

**DOL THREATENS PERSONAL AND COMMERCIAL
PRIVACY IN PROPOSAL DIRECTED AGAINST
SKILLED FOREIGN NATIONALS**

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EXECUTIVE SUMMARY

A host of business trade associations have come out against a Department of Labor (DOL) proposal aimed at the employment of skilled foreign nationals on H-1B visas. The associations argue the proposal to change the labor condition application (LCA) will threaten personal and commercial privacy, encourage identity theft, add undue burdens on employers that need to move quickly to serve customers and discourage hiring skilled personnel to perform work in the United States. Since an H-1B visa is often the only practical way to hire a skilled foreign national long-term in America, DOL's proposal will make it more difficult to attract and retain highly skilled and educated foreign-born scientists, engineers and professionals, encouraging more work and projects to be done abroad.

On July 7, 2012, the U.S. Department of Labor published a Federal Register notice announcing its intention to revise Form ETA-9035, the labor condition application, or LCA, on which all prospective H-1B employers must attest to compliance with regulations concerning wages, working conditions and other H-1B visa obligations.¹ The LCA is typically the first compulsory step in the process to petition for a skilled foreign national. Citing the need to enhance its "integrity review" of Form ETA-9035 and to guard against purported abuse, DOL plans to double the length of the LCA form and add 50 new information fields. But what appears to be a straightforward administrative action is, in fact, an impermissible expansion of the agency's statutory and regulatory authority.

The U.S. Chamber of Commerce, the Information Technology Industry Council, American Council on International Personnel, Society for Human Resource Management, American Immigration Lawyers Association and individual companies have expressed opposition to the Department of Labor's plan to substantially revise the labor condition application. (See links to comments submitted by organizations in the Appendix.)

If the Department of Labor's proposed form goes into effect it will lead to many troubling consequences:

- The extra time and expense, reduced flexibility and the burden of publicizing previously closely-held information means the form's new requirements will act as a type of tax directed against companies that hire skilled foreign nationals off U.S. college campuses or elsewhere.

¹ 77 Federal Register 40383 (July 9, 2012). Along with Form ETA-9035, DOL also plans to revise Form ETA-9035CP (the LCA form instructions) and Form WH-4 (the H-1B Nonimmigrant Information Form used by DOL's Wage and Hour Division to assess allegations of H-1B program violations made by aggrieved parties). DOL did not publish the proposed forms, but they can be obtained by making a specific request to the agency. Copies of the proposed revision to [Form ETA-9035](#), the form [instructions](#), [Form WH-4](#), and DOL's [supporting statement](#) are available for examination at the website of Fragomen, Del Rey, Bernsen & Loewy, LLP.

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- Since all information placed on a labor condition application becomes available to anyone in the public who requests the information (via a public access file), companies would be forced to disclose to competitors (and others) important commercial information. This may violate nondisclosure agreements with customers and would encourage work to be performed outside the United States.
- Simply because they choose to hire one or more foreign nationals, privately-held companies would be compelled to release such financial information as their annual revenues and salary structure, information often closely guarded by entrepreneurs and small businesses. Larger companies would be forced to perform complex calculations of financial information not always available.
- By requiring a new labor condition application to include – potentially months or years in advance – each place a skilled foreign national will work, the new form will prevent many companies from being able to serve customers in a timely and expected manner, making them less able to compete.
- Forcing employers to name in advance any individual who will work under the labor condition application (which is unprecedented) and at a single work location unrealistically requires companies to predict the future. This fails to recognize fast-changing business needs and interferes with serving customers.
- Mandating that personally identifiable information on individual foreign nationals be made public (including name, birth date, place of work, rate of pay) will expose the foreign-born to identity theft, harassment or possibly worse consequences. This will make it more difficult for America to attract and retain talent.
- The proposed form complicates the issue of who is permitted to sign the labor condition application and establishes questionable data linkages related to the permanent labor certification process. It would also add ambiguous questions that require guesswork on issues such as similarly employed workers that go beyond the form's purpose but for which employers could later be held liable.

