AMERICAN IMMIGRATION LAWYERS ASSOCIATION

June 25, 2018

Office of Information and Regulatory Affairs
Attention: OMB Desk Officer for DOL-ETA
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Submitted via e-mail: OIRA_submission@omb.eop.gov
Cc: DOL_PRA_PUBLIC@dol.gov

Re: OMB Control Number 1205-0310
Department of Labor 30-Day Notice and Request for Comments:
Labor Condition Application for H-1B, H-1B1, and E-3 Nonimmigrants

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 30-day notice and request for comments published in the Federal Register on May 24, 2018.[1]

AILA is a voluntary bar association of more than 15,000 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. We appreciate the opportunity to comment on the proposed revisions to Form ETA-9035, Labor Condition Application for Nonimmigrant Workers, and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government. The following comments resonate in substance with AILA's comments filed in response to a previous related notice of information collection published in the Federal Register on August 3, 2017.[2]

I. Background and Introduction

When considering any changes to the processes and procedures relating to H-1B, H-1B1, or E-3 nonimmigrants, it is important to begin by recognizing and understanding the critical role that

[1] 83 Fed. Reg. 24141 (May 24, 2018).
[2] 82 Fed. Reg. 36158 (Aug. 3, 2017). *See* AILA Comment on Proposed Revisions to ETA Form 9035 (Oct. 2, 2017), www.reginfo.gov/public/do/DownloadDocument?objectID=83161400.

skilled workers play in our economy. Founded and built by immigrants, the United States has flourished as a nation because of our diversity, our belief in the entrepreneurial spirit, and our history of welcoming innovators to our shores. Our country benefits when companies are able to hire talented individuals from across the globe and increase their competitive advantage. For U.S. companies with no ties or affiliates abroad, one of the only nonimmigrant visas that allows them to compete in the global talent race is the H-1B. The H-1B visa is vital to provide a legal pathway for U.S. businesses to hire and retain top talent from around the world. Far from harming U.S. workers and the U.S. economy, highly educated foreign professionals benefit the U.S. by filling critical skills gaps in the U.S. workforce, developing cutting-edge products, undertaking ground-breaking research, and permitting U.S. businesses to expand and grow their operations, in turn creating new jobs in the U.S.

Changes that have the effect of substantially slowing or delaying the H-1B, H-1B1, or E-3 process will damage U.S. economic growth. Leading companies like Amazon, Uber, Tesla, Facebook, Apple, Netflix, and Google have all benefitted from innovations brought to the table by H-1B workers and have used the H-1B to help expand their operations and in turn create new jobs for U.S. workers. With a shortage of U.S. STEM workers, the H-1B visa program allows employers, both large and small, established and emerging, to fill critical positions and keep jobs in the U.S. In addition to driving technology, H-1B workers are also critical to industries such as healthcare, manufacturing, and energy, and are particularly vital to state and local economies that depend upon these industries. Without a functional, efficient H-1B process, U.S. employers, whose decisions are driven by business necessity, will be forced to send jobs overseas, and innovators will turn to other countries to sow the seeds of the next great business.

With this in mind, AILA appreciates the Department of Labor's (DOL) interest in providing transparency and clarity in completing and filing Form ETA-9035, Labor Condition Application for Nonimmigrant Workers (hereinafter "ETA 9035" or "LCA"), an essential component of the H-1B, H-1B1, and E-3 visa categories. While the proposed changes are largely helpful, there are nevertheless areas where the proposed changes may (1) violate regulatory requirements; (2) create unnecessary new burdens on employers; and (3) fail in practice to meet DOL's stated purpose of providing clarification.

II. The Proposed Changes are Contrary to the Statutory and Regulatory Requirements

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

Any change in agency practice or procedure that creates new substantive rules or legal obligations must be promulgated through the appropriate notice and comment provisions contemplated by the Administrative Procedure Act (APA). The circumstances in which DOL may implement a rule change without notice and comment are extremely limited and would require DOL to explain why

it has "good cause" to conclude that notice and comment would be "impracticable, unnecessary, or contrary to the public interest."[3]

The Federal Register notice provides notice of a form revision only and does not include any changes to the LCA regulations. Despite this, the proposed revisions would impose practical changes that appear to contravene existing regulations, and at a minimum, they may create confusion sufficient enough that employers will file additional LCAs where there is no regulatory requirement to do so, further adding to the DOL workload and placing additional burden on employers that utilize the H-1B, E-3, and H-1B1 programs.

