at 77 Fed. Reg. 40383-40384 (July 9, 2012).

About EPI

Since 1986, the Economic Policy Institute has investigated and reported on labor market issues and the conditions of low- and middle-income workers. EPI examines the economic landscape and analyzes what is happening to working families – including the college-educated workers who enter the country with temporary nonimmigrant visas, as well as the high percentage of Americans who are skilled and educated, but currently unemployed, and who are actively seeking employment opportunities.

I. Introduction

The Economic Policy Institute (EPI) generally SUPPORTS the Department of Labor’s proposed changes to Labor Condition Application Form 9035/9035E, for the collection of additional data from petitioning employers, as well as the changes to the Department’s LCA instructions on Form 9035CP, the updated version of the Form 9035’s current instructions. We also concur with and support the comments submitted by the AFL-CIO.
II. The LCA Process in the United States

Section 212(n) of the Immigration and Nationality Act governs the Labor Condition Application (LCA) process and its enforcement. Subsection 212(n)(1)(A)(ii) requires that “The employer will provide working conditions for such a nonimmigrant [H-1B worker] that will not adversely affect the working conditions of workers similarly employed.” We believe that most of the evidence we have reviewed suggests that the current LCA process is not satisfying this requirement – in other words, it is failing to protect the working conditions of U.S. workers in major H-1B occupations. In fact, the current H-1B/H-1B1/E-3 LCA process in the United States is perfunctory at best and a rubber stamp at worst, as numerous government studies by the Inspector General and U.S. Government Accountability Office (GAO) have documented. There are several reasons for this.

First, unless an employer is “H-1B dependent” ¹ or was found to be a “willful violator,” the employer is not required to recruit U.S. workers for job openings they wish to fill with temporary foreign workers. Effectively, this means that employers are legally permitted to entirely bypass the U.S. workforce for open positions that require a college education. Those employers that are H-1B dependent or willful violators must simply “read and agree” and literally check a box containing a statement that they have recruited “U.S. worker[] applicants who are equally or better qualified than the H-1B” ² worker – but employers are not required to prove that they have done so.

It is important to note that an H-1B dependent or willful violator employer can easily avoid the non-displacement and recruitment requirements imposed on it. If the H-1B dependent or willful violator employer hires only H-1B workers on an LCA who either hold a Master’s degree or higher, or receives an annual salary of $60,000 or more, the employer will be exempted from the non-displacement, recruitment, and hiring obligations that otherwise are required.³ It makes sense to allow employers who pay H-1B workers high, above average wages to have streamlined access to those workers and to be exempt from recruiting U.S. workers, since an above-average wage is evidence that the H-1B worker has exceptional skills which are in high demand. But in our opinion, $60,000 per year is far too low a wage to allow employers to bypass American college-educated workers. Recent Bureau of Labor Statistics data support our claim: The median hourly wage for all college educated workers in the United States last year was $59,800 – just $200 dollars below the H-1B dependency cutoff. Male college educated workers earned a median annual wage of $69,264; almost $10,000 dollars more. The most common LCA occupations are computer-related, where the median annual

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wage is generally more than $80,000 according to the BLS.\(^4\) Furthermore, last year the Department of Commerce reported that all workers in science, technology, engineering and mathematical occupations have suffered from flat wages over the past decade and unemployment rates that are double what they were before the recession,\(^5\) and the GAO reported that U.S. workers in the major H-1B occupations of “electrical/electronics engineers” and “systems analysts, programmers and other computer-related workers” have also experienced stagnant wage growth over the past decade and unemployment rates that doubled since the recession.\(^6\) These data suggest that there are many unemployed U.S. workers qualified to fill H-1B, H-1B1 and E-3 jobs. Thus, employers who hire temporary foreign workers in these categories should be legally required to consider the employment needs of U.S. workers before petitioning for H-1B, H-1B1 or E-3 workers. But under current U.S. law, they are not.