If DOL's proposal were implemented, the LCA process would be transformed from the streamlined, attestation-based system contemplated by Congress into a lengthy (and more expensive) process that would expand DOL's review authority beyond what is permitted by statute and its own regulations. The new form would impede employer flexibility to meet urgent business needs, making U.S. companies and customers less competitive in the global marketplace. The proposals would require employers to publicly disclose sensitive personal and business information of current and prospective employees and clients, in contravention of federal agency

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recommendations on data privacy and potentially in violation of state privacy laws and private contracts. The Department of Labor should withdraw its proposed changes to the labor condition application.

THE LCA PROCESS

Congress established the H-1B temporary visa category and LCA requirement in the Immigration Act of 1990, legislation that transformed the U.S. immigration system and added an array of nonimmigrant categories for temporary workers.² Prior to 1990, employers could hire foreign nationals on H-1 visas. In creating the H-1B category, Congress contemplated a visa classification that would allow employers the flexibility “to quickly obtain temporary workers when needed.” At the same time, the Congress sought to balance that flexibility with labor protections for U.S. workers.³

Thus, Section 212(n) of the Immigration and Nationality Act prohibits the admission of an H-1B worker unless the employer has filed a labor condition application with the Department of Labor, on which it has assented to the following attestations:⁴

- The employer will pay H-1B workers the higher of the prevailing wage for the occupation or the actual wage paid to similarly situated U.S. workers;
- The working conditions of H-1B workers will not adversely affect those of U.S. workers;
- There is no strike or lockout at the work place; and
- The employer has provided notice of filing the LCA to employees in the occupational classification for which H-1B nonimmigrants are sought.⁵

To achieve the appropriate balance between employer flexibility and sufficient labor safeguards, Congress called for an LCA system that requires employers to file their attestations with DOL, but subjects the LCA to agency review for completeness and obvious inaccuracies only – an appropriate standard for the review of what is essentially the employer’s promise to comply. Crucially, Congress intended that there would be no “pre-screening of the employer’s assertions and promises as long as the attestation is filled out in a complete manner,” and no challenge to an LCA until after the attestation is in effect.⁶ Thus, DOL has no role in determining whether the job opportunity or individual beneficiaries are eligible for H-1B classification, areas that are exclusively the purview of its sister agency, U.S. Citizenship and Immigration Services (USCIS).⁷ In 1991, DOL developed a streamlined

² Pub. L. No. 101-649, 104 Stat. 4978 (November 29, 1990).

³ H. Rep. No. 101-723(I), 1990 U.S.C.C.A.N. 6710.

⁴ 8 U.S.C. § 1182(n). These obligations also extend to employers of H-1B1 and E-3 nonimmigrants. INA § 212(t). For ease of reference, however, this article will refer to H-1B workers and employers throughout.

⁵ Employers that are H-1B dependent – i.e., those whose workforces consist of 15% or more H-1B workers, as determined by a calculation prescribed by regulation – or found to have willfully violated the LCA regulations are subject to additional attestations concerning recruitment and nondisplacement of U.S. workers. 20 C.F.R. § 655.736, 655.738, 655.739.

⁶ H. Rep. No. 101-723(I), 1990 U.S.C.C.A.N. 6710.

⁷ H. Rep. No. 101-723(I), 1990 U.S.C.C.A.N. 6710. See also, 65 Federal Register 80157 (December 20, 2000). (“The Department [of Labor] has no intention of second-guessing work-related screening criteria used by an employer or intruding upon the role provided for [USCIS] with respect to any hiring decision involving a particular applicant.”)

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LCA certification process that was consistent with Congress's intent. Though the process was eventually automated and has evolved over its more than 20-year lifespan, the basic structure of the attestation system has remained undisturbed since that time.

Under current procedures and rules, employers complete and file Form ETA-9035 online at DOL's iCERT portal,⁸ providing information about the employing organization and job opportunity, and assenting to compliance with the rules concerning wages, working conditions and notice to U.S. workers. Once an LCA is filed, DOL has up to seven days to certify that it is complete and contains no obvious inaccuracies.⁹ DOL defines an "incomplete" LCA as one on which the employer has failed to check all the necessary boxes, or failed to complete any of the required fields on the form.¹⁰ An LCA that contains "obvious inaccuracies" is one that has been filed in error after the employer has been disqualified from the H-1B program, states a wage rate that is below minimum wage or the prevailing wage for the occupation, or is submitted earlier than six months before the start date of employment.¹¹