We are concerned that the proposed form changes would effectively nullify 20 CFR §655.734(a)(2), which allows an employer to place an H-1B worker at a worksite not contemplated when the LCA was filed as long as the employer posts notice of the LCA at the new worksite. This, combined with the definition of "area of intended employment" at 20 CFR §655.715, as an area within normal commuting distance, has long been understood to give employers flexibility to move H-1B employees to new locations within the same Metropolitan Statistical Area (MSA) without the need to file a new LCA. Despite the DOL's response to our initial concerns, we do not believe that the DOL's proposed changes offer the same level of flexibility.

That the LCA is intended to cover an area of intended employment and not just a specific street address is also evident in the preamble to the 1994 LCA final rules, where DOL explained that requiring an employer to post a notice and file a new LCA for a new work location within the area of intended employment "appears to the Department to be burdensome…"[4] Instead, DOL adopted the rule at 20 CFR §655.734(a)(2), recognizing that an LCA covers an area of intended employment, and not just a single street address.

This provision is of great importance to many employers, including but not limited to healthcare, management consulting companies, information technology companies, accounting firms, and engineering firms who have employees who periodically move from one worksite to another. In light of the proposed revisions, which include a requirement in Section F.a.3 to list the name of the end-user where the worker will be placed, it is unclear whether employers will be allowed to move an employee to a new worksite within the area of intended employment without filing a new LCA. Faced with this confusion and considering the very serious penalties associated with a violation of the LCA regulations, employers will likely file a new LCA for each location change, even if that change involves moving an employee just a block or two down the street in the same city. Under current USCIS policy, an employer would also be required to file an amended H-1B petition before the foreign national may work at the new site, thus adding tremendous time and expense to the process of moving an employee within the same MSA. The revision to the ETA 9035 does precisely what 20 CFR §655.734(a)(2) is intended to prevent. By effectively changing

[3] 5 USC §553(b)(B).
[4] 59 Fed. Reg. 65646 (Dec. 20, 1994).

the underlying regulation with this form revision, DOL is adding unreasonable burdens to businesses without the required justification and without notice.

This could easily be resolved by requiring employers to simply list the city and state of employment. Such a change would eliminate potential confusion regarding use of the same LCA for additional locations within the same area of intended employment, while ensuring that U.S. workers are protected and that the required wages are paid. We therefore urge DOL to modify the proposed Form ETA-9035 to ensure consistency with the regulatory definitions at 20 CFR §655.734(a)(2).

b. The New ETA Form 9035 Appendix A Requirements Exceed DOL's Statutory and Regulatory Authority

Section 212(n) of the Immigration and Nationality Act (INA) sets forth an employer's obligation to file an LCA with DOL prior to filing an H-1B petition. Section 212(t) of the INA specifies the information that must be included in the LCA and provides DOL with the authority to investigate an employer's failure to meet a condition in the LCA. When the LCA was introduced as an additional element of the H-1B process in the Immigration Act of 1990 (IMMACT90), it was viewed by Congress as an attestation-driven document that would be promptly adjudicated. IMMACT90 mandated an efficient and speedy certification process to facilitate the admission of urgently needed H-1B talent while providing appropriate protections to U.S. workers.

The regulations at 20 CFR §655.730 set forth the information that employers must provide to DOL as part of the LCA process. DOL now proposes to require H-1B dependent employers and/or willful violators claiming a master's degree exemption to complete a new ETA 9035 Appendix A, to provide the name of the accredited or recognized institution that awarded the degree to the H-1B worker, the field of study in which the degree was awarded, and the date on which the degree was awarded. Neither INA §212(t) nor 20 CFR §655.730 require employers to provide such information or submit documentation in support of an LCA. Unless both INA §212(t) and 20 CFR §655.730 are amended, DOL cannot require employers to submit this information and/or supporting documentation. This also creates unnecessary new burdens on employers.

In DOL's response to similar comments submitted in response to the 60-day notice published in the Federal Register on August 3, 2017, DOL has failed to justify adequately why the submission of information and documentation about the employee's educational background is not duplicative and unnecessarily burdensome on employers.[5]

According to Section 71d02(d) of DOL's Wage and Hour Department's (WHD) Field Operations Manual, "prior to approving any Form I-129/Form I-129W, [U.S. Citizenship and Immigration

[5] *See* Appendix B to Labor Condition Application for H-1B, H-1B1, and E-3 Nonimmigrants and the Nonimmigrant Worker Information Form, https://www.reginfo.gov/public/do/DownloadDocument?objectID=83177700.