Next, the statutory requirements\(^7\) that DOL process LCAs within seven days, and that applications may only be reviewed by DOL “for completeness and obvious inaccuracies” ensure that DOL agents are prohibited from reviewing or investigating applications which may be suspect for other reasons. Unless they are obviously inaccurate or missing required information, DOL agents must take the employers at their word when they submit information and statements in an LCA, and then quickly approve it. Thus, the burden on employers who submit LCAs is minimal. Such a streamlined, employer-friendly process would make sense if it were combined with random and thorough post-entry audits and investigations of petitioning employers to ensure adequate compliance. However, this is not the case — instead, investigations only occur after complaints are made. The indentured status of H-1B workers ensures that few complaints arise, and therefore, few employers are ever investigated,\(^8\) giving them little incentive to comply with requirements. (It should be noted that in 2009, despite the low number of complaints, DOL required H-1B employers to pay nearly $11 million in fines and unpaid wages.)

The entire LCA process does not do what we believe it should do, which is to determine whether a genuine labor shortage exists for a potential H-1B employer. The LCA only serves as evidence that an employer wishes to hire a foreign temporary worker. And most importantly, the speedy LCA process, where applications are nearly automatically approved without an in-depth review of U.S. labor market needs, is grossly inadequate to ensure that qualified, college-


\(^7\) INA § 212(n)(1)(G)(ii).

\(^8\) GAO, supra note 6, at 48.
educated unemployed U.S. workers in many skilled occupations are adequately – and primarily – considered for job openings in the United States. As a result, DOL should be commended for its new effort to collect more and better data on the employers that hire H-1B, H-1B1 and E-3 nonimmigrant workers, the potential nonimmigrant beneficiary workers themselves, as well as about the worksites where potential beneficiaries will be located and the wages they have been promised. These data will assist DOL (and in the case of the H-1B program, the public), to better understand the impacts of the H-1B, H-1B1 and E-3 programs on the U.S. labor market and on U.S. workers, as well as improve enforcement.

By way of comparison, as EPI has documented, other modern, developed net-immigration and immigrant-friendly nations have much more stringent requirements for certifying local and national labor market needs before allowing employers to hire temporary foreign workers. Canada for example, has its own version of the LCA known as the “Labor Market Opinion” (LMO), in which the government determines whether there is an actual need for the potential beneficiary/temporary foreign worker, and if there truly are no Canadian workers available that can fill the employer’s job opening. In other words, it “assesses the impact the foreign worker would have on Canada’s labour market” – something the American LCA process fails to do. The Canadian experience in particular – although imperfect and subject to important criticisms – nevertheless suggests that there is much more that DOL can do in order to protect U.S. workers and comply with the requirements of INA § 212(n)(1)(A)(ii).

The remainder of our comments will focus on specific aspects of Forms 9035/9035E and 9035CP.

III. Limiting the number of solicited workers per LCA to a maximum of ten will improve DOL’s enforcement efforts while imposing a minimal burden on a small number of petitioning employers.

In DOL’s supporting statement to the Office of Management and Budget (OMB) regarding the proposed changes to Form 9035, DOL notes that its Wage and Hour Division (WHD) “has found enforcement of the LCA obligations to be far more difficult when an LCA is for 50 or 100 job opportunities,” and that limiting each LCA to a maximum of ten workers “will also permit easier access to the LCA by USCIS in any electronic sharing of data as well as enable that agency to better track LCA usage.” Because we strongly believe that additional and improved

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enforcement is justified in the LCA process specifically and the H-1B program generally, in this instance we defer to DOL’s wisdom about the data collection needs and methodology that will facilitate more effective LCA enforcement and streamline enforcement efforts with partnering agencies.

Our belief is additionally justified by the fact that only a small fraction of employers will be impacted by this change. DOL estimates that 2.6 percent of all LCAs filed will be for more than 10 workers, and that each employer petitioning for more than 10 workers at a time will only be burdened with a few additional hours of paperwork. But DOL has also made efforts to minimize this burden on these few employers, by offering an electronic filing system that stores much of the information from one LCA, and allows that information to be reused and uploaded to the employer’s subsequent LCA petitions.