After an LCA is filed, the employer must give notice of filing by posting the LCA for ten days at the worksite.¹² Within one working day after the LCA is filed, the employer must make it and certain other documentation available in a public access file (PAF) for examination by any individual upon request. In addition to the completed LCA, the public access file must include documentation of the actual and prevailing wage, the employer's compliance with the posting requirement and other LCA obligations.¹³

DOL's enforcement responsibilities with respect to certified labor condition applications are clearly defined by statute and regulation. Consistent with congressional intent, enforcement is complaint-driven as opposed to adjudication-driven. DOL is authorized to investigate alleged LCA violations based on the complaints of aggrieved parties only, and is generally not empowered to initiate investigations on its own.¹⁴ Before proceeding with an LCA investigation that is not complaint-driven, DOL is required to demonstrate and the Secretary of Labor is required to personally certify that the agency has reasonable cause to believe an employer has committed willful or substantial violations, or has engaged in a pattern or practice of such violations.¹⁵ Congress imposed these and other limits.¹⁶

⁸ <http://www.icert.doleta.gov>.

⁹ 20 C.F.R. § 655.740. For many years, this certification was made in a matter of minutes, though in recent years, DOL has exercised its authority to use the full seven days to complete its review.

¹⁰ 20 C.F.R. § 655.740(a)(2)(i).

¹¹ 20 C.F.R. § 655.740(a)(2)(ii).

¹² 20 C.F.R. § 655.732. Both physical and electronic notice are contemplated in the regulation.

¹³ 20 C.F.R. § 655.760. Employers determined to be H-1B dependent or to have willfully violated the LCA regulations have additional public access file documentation responsibilities. 20 C.F.R. § 655.760(a)(8)-(10).

¹⁴ INA § 212(n)(2)(A), 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.800 et seq.

¹⁵ INA § 212(n)(2)(B) & (G); 8 U.S.C. § 1182(n)(2)(A).

¹⁶ H-1B Visa Reform Act of 2004, Pub. L. 108-447, div. J, title IV, Dec. 8, 2004, 118 Stat. 3351.

DOL'S PROPOSED CHANGES TO THE LCA FORM

The information solicited on the current version of Form ETA-9035 is prescribed by regulation and focuses on particulars of the job opportunity.¹⁷ Employers are required to identify the occupational classification for which the LCA is being submitted, the applicable three-digit Dictionary of Occupational Titles code and the employer's own job title for the position. The number of nonimmigrants sought for the occupation must be specified. With respect to wage, the employer must list the gross wage rate to be paid to each nonimmigrant, the prevailing wage for the occupation in the area of intended employment, and the specific source relied upon to determine the prevailing wage. The start and end dates of employment and the place of intended employment must also be listed.

In contrast, the proposed revision of the LCA would shift the form away from its appropriately job-centered focus. It would require employers to provide detailed personal information about prospective H-1B beneficiaries and would establish new data and procedures to track individual beneficiaries. It would also require employers to provide detailed corporate information and, if H-1B workers are to be placed at client worksites, information about end clients. Though DOL justifies the collection of this information on the vague ground that it is "needed for statistical purposes and integrity measures," "to cure operational issues" and "appears necessary to prevent abuse,"¹⁸ there is no statutory or regulatory authority for it. In fact, DOL's rationale is in conflict with the intent of Congress, which specifically limited investigation, evidence-gathering and enforcement activities to the post-certification stage. Furthermore, as will be addressed below, there is no evidence to suggest that overwhelming LCA abuse is currently taking place; in fact, DOL and USCIS studies demonstrate the opposite.

- *Disclosure of Information About Prospective H-1B Beneficiaries; Limits on the Number of Beneficiaries Per LCA*

DOL's draft revision begins with a series of new fields that solicit extensive information about the foreign H-1B beneficiaries the employer anticipates will be employed in the positions covered by an LCA. DOL also proposes to limit to ten the number of beneficiaries that can work pursuant to a single LCA.

Currently, the LCA form solicits no specific information about beneficiaries, other than the number that will be employed. This is appropriate, given that the focus of the LCA is the occupation. If the proposed revisions are

¹⁷ 20 C.F.R. § 655.730(c)(4).

¹⁸ Department of Labor, "Supporting Statement for Request for OMB Approval Under the Paperwork Reduction Act of 1995: 1205-0310," July 9, 2012, 1-2 (hereinafter "DOL Supporting Statement"). A copy of the [statement](#) is available for examination at the website of Fragomen, Del Rey, Bernsen & Loewy, LLP.