Services] will examine, among other things, the exempt status of any nonimmigrant whose petition is supported by an LCA that designates it will be used exclusively for exempt H-1B workers (*see* 20 CFR 655.737(e)(1)). USCIS will first review the LCA for the guaranteed $60,000.00 salary. If the salary is not present, USCIS will then review the LCA for education requirements. If USCIS determines that the H-1B worker is not exempt, USCIS will not grant the petition." Therefore, DOL has confirmed that as part of the H-1B adjudication process, USCIS is determining whether the employee is eligible for an exemption based upon his/her educational requirements. However, in Section A4 which justifies this new proposed requirement, DOL fails to explain how requiring of the submission of information and documentation about the employee's educational background is not duplicating the documentation that is being submitted to USCIS when USCIS (not DOL) is ultimately determining whether the employee qualifies for the exemption. DOL states that the collection of education information and documentation "will assist the [USCIS] in more effectively performing its review." USCIS has been assessing whether an employee qualifies for the educational exemption for more than 28 years since the inception of the LCA. DOL has failed to provide a detailed explanation of how this burdensome new requirement will assist USCIS in more effectively performing its H-1B adjudications (especially in light of the fact that DOL has confirmed that it will only be basically reviewing the additional information provided on the LCA against the documents uploaded into the iCERT system for typographical errors) and how this supposed new assistance to USCIS outweighs the additional costs that will be incurred by employers in complying with this duplicative requirement.

We therefore urge DOL to eliminate the proposed Appendix A, and instead keep DOL resources focused on the nature of the job. The qualifications of the foreign worker are appropriately within the jurisdiction of USCIS in the adjudication of the H-1B petition, and should not become part of DOL's review of Form ETA-9035.

III. The Proposed Changes Create Unnecessary New Burdens on Employers

In addition to the burdens created by the proposed new Appendix A, described above, several other proposed changes would impose new and unnecessary burdens on employers.

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

AILA has previously raised concerns with DOL regarding its underestimation of the burden of the additional data collection in response to a previous notice of information collection published in the Federal Register on August 3, 2017.[6] While DOL has responded by stating that it has considered the burden, we maintain that the DOL's calculations are incorrect. DOL estimates that the proposed revisions would add only 7 minutes to the time needed to complete the LCA for H-1B non-dependent employers and H-1B dependent employers and/or willful violators who are

[6] *See* AILA Comment, *supra* note 2, at 6.

not claiming the master's degree exemption from the additional attestation obligations regarding displacement and recruitment of U.S. workers. For employers claiming the master's degree exemption, DOL estimates that the proposed revisions would add 33 minutes to the time needed to complete the LCA process. We maintain that DOL has vastly underestimated the regulatory burden the proposed LCA would create, particularly in light of the additional procedures that employers will need to implement and complete as described below.

Assuming that DOL has the statutory and regulatory authority to request additional information and documentation from H-1B dependent employers and willful violators claiming the master's degree exemption, the additional burden on these employers does not outweigh DOL's stated goal of increased transparency in the LCA process, nor does it add only a small regulatory burden to employers. The proposed Appendix A would require employers claiming the master's degree exemption to provide the name of the accredited or recognized institution that awarded the degree to the H-1B worker, the field of study in which the degree was awarded, and the date that the degree was awarded, along with supporting documentation. DOL has not explained how this information and documentation increases transparency or how it will use this data to justify the substantial increased burden on impacted employers.

DOL also proposes modifying the LCA to require H-1B dependent employers that are claiming an exemption to indicate the basis of the claim (master's degree, wage-based, or both). This modification should be sufficient to achieve DOL's goal of increased transparency because it will for the first time allow DOL to gather information about the type of exemptions claimed. DOL can then incorporate this information into its reports released to the public. However, we would object to any plans to publish the names of institutions and major fields of study, which would provide no relevant insight into the program and would not justify the additional burdens imposed upon impacted employers.

Data collection that is duplicative adds unnecessary burdens on employers, and agencies with different legal mandates should only collect data relevant to their mandate. If it is determined that the names of the institutions attended by some H-1B workers, their major fields of study, and their dates of graduation is necessary to provide greater transparency with respect to the employer's exemption attestation, DOL should instead work with USCIS, which already collects this data, to obtain and/or release it.