IV. Requiring employers to list the names and additional details of potential H-1B, H-1B1 and E-3 nonimmigrant beneficiaries on the LCA requires little effort from employers but will improve DOL and DHS enforcement efforts and better protect nonimmigrant beneficiaries and U.S. workers.

The proposed LCA form will now require that employers list the name of each potential H-1B, H-1B1 and E-3 beneficiary, as well as information about the nonimmigrant’s date of birth, country of birth, current visa status, and Program Electronic Review Management (PERM) number if applicable. The information will be beneficial and useful to DOL and DHS because this basic information will be organized and available ahead of time to DOL and DHS staff who are tasked with enforcement and investigating complaints or irregularities found in petitions. For example, if a complaint arises with respect to a particular H-1B worker, DOL and DHS staff will be able to search for, find and interview other workers who are part of the same LCA, and investigate their working conditions if necessary. Providing DOL with additional background information up front about nonimmigrants in these categories makes it much easier to do this.

If this newly collected data for the H-1B category is made public on DOL’s website, it will provide researchers and the general public with a better understanding of key data points such as the range of ages of H-1B workers, where they were born (as opposed to the country they were in when they were awarded a visa), and if H-1B workers are adjusting to H-1B status from a previously held nonimmigrant visa status (such as an F-1 student visa, etc.). These data will be beneficial because academics, civil society organizations, and the public will be better able to measure the impact of the H-1B program on the U.S. labor market and on U.S. workers, and because they will enhance the transparency of the H-1B program, allowing for a more informed H-1B policy discussion among the public. Currently, these data are not collected by DOL and unavailable to the public without a Freedom of Information Act request to USCIS, which collects much of it via Form I-129 — but only after the LCA petition is approved.

13 Id. at 15.
14 Id. at 11.
There is no major extra administrative and financial burden on employers who provide this information on their LCA. Employers should already have the requested information in their possession—it is simply a matter of transcribing it to form 9035. If they do not have this information, it can be requested from the potential nonimmigrant beneficiary. As noted by DOL, the vast majority of employers—all but 2.6 percent—have already identified the potential beneficiaries they hope to hire.15 This change also ensures that the LCA better meets its primary purpose as a safeguard for American and foreign workers alike. Linking the LCA to a specific worker provides clear continuity with the H-1B petition (I-129) filed with DHS. Given that DOL is required to process an LCA within seven business days ensures that employers will continue to have access to the program without any burdens or delays. And employers are more likely to know the true state of the labor conditions if they have a specific foreign worker, with his or her qualifications and skills, identified.

V. Requiring employers to provide additional information about their business, job sites, workforce composition, and prevailing wages on the LCA requires little effort from employers but will provide greatly improved information to members of the public who seek to remedy potential violations and assist WHD in determining employer compliance.

The proposed LCA form will now require that employers list basic information about their business, including the NAICS industry name, gross and net annual income, and the country the company is headquartered in. This information will benefit DOL by allowing it (and in the case of the H-1B, also the public) to know the nationality and monetary value of the companies that use the H-1B, H-1B1 and E-3 programs, as well as the industries they are in.

Employers will also have to disclose more detailed information about all of the job sites and locations where potential beneficiaries will perform their duties, including the name of any third party client site (or sites). This information will provide key data on how the H-1B program is being used. Many H-1B employers (including all of the top four users) are outsourcing companies that hire and staff H-1B nonimmigrant workers with the intention of placing them at various third-party client sites, which allow the client companies to subcontract and outsource certain tasks to them.16 DOL’s Wage and Hour Division has reported that most problems in the H-1B program occur within this subcontracting/staffing company context, noting that “nearly all of the complaints they receive involve staffing companies and [] the number of complaints are growing.”17 Thus, from an enforcement and compliance perspective, if a complaint is filed or an investigation takes place, it is imperative that DOL and DHS agents immediately know all of the locations where the H-1B worker may have been outsourced and subcontracted to perform their job duties. This information could also allow the government and the public to assess whether companies in the United States have laid off U.S. workers and replaced them with H-1B workers.