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implemented, however, employers would be required to provide personally identifiable information (PII)¹⁹ concerning each beneficiary, including name, birth date, country of birth, country of citizenship and immigration status of each prospective beneficiary at the time of filing the LCA, along with the wage information that is a central component of the LCA. This information has never before been collected by DOL, nor has it ever been deemed necessary to validate the employer's assent to the LCA attestations or compliance with program rules. Furthermore, DOL's Wage and Hour Division, the department responsible for LCA enforcement, already has significant authority to obtain H-1B beneficiary information during its investigations. Nonetheless, DOL now claims, without further explanation, that collecting this beneficiary-specific information "appears to be necessary to prevent abuse of [the] LCA."²⁰

This proposal has prompted widespread concern in the business immigration community because it raises significant privacy issues. By statute, employers are required to make each LCA and related information available in a public access file to any individual who requests it. Requiring employers to include beneficiary information would mean that any member of the public – including current employees, competitors and identity thieves – could have access to personally identifiable information about prospective H-1B beneficiaries.

It is important to note that this disclosure of personally identifiable information would not be limited to current employees of the employer, but also to individuals who are not yet and may never be employed by the employer. The LCA and the H-1B petition are filed in order to obtain authorization to employ foreign workers. Employers may file LCAs and H-1B petitions up to six months before the anticipated employment start date. But because the public access file, containing the accepted and signed LCA, must be made available to the public within one business day after the LCA is filed, any member of the public would be able access this personal and sensitive information up to 5 months and 30 days before the beneficiary ever becomes an employee of the employer, and before USCIS grants authorization to employ the beneficiary. Furthermore, the LCA regulations require employers to retain the public access file for one year beyond the date on which any H-1B worker is employed under the LCA or, if no H-1B workers were ultimately employed under the LCA, for one year after it expires or is withdrawn.²¹

Overexposure of personally identifiable information would be particularly widespread in years when the annual cap on H-1B admissions is oversubscribed and a large proportion of filed H-1B cases are never processed to

¹⁹ The Government Accountability Office (GAO) defines PII as any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information. GAO Report 08-536, *Privacy: Alternatives Exist for Enhancing Protection of Personally Identifiable Information*, May 2008, <http://www.gao.gov/new.items/d08536.pdf>.

²⁰ DOL Supporting Statement at 2.

²¹ 20 C.F.R. § 655.760(c).

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completion. In the case of an LCA covering multiple beneficiaries, where a beneficiary is no longer employed by the employer, there appears to be no way for an employer to remove that beneficiary's information from the LCA. Current regulations contain no procedure for amending an LCA, and the alternative – withdrawing the entire LCA and refiling it as to the remaining beneficiaries – would be extremely burdensome for the employer. If the employer chose this option to minimize the release of personally identifiable information, it would also be required to file an amended H-1B petition for each of the remaining beneficiaries, with all of the attendant costs and fees.

In proposing to require employers to disclose the personally identifiable information of current and prospective beneficiaries, DOL seems to pay little heed to the federal statutes and recommendations aimed at minimizing the disclosure of personally identifiable information – which includes such data as the name, date of birth and salary. Though DOL suggests that it is planning to create an LCA registry “to allow all the data we collect to be made available online and in downloadable formats – while protecting any personally identifiable information as well as any governing legal constraints such as the Privacy Act, the Trade Secrets Act and the Confidential Information Protection and Statistical Efficiency Act,”²² it fails to consider the significant privacy impact of making personally identifiable information available at the worksite in the public access file. It has also failed to consider state privacy laws and international data privacy rules, such as those of the European Union, compliance with which is critical for multinational organizations.

In combination with the proposed limit on LCA beneficiaries, the requirement to provide identifying information about prospective employees raises important procedural concerns. Employers would no longer be able to file “blanket” LCAs covering multiple openings for employees to be identified in the future. Blanket LCAs are useful for employers who want the flexibility to move employees to new work locations or projects to meet business needs. They are an important compliance tool for industries in which employees are highly mobile. DOL criticizes this practice, claiming that employers who use LCAs for large numbers of workers violate the “spirit” of the notice requirement and allegedly deprive U.S. workers of the opportunity to know when new H-1B workers are hired.²³ DOL fails, however, to point to any statutory or regulatory basis for this criticism. By statute, employers are required to specify the number of H-1B workers that will be sought under an individual LCA, but there is no statutory or regulatory limit on the number of beneficiaries that can be sought for a particular job opportunity.²⁴

Requiring employers to provide beneficiary information would also hamper employers' ability to begin the H-1B petition process. Employers may have identified a need to fill a job opening before they have identified the specific employees who will be hired to fill those positions, especially as they plan for the highly competitive H-1B filing season, which begins six months before the start of each fiscal year. The demands of the filing period often

²² DOL Supporting Statement at 20.

²³ DOL Supporting Statement at 11.

²⁴ INA § 212(n)(1)(D), 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. § 655.730(c)(4)(ii).

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require employers to begin LCA filings before they determine with specificity the employees on whose behalf H-1B petitions will be filed and where these employees will work.

The agency appears to infer that a job opportunity for which a beneficiary has not yet been specifically identified is speculative, and thus is not a legitimate opportunity. This is a false assumption. It is not the job opportunity that is speculative – it is that the employer has not yet identified the worker who will fill the bona fide job opportunity.

- *Beneficiary Data Tracking*

Under the proposed revisions, LCA beneficiaries would be assigned an “OFLC H number” upon submission of an initial LCA. DOL intends the H number to follow the foreign national to any future LCAs filed on his or her behalf. The H number would present a new and burdensome requirement for employers. Employers would be required to collect and track each worker’s H number. This could pose additional burdens where prospective hires are already employed as H-1Bs with other employers. DOL justifies the creation of the H number on the grounds that it will allow it and the Department of Homeland Security to better share information and to track foreign workers. However, adequate means for DOL and DHS to correlate the foreign national to a specific LCA already exist in the present system. USCIS Form I-129, the nonimmigrant worker petition filed on behalf of prospective H-1B workers, already asks employers to provide the applicable LCA case number for the beneficiary. And, as noted above, DOL’s Wage and Hour Division has the authority to obtain information about foreign beneficiaries during the course of a complaint-based LCA investigation.

DOL also seeks to require employers to list the application number of any PERM labor certification pending on behalf of the beneficiary. DOL justifies this by stating that it will enhance its “integrity review” efforts between LCA applications and PERM program applications. But the form does not specify whether the request relates to PERM applications for different positions or different employers. Furthermore, it is unclear why the comparison of an LCA with a pending PERM application would enhance the integrity of either process. As discussed above, the LCA contains the employer’s promise to adhere to requirements concerning the wages, working conditions and obligations concerning a job classification. It is not an adjudication of the required wage for the job classification or the beneficiary’s eligibility, nor is it a labor market test. By contrast, the PERM application is a certification that there are no able, qualified, willing, available U.S. workers to fill a specific position for which a specific foreign worker is sought for future employment and entails a test of the labor market. DOL provides no explanation why an LCA would have any bearing on the integrity of a permanent labor certification, nor why documentation available to it during the PERM review process would not adequately address PERM integrity issues.

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As with other personally identifiable information addressed above, disclosure of a beneficiary's H number and PERM application number would also raise legitimate privacy concerns.

- *Information About the H-1B Employer*

The proposed LCA would require employers to provide specific information about their organizations, including the year the business was established, the current number of employees in the United States, gross annual income, and net annual income. Most of this information already appears on the USCIS Form I-129 H-1B petition, but in contrast to that petition, the LCA is subject to public access. Information concerning annual income presents confidentiality concerns for private organizations, particularly closely held companies. Though publicly traded companies disclose this information in many contexts, private organizations have the right to protect income information. In the context of an I-129 petition, this information is subject to exceptions from Freedom of Information Act disclosure, and employers have the option to flag the information as company confidential, thereby further protecting it from disclosure. No such option is available in the LCA context, due to the public access requirement.

The proposed LCA would also require the employer to list the country of its "business headquarters." This is broadly and somewhat confusingly defined as "the country of the employer's chief place of business or the nerve center that directs and controls all of the employer's business activities." DOL provides no justification of its need for this information.

- *Information About the Worksite and End Clients*

The employer would be required to list each specific physical address where a foreign beneficiary will work. If the H-1B employee will be placed at a client worksite or multiple client worksites, the proposed LCA revision would require the employer to state that fact and name each end-client. The employer would also be required to state whether each location presents a bona fide job opportunity. DOL justifies the collection of this information by stating that it needs "clarification on actual worksite to enable employer to demonstrate regulatory compliance regarding changes in worksite."

This information is problematic for a number of reasons. First, LCA regulations and policy allow employers to send H-1B employees to locations within the area of intended employment without the need to obtain a new LCA. An LCA controls all worksites within this area, which is defined as the area within normal commuting distance of the place of employment where the nonimmigrant is or will be employed. The proposed revision to the form

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suggests that an employer may be required to file a new LCA for new work locations that are within the area of intended employment.

Second, the identity of end clients is sensitive business information that many employers may not wish to disclose, or may be prohibited from disclosing under the terms of a contract. It is not clear how public disclosure of the specific identity of an end client relates to the employer's obligations under the LCA.

- *Wage Information*

As noted above, employers are required to pay H-1B beneficiaries the higher of the prevailing wage for the position and the actual wage paid to similarly situated employees. The actual wage is defined as the wage paid by the employer to all individuals at the worksite with similar experience and qualifications in the same occupation.²⁵ The LCA regulations prescribe detailed factors for employers to consider when determining the actual wage.

The proposed revision would ask employers to respond to two questions that apparently relate to this wage determination: (1) whether the employer has "looked at" its workforce to determine whether there are similarly employed U.S. workers in the occupation; and (2) the "approximate number" of U.S. workers similarly employed by the employer. These questions do not accurately reflect the applicable wage regulations. First, the actual wage is that paid to all similarly situated workers, regardless of their specific citizenship or immigration status. It is not limited to U.S. workers -- defined as U.S. citizens or nationals, U.S. lawful permanent residents, asylees and refugees -- but must include foreign workers in nonimmigrant categories other than H-1B.²⁶ Second, it is not clear how an approximate number of U.S. workers similarly employed would serve the employer or DOL in regard to the calculation of actual wage. Lastly, these questions ignore an important element of the actual wage calculation: if there are no other similarly situated employees at the worksite, the actual wage is the wage the employer pays to the H-1B nonimmigrant.²⁷

- *Declaration Concerning Recoupment of Expenses*

The proposed revision would require employers to declare that they may not deduct from an H-1B beneficiary's wages business expenses related to the H-1B petition and LCA, including attorney fees and other costs. This is

²⁵ 20 C.F.R § 655.731(a)(1).

²⁶ 20 C.F.R § 655.715.

²⁷ 20 C.F.R § 655.731(a)(1).

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an inaccurate statement of DOL regulations. Employers are permitted to recoup certain costs related to the H-1B petition process as long as the recoupment does not lower the worker's rate of pay below the required wage.²⁸

RAMIFICATIONS OF THE PROPOSED FORM REVISION

Each piece of data DOL proposes to solicit on Form ETA-9035 presents an array of concerns for employers. Viewed in total, the revisions carry significant ramifications for LCA processing that would exceed DOL's statutory authority.

- *Expanded Scope of DOL Review*

As discussed above, DOL is authorized to review LCAs for completeness and obvious inaccuracies only. The addition of a large number of new data fields to the form raises important questions about the scope of this review. What will it mean for DOL to scrutinize beneficiary, employer and end-client information for completeness and accuracy? The addition of this and other new information raises the possibility of more searching initial review of LCAs to verify biographic and geographic information, which could move initial LCA processing away from the streamlined, non-adjudicatory process contemplated by Congress. When the proposed broadening of Form ETA-9035 data is viewed in light of pending legislation, there is even more reason for concern. A bill now under consideration in Congress would greatly expand DOL's investigatory powers, authorizing it to conduct far-reaching initial reviews of LCAs for "clear indicators" of fraud or material misrepresentation.²⁹ DOL would itself define those indicators. This means DOL could decide that data on or characteristics of an employer's LCAs (such as specific occupations for which LCAs are sought or particular wage levels) warrant in-depth review.

- *Tougher Scrutiny of End-Client Placements*

The proposal to require employers to name end-clients and to list a physical address for all such placements even if within the area of intended employment covered by the LCA is a further step in the government's close scrutiny of third-party placements. DOL would join USCIS and the State Department in imposing strict limits on these work arrangements.