Moreover, DOL has estimated that the new educational requirement will add approximately $1 million in costs to employers participating in the H-1B program. $1 million is an understatement of the financial burden to employers but even $1 million is not *de minimis*. DOL has indicated in Section A5 that the burden on small businesses is minimal. However, it is highly likely that a majority of this new duplicative requirement will impact small businesses. This new proposed requirement is contrary to the Administration's pledge to reduce unnecessary government regulations and requirements on businesses, especially small businesses. DOL should be required

to explain in detail the impact of this duplicative requirement on small businesses. If the benefits of a duplicative requirement were properly weighed against the costs to business (especially small businesses), DOL would and should remove this proposed burdensome modification to the LCA as a duplicative and unnecessary addition to the overall H-1B process.

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

Assuming again that DOL has the authority to collect information in the proposed Appendix A, DOL has not stated how it will review such information for "obvious inaccuracies." For example, will DOL review the field of study to determine if it relates to the position title and/or Standard Occupational Classification (SOC) code? Will DOL review the institution to determine whether it is accredited? In adjudicating an H-1B petition, USCIS determines whether the field of study relates to the occupation and whether the degree-granting institution is accredited. If DOL will now be reviewing these factors, will it adhere to USCIS guidance to avoid creating different standards which will only increase confusion and burdens on U.S. employers? In addition, will DOL provide for administrative recourse, such as Center Director review and BALCA appeal when the employer disagrees with the decision?

DOL has also not explained why employers will now be required to submit documentation in support of its master's degree exemption. DOL has not previously required employers to submit documentation in support of its attestations because the LCA process is complaint driven. If an individual believes that an employer is not complying with the conditions of the LCA, it can file a Form WH-4 with DOL's Wage and Hour Division (WHD) which determines whether it will commence an investigation. Documentation in support of the master's degree exemption is currently submitted to USCIS, and USCIS determines whether the exemption is warranted. If USCIS determines that the H-1B worker does not qualify for the master's degree exemption, it will deny the H-1B petition. In its Supporting Statement, DOL stated that it will not conduct a substantive review of the degree information but will rather review the documentation only for completeness and obvious inaccuracies. USCIS's standard of review ("preponderance of the evidence") is much higher than DOL's standard of "obvious inaccuracy." DOL has not explained why it is necessary to require the employer to submit documents already provided to and evaluated by USCIS. A duplicate submission and review process unnecessarily increases burden on employers.

DOL has also not explained how employers will submit the supporting documents and what will be done with these documents after they are submitted. If employers will be required to upload supporting documents into the iCERT system, will DOL allow employers to submit supporting documents through other methods if the upload function is not working? Additionally, will DOL retain the supporting documents for a designated period of time and if so, for what purpose?

c. The Proposed Changes Will Virtually Eliminate the Use of Multiple-Slot LCAs for Certain H-1B Dependent Employers Thus Increasing Administrative and Recordkeeping Burdens

We continue to maintain, as we previously raised in our prior comment submitted on October 2, 2017[7], that requiring information about the accredited institution, the field of study, and the date the degree was awarded to the H-1B worker will virtually eliminate the use of multiple-slot LCAs for H-1B dependent employers claiming the master's degree exemption. It is a rare occasion when an employer knows in advance the names of ten employees who will be placed at a single location and their educational backgrounds. As a result, H-1B employers will be forced to file individual LCAs for each employee and each LCA carries recordkeeping requirements.

An LCA violation can result in thousands of dollars in penalties and, in severe cases, debarment. Therefore, employers must dedicate significant resources to ensure compliance including maintaining records, periodically auditing LCA public access files, and monitoring the timeline following the departure of an H-1B employee for file retention. With the effective elimination of multiple-slot LCAs for an entire class of H-1B workers, the administrative resources required to process more LCAs and monitor compliance for certain H-1B employers will increase exponentially.

d. The Estimate of the Regulatory Burden is Unreasonably Low, Especially for H-1B Employers Claiming the U.S. Master's Degree Exemption

With respect to the regulatory burden, DOL states in its supporting statement that it "believes that of the average 569,260 total filings, approximately 11,337 LCAs are estimated to be degree-based exemptions requiring completion of Appendix A and provision of educational degree information."[8] However, because DOL takes the position that most of the regulatory burden due to the proposed changes will fall on U.S. employers claiming the master's degree exemption, it should endeavor to provide a more precise estimate. As noted, U.S. employers currently provide information to USCIS as to whether they are claiming the master's degree exemption, and USCIS adjudicates H-1B petitions based on whether the petition qualifies for the exemption. Because USCIS is tracking this information as part of the H-1B adjudication process, DOL should solicit appropriate data from USCIS to determine whether 11,337 is an accurate estimate. Due to the number of U.S. employers claiming an exemption from the additional displacement and recruitment attestations each year, it would seem that this estimate is quite low. Additionally, USCIS should be able to provide data as to the number of small businesses claiming the master's degree exemption to assess whether the burden on small businesses is in fact minimal as claimed in the Supporting Statement for Paperwork Reduction Act Submissions.