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15 Id. at 10-11.
17 GAO, supra note 6, at 53.
1B workers employed by an outsourcing company. Further, it can be used in conjunction with the H-1B dependency data to ensure compliance with the secondary displacement prohibition, a key statutory provision that Congress enacted to ensure the integrity of the program.

The revised LCA form will also require employers to reveal more information about the composition of their workforce, in terms of how many of its employees are H-1B and/or U.S. workers. Currently, DOL does not release data showing how many, and which, H-1B employers are considered H-1B “dependent.” If the newly collected information were made publicly available, it would allow the public to know which companies are staffed with large numbers of H-1B employees. There has been some discussion and debate about “50-50” companies (i.e., companies with more than half of their employees authorized to work on H-1B or L-1 visas), as well as proposed legislation to curb the abuses of 50-50 companies. However, information about H-1B dependent and 50-50 companies is nonexistent, and we consider this to be a serious deficiency in DOL’s annually published H-1B data. Ideally, we would suggest that Form 9035 require every company to disclose the number of nonimmigrants that it employs in all visa categories; this would provide the public with valuable information about the use of foreign workers in the United States, especially by companies that hire skilled and college-educated workers.

The proposed LCA form requires that employers provide more detailed information about the source used to determine the prevailing wage for the potential H-1B beneficiary. This simply allows the government and the public to know what proportion of prevailing wages were obtained by using a wage provided by the Office of Foreign Labor Certification or Occupational and Employment Statistics survey data; by a collective bargaining agreement, Davis-Bacon or Service Contract Act wage; or through the use of a private or custom survey.

The collection of this additional data puts no major extra administrative and financial burden on employers who provide it on the LCA. Employers or their attorney/agent should already have the requested information readily available in their records – it is simply a matter of inputting it onto form 9035. There are likely to be very few instances where an employer does not already have this basic information. In those cases, the new LCA will compel employers to collect and report it. Especially if DOL goes on to publish these data, this requirement will be justified, because without knowing much of this information, it is impossible to have informed discussions with members of Congress, responsible administrative agencies, or the public about employers who use the H-1B program.

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VI. DOL’s publication of newly required information from H-1B employers does not create serious privacy or conflict of law concerns, or provide competing non-H-1B employers with a competitive advantage.

In a recent op-ed, one prominent business immigration attorney discussed what he believed to be the “significant ramifications” of the proposed changes to LCA Form 9035, complaining that they “could result in the release of personal information to the public,” and that “[r]eleasing such information could violate state laws and company policies regarding the disclosure of private employee data.”19 For the following reasons, we find this alarmist reaction unjustified and inaccurate.

First, the proposed LCA form may indeed result in the release of some basic personal information about H-1B beneficiaries to the public, but only if DOL decides to publish that information as part of its yearly H-1B disclosure data. If DOL decides to publish this personal information, we wish to remind DOL and H-1B employers that the ability to hire H-1B workers is a privilege, and not a right. It should be noted, therefore, that employers do not have an absolute right to privacy, and in any case, no employer is required to participate in the H-1B program and therefore to release the information solicited on Form 9035.

Congress, DOL and DHS, by statute and regulation, have determined the circumstances under which an employer may hire an H-1B worker. The Immigration and Nationality Act requires that DOL publish a list that is “publicly available” containing information about employers who use the program, wages to be paid, and dates of need.20 The statute uses broad language – but does not specifically require that information about particular potential beneficiaries be published. However, the statutory language does not limit the information that DOL may collect and publish. In addition, Congress’s broad grant of authority to DOL to manage the H-1B program in order to protect the interests of U.S. workers and to enforce employer violations suggests that it is within DOL’s authority to determine if additional information is required to adequately manage the LCA process, and that DOL has discretion to make that information public if it believes it will improve the integrity of the H-1B program. If employers disagree, and do not wish to share this information with DOL and/or the public, they do not have to participate in the H-1B program – they have complete discretion to determine if hiring an H-1B worker is right for them under the terms and conditions offered by the U.S. government.

The second concern of the aforementioned complaint, that releasing the collected information will violate state laws and company policies about employee data, is groundless. In the first place, it is unlikely that any state laws would be violated by disclosing company information that is required by the federal government for participation in a federal program.

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20 INA § 212(n)(1)(G)(ii).
(Indeed, the author provides no examples.) If a state’s disclosure law were in fact violated, under the Supremacy Clause of the Constitution, the state law would be trumped by federal law – specifically, the Immigration and Nationality Act. Since it is authorized and required by a conflicting federal law, the employer’s disclosure of employee data in this case would be legal. But to go even further and suggest that DOL should consider the internal corporate policies of employers when crafting public policies that impact large portions of the U.S. labor market is bizarre. DOL manages the H-1B program under the authority granted to it by Congress, and if an individual company’s internal corporate policies conflict with the program’s requirements, that company has two choices. The company may: 1) Not petition for H-1B workers; or 2) Modify its policies.

Some H-1B employers and their representatives are likely to argue that DOL’s disclosure of newly collected information about individual H-1B beneficiaries, their salaries, and worksites will give competing employers in similar industries – but that do not hire H-1B workers – a competitive advantage over them because they will have access to detailed information about the workforces of H-1B employers. DOL should take claim this with a grain of salt. Even if DOL decides to disclose some or all of the new information it proposes to collect, it will not considerably alter the H-1B disclosure data that are already disclosed and published online. The prevailing wage the employer has promised to pay and the employer’s address and number of H-1B workers requested and certified is already available to the public. If the proposed changes to form 9035 are made, DOL will have discretion to decide if it will publish the additional worksites where the beneficiaries will perform their job duties, as well as the names and nationalities of the individual beneficiaries. If DOL decides to disclose this information (which we hope it does), it is unclear to us how it will create a competitive business advantage for non-H-1B employers – but those who make this claim should explain in detail. Among H-1B employers, a claim of competitive advantage cannot be made, since all are required to disclose the same information about their H-1B employees.

VII. None of the data DOL proposes to collect will cause delays in LCA processing or significantly increase the total cost to employers to complete an LCA petition.

In general, we wish to reiterate that all of the new information Form 9035 proposes to collect is basic information about the employer and its workforce, which the employer can reasonably be expected to know or to discover quickly. As a result, the data collection is unlikely to cost the employer much in terms of staff hours worked to complete Form 9035. The one exception to this may be among the 2.6 percent of employers who file LCAs for more than 10 employees, because they would have to file multiple LCAs, and as DOL notes, there exists a possibility that this subset of employers may not yet know the names of all their intended beneficiaries. But any burden on this small proportion of H-1B employers is outweighed by the benefits of

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21 U.S. Const. art. VI, cl. 2.
22 DOL Supporting Statement, supra note 12, at 10-11.
disclosure of this important information, which is crucial for conducting DOL and DHS investigations, and for public inspection.

Once the employer has compiled the information and filed the LCA petition, the employer always knows it will receive a response from DOL within seven days, because that is what the law requires.\textsuperscript{23} Thus, no post-filing time delays will be created by DOL’s proposed data collection. By any objective standard, this is an astonishingly fast turnaround time for any petition to the federal government.

\textbf{VIII. DOL should create a new, publicly available H-1B job registry database, or at least require that LCAs be posted in additional physical and electronic locations.}

Current H-1B regulations require that employers seeking to hire H-1B workers for an open position provide notice about their intention either to an appropriate bargaining representative, or if none exists, by posting the information about the petition and the open position for 10 days in at least two locations where the H-1B workers will perform their job duties.\textsuperscript{24} The posting must:

- indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H-1B employer’s principal place of business in the U.S. or at the worksite.\textsuperscript{25}

We believe that simply posting this information at individual worksites does not do enough to provide unemployed U.S. workers with an opportunity to apply for jobs that employers hope to fill with H-1B workers. As a result, we suggest that as part of the LCA process, DOL create and host a searchable and publicly available national H-1B job database, or “H-1B job registry” website, and require petitioning employers to submit the same information to it. The job registry would benefit employers who would increase their pool of job candidates significantly, and American workers would benefit by being notified of job opportunities.

The creation of an H-1B job registry website would not be unprecedented. The 2012 final H-2B regulations require the Department to create an H-2B database of this sort,\textsuperscript{26} and DOL already maintains a job registry for H-2A job orders.\textsuperscript{27} The size of the H-1B program would

\textsuperscript{23} INA § 212(n)(1)(G)(ii).
\textsuperscript{24} See 20 C.F.R. § 655.734(a) Establishing the notice requirement.
\textsuperscript{25} 20 C.F.R. § 655.734(a)(1)(ii).
\textsuperscript{26} See 20 C.F.R. § 655.34. However, the 2012 H-2B regulations have not yet come into force.
also justify it. The H-1B program is larger than the H-2A and H-2B programs combined,\textsuperscript{28} thus creating an H-1B job registry would provide unemployed U.S. workers with an opportunity to apply for hundreds of thousands of job openings across the country each year. In fact, DOL’s Employment and Training Administration estimates it will receive 340,000 LCAs each year – and each individual LCA represents one or more potential job openings that could be filled by an unemployed U.S. worker.\textsuperscript{29}

The cost for DOL to create and maintain an H-1B database is likely to be low, since the system can be automated and entirely electronic, and because DOL already has experience creating and planning the H-2A and H-2B job registries. Requiring that employers pay a small fee could offset any of DOL’s administrative and staff costs. On the employer side, no significant, additional time, money or effort will be required, because the employer is already required to compile the necessary information about the job opening under 20 C.F.R. § 655.734(a)(1)(ii). The information could be forwarded on to DOL or inputted directly into the registry by the employer.

We do not believe that the creation of an H-1B job registry requires the passage of new legislation by Congress. Both the H-2A and H-2B job registries were established via DOL regulations, and creating an H-1B job registry is consistent with the letter and spirit of the relevant sections of the INA that grant DOL authority to manage and enforce the LCA process, in order to ensure that the hiring of an H-1B worker “will not adversely affect the working conditions of workers similarly employed.”\textsuperscript{30} However, an H-1B job registry might require the promulgation of a new regulation under the Administrative Procedure Act, along with a set period for notice and comment.

If DOL does not agree with our suggestion to create an H-1B job registry, we ask that at a bare minimum, it require employers to post the information required by 20 C.F.R. § 655.734(a)(1)(ii), as well as the LCA itself, in additional physical and electronic locations. This information should be made available to, and posted by, all appropriate State Workforce Agencies (SWA), unions that represent workers in the occupation (regardless of whether employees at the intended worksite are represented by a union), and multiple major job search websites such as Monster.com and Craigslist. Form 9035 should also require that employers list the dates the job posting will be advertised at the worksite, SWAs and on the internet, so that the posting can be easily verified by DOL if an investigation occurs in the future.

\textsuperscript{28} In Fiscal Year 2011, 129,134 H-1B visas were issued, compared to a total of 106,210 H-2A and H-2B visas.
\textsuperscript{29} DOL Supporting Statement, \textit{supra} note 12, at 14.
\textsuperscript{30} INA § 212(n)(1)(A)(ii).
IX. Conclusion

For these reasons, we support the proposed changes to Form 9035/9035E, which include modest but important improvements to the Department of Labor’s LCA petition. Nevertheless, we hope the Department will go further and consider the improvements we have suggested.

We would also like to express our gratitude to the Department for providing the public with an opportunity to comment on the LCA form and process, which we consider to be an essential part of the process for employers who petition to hire temporary foreign workers. We appreciate the Department’s efforts to improve the H-1B, H-1B1 and E-3 programs, and hope that additional protections will result from the Department’s consideration of these comments for the temporary foreign workers who are employed in the United States on these three visas, as well as for the U.S. workers who are similarly educated and skilled, and who are employed or seek work in the main H-1B, H-1B1, and E-3 occupations.

Sincerely,

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