USCIS already requires employers to provide extensive documentation of third-party placements and typically grants shorter approval periods to petitions that involve end-client assignments.³⁰ USCIS takes the position that

²⁸ 20 C.F.R. § 655.731(c)(1), (c)(9)(iii)(C).

²⁹ H.R. 3012.

³⁰ See Donald Neufeld, Associate Dir., USCIS Service Center Operations, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," January 8, 2010, available at

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employers must document client assignments for the full employment period requested in the petition and takes the position that future, as-yet-undetermined client assignments constitute speculative employment. DOL's proposal to require employers to name specific LCA beneficiaries, limit the number of beneficiaries per LCA and list specific end-client locations extends this restrictive position and would impede employers from moving workers to new locations that may not be known at the inception of the three-year validity of the LCA. This is a significant obstacle in industries where business opportunities occur rapidly and the ability to immediately place employees on new projects is essential.

ARE THE BURDENS OF THE PROPOSED LCA REVISION JUSTIFIED?

The Department of Labor justifies its proposed revisions by citing the recommendations of its own Inspector General (IG) and its sister agency, USCIS. Yet an examination of publicly available documentation suggests that the proposed revisions go far beyond stated recommendations and are not justified in regard to the actual rate of H-1B program noncompliance.

In 2009, the DOL IG conducted an audit of iCERT, the agency's online LCA portal.³¹ Though detailed results of the audit have been deemed sensitive and have not been publicly released in full, a summary of the IG's recommendations appears in a 2009 report to Congress and in the IG's own audit work plan for FY 2012. In the 2009 report, the IG found shortcomings not in Form ETA-9035 itself or in the data collected thereon, but rather in the electronic processing controls that are embedded within the iCERT system and are used to flag incomplete or obviously inaccurate applications.

According to the IG, electronic checks in iCERT were not adequate to screen inaccuracies, leading to manual reviews of LCAs. In the only public reference to the data collected on Form ETA-9035, the report stated that certain form fields are not electronically checked for completeness or accuracy.³² The FY 2012 audit work plan specified that some of the IG's recommendations included incorporating electronic checks that flag an LCA for further review if the employer selects "no" to any of the attestation statements. It also recommended checks to flag obvious inaccuracies in the county location of the prevailing wage and in the wage source. Lastly, it

<http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>. See also, U.S. Citizenship and Immigration Services, "Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions," available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3d015869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>

³¹ Office of the Inspector General, U.S. Department of Labor, "OFLC's iCert Processing Controls Need to be Strengthened to Better Identify Incomplete and/or Obviously Inaccurate Labor Condition Applications," Report No. 06-09-004-03-321 (September 30, 2009), cited in Office of the Inspector General, U.S. Department of Labor, "Semiannual Report to Congress, April 1-September 30, 2009," at 7, 17-18, available at <http://www.oig.dol.gov/public/semiannuals/62.pdf>.

³² Office of the Inspector General, U.S. Department of Labor, "Semiannual Report to Congress, April 1-September 30, 2009," at 7, 17-18, available at <http://www.oig.dol.gov/public/semiannuals/62.pdf>.

DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals

recommended checks to flag whether the prevailing wage is listed other than on an hourly basis for part-time positions.³³ Nowhere in the public materials is there an indication that the IG recommended an expansion of the fields on the form as a necessary improvement to the review process.

An examination of available enforcement data suggests that problems with “integrity” in the H-1B and LCA programs are, contrary to DOL’s vague assertions, not common. In a September 2008 USCIS study, 246 H-1B cases were reviewed for evidence of fraud and/or technical violations.³⁴ In its examination of H-1B wages, a key LCA component, USCIS found just 14 cases in which an H-1B beneficiary was being paid less than the prevailing wage. Of these, nine cases (3.7% of the reviewed cases) were determined to be fraudulent, while five cases (2%) were deemed to have technical violations. (USCIS estimated an overall fraud rate of 13% in that report.) Violations included failure to pay at least the prevailing wage, the placement of H-1B workers in non-productive status (“benching”), and deduction of petition fees that resulted in the wage falling below prevailing rates. In a 2009 GAO report on the H-1B program, it was revealed that DOL Wage and Hour Division LCA investigations between FY 2000 and FY 2009 never amounted to more than 155 cases in any year, and far fewer in many years.³⁵

A more recent report by the USCIS Fraud Detection and National Security Directorate shows similarly low incidence of H-1B program violations. Of more than 14,000 H-1B cases randomly selected for investigation in FY 2010, only 495 (3.5%) were revoked – an agency action that is not limited to fraudulent petitions, but may relate to petitions in which the H-1B worker simply no longer works for the petitioner. Just 192 cases – 1% of the investigated cases – were referred for fraud investigation.³⁶

These low rates of noncompliance in the H-1B program do not support the actions that DOL proposes to take. Under current statute and regulations, the agency has ample tools to respond to LCA complaints, gather evidence and penalize violations. Yet with minimal justification, DOL seeks revisions to the LCA form and process that would change the very nature of the LCA system, in contravention of Congress’s intent and legislative mandate, expose sensitive personal and business information at undue risk to employers and foreign beneficiaries, and burden employers with significant new costs.

³³ Office of the Inspector General, U.S. Department of Labor, “Office of Audit Workplan, FY 2012” at 20-21, available at <http://www.oig.dol.gov/public/reports/oa/2012/Audit%20Workplan%20FY%202012.pdf>.

³⁴ U.S. Citizenship and Immigration Services, “H-1B Benefit Fraud and Compliance Assessment,” September 2008, available at American Immigration Lawyers Association InfoNet Doc. No. 08100965.

³⁵ Government Accountability Office, “H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program,” January 2011, available at <http://www.gao.gov/products/GAO-11-26>.

³⁶ American Immigration Lawyers Association, “USCIS Fraud Detection & National Security (FDNS)

Directorate Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions,” June 7, 2011, available at AILA InfoNet Doc. No. 11062243. USCIS has not released data on the number of fraud referrals that resulted in actual findings of fraud.

APPENDIX

LINKS TO ORGANIZATION COMMENTS FILED WITH DEPARTMENT OF LABOR

U.S. Chamber of Commerce

<https://www.uschamber.com/sites/default/files/comments/USCC%20comment%20on%20LCA%20final%20to%20DOL%209-7-2012.pdf>

American Council on International Personnel and Society for Human Resource Management

http://acip.com/sites/default/files/ACIP%20Comments%20on%20Revised%20LCA%20July%202012%20FINAL%20%282%29_0.pdf

American Immigration Lawyers Association

<http://www.aila.org/content/default.aspx?docid=41213>

NAFSA: Association of International Educators

<http://www.nafsa.org/uploadedFiles/NAFSA%20comments%20to%20DOL%20re%20LCA%2008232012.pdf>

DOL RESOURCES

Here are copies of the proposed revision to [Form ETA-9035](#), the form [instructions](#), [Form WH-4](#), and DOL's [supporting statement](#) (at the website of Fragomen, Del Rey, Bernsen & Loewy, LLP).

ABOUT THE AUTHOR

R. Blake Chisam is a Partner in Fragomen, Del Rey, Bernsen & Loewy, LLP, based in Washington, DC, and leads Fragomen's Professional Practices Group. Blake was previously senior counsel to the immigration subcommittee for the U.S. House Committee on the Judiciary, where he worked on policy and oversight issues related to employment-based immigration, international law, border security, immigration enforcement, refugee issues, naturalization and citizenship. In addition to his former role with the House Judiciary Committee, Blake served as Staff Director and Chief Counsel for the House Committee on Standards of Official Conduct (Ethics Committee) from 2009-2011, and counsel to the Ethics Committee Chair and Senior Policy Advisor to Representative Zoe Lofgren in 2009. During his tenure, Blake directed an unprecedented number of complex Congressional ethics investigations and served as lead counsel in high-profile House ethics disciplinary hearings. Prior to his government service, Blake practiced immigration and nationality law in the private sector. His practice focused on advising organizations with respect to immigration-related policy, employment issues and other related matters. Blake is a sought-after speaker and guest lecturer and has published many commentaries on immigration law including a book, *Immigration Practice*, which he co-authored. In 2000, he was awarded the Meritorious Public Service Award by former Attorney General Janet Reno. For this policy brief the author adapted information from "New Proposals Seek to Toughen LCA Review and Enforcement," by Austin T. Fragomen, Jr., an article that will appear in a future issue of *Interpreter Releases* (Thomson West).

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