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[7] AILA Comment, *supra* note 2, at 6.
[8] *See* Supporting Statement, Labor Condition Application for H-1B, H-1B1, and E-3 Nonimmigrants and the Nonimmigrant Worker Information Form, www.reginfo.gov/public/do/DownloadDocument?objectID=83008100.

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

For U.S. employers placing an H-1B worker at a third-party site, the proposed LCA would require the employer to include the name of the end-client. Disclosing this information may violate confidentiality agreements between the H-1B employer and the end-client. To comply, an employer will be required to review the terms of each contract, identify any restrictions, and if necessary, obtain consent from the end-client to disclose this information on the LCA. Additionally, citing 20 CFR §655.730(c)(5), the Supporting Statement states that it is clarifying "the existing regulatory requirement that the employer must identify all intended places of employment of the LCA."[9] However, DOL should confirm that it is not (and cannot) modify through this notice of information collection the fact that LCAs are valid for the "area of intended employment" as set forth in 20 CFR §655.715.

In response, DOL indicated that using the H-1B program is strictly voluntary and that sufficient notice has been given first in August 2017 and now in May 2018 to employers and their end-clients to draft contracts differently to comply with the new data requirements or to work around them. It is irresponsible of DOL to make changes that would actually impede, instead of foster, U.S. business operations and U.S. economic growth.

IV. Some of the Proposed Changes Fail to Provide Clarity

In addition to the comments above, we note the following concerns with regard to the proposed text included in ETA Form 9035 CP, General Instructions for the 9035 and 9035E and for the Forms ETA 9035 and 9035E.

ETA Form 9035CP

Page 1, Important –

In this section, DOL states that the response time is "estimated to average 75 minutes." Given the additional burdensome requirements with which an employer must comply, as discussed above, the estimated time frame significantly underestimates the actual time that an employer must spend completing the ETA 9035 or 9035E. In addition, DOL has failed to justify these new burdens on employers.

[9] Supporting Statement, *supra* note 8, at 21.

Page 3, Section B, Temporary Need Information –

Item 7. AILA previously raised concerns in its prior comment submitted on October 2, 2017, that the instructions for completing Items B.7(a) through (f) were confusing.[10] The form states that a "single worker may fit into multiple boxes, as appropriate." Is DOL instructing the employer to count the individual only once or should the employer check as many boxes as appropriate for that individual? We thank the DOL for its response and clarification.

Page 11, Section I, Public Disclosure Information –

Employers are allowed to maintain public disclosure information electronically. AILA previously sought guidance in its prior comment submitted on October 2, 2017, as to which box the employer should check on the form regarding where it was keeping its public disclosure information.[11] We thank DOL for its clarification.

Appendix A –

The instructions state that an employer may claim the master's degree exemption where an employee has a "master's or higher degree (or its equivalent)." The instructions (and 20 CFR §655.737(d)), indicate that an equivalent degree must be "a foreign academic degree from an institution which is accredited or recognized under the law of the country where the degree was obtained, **and** which is equivalent to a master's or higher degree issued by a U.S. academic institution." [Emphasis added]. While "time equivalency" is not accepted, please provide additional guidance to employers as to how to determine what would be acceptable "equivalency." 20 CFR §655.737(d) only indicates that "the DHS and the Department will consult appropriate sources of expertise in making the determination of equivalency between foreign and U.S. academic degrees." In the spirit of transparency and clarity, please specify to employers what is considered "appropriate sources of expertise." We continue to raise this as a concern.

ETA Form 9035 & 9035E

Page 5, Section J. Notice of Obligations –

As indicated above, AILA previously sought guidance from DOL in AILA's prior comment submitted on October 2, 2017, in light of an employer's ability to maintain public disclosure information electronically.[12] We thank DOL for its response.

[10] AILA Comment, *supra* note 2, at 7.
[11] AILA Comment, *supra* note 2, at 7.
[12] AILA Comment, *supra* note 2, at 8.

V. Conclusion

We appreciate the opportunity to comment on the proposed changes to the Form ETA-9035 and instructions and look forward to a continuing dialogue with OFLC on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION