Appendix C to LABOR CONDITION APPLICATION FOR H-1B, H-1B1, and E-3 NONIMMIGRANTS and the NONIMMIGRANT WORKER INFORMATION FORM OMB Control Number 1205-0310

Form ETA-9035/9035E, Form ETA-9035CP, Form ETA-9035/9035E Appendix A, and WH-4: Comment Responses

This is an appendix to the Office of Management and Budget's (OMB) supporting statement for the Labor Condition Application (LCA) for H-1B, H-1B1, and E-3 Nonimmigrants and the Nonimmigrant Worker Information Form, OMB Control No. 1205-0310. The comments discussed in this appendix are also referenced in Questions A.8 and A.15 of the supporting statement.

This appendix includes a summary of all public comments received in response to the 30-day notice the Department of Labor (Department) published in the *Federal Register* (83 FR 24141) on May 24, 2018. The Department received comment submissions from three commenters on the proposed Form ETA-9035/9035E, Form ETA-9035CP and Form ETA 9035/9035E Appendix A. The Department has reviewed and considered the public comments received in response to the 30-day notice, and has included its responses in this document. The Department received comment submissions from three commenters, all of whom previously submitted comments during the 60-day comment period and all of whose comments during the 30-day comment period were substantially similar to their 60-day submissions. Two commenters' 30-day comment submissions acknowledged revisions the Department made in response to their 60-day comments.

The Department did not receive any comments during the comment period on the proposed revisions to the WH-4 information collection.

I. Forms ETA-9035/9035E and 9035CP:

A. Support for the Department's Proposed Revisions

No updates.

B. Burden Imposed by the Department's Proposed Revisions

One commenter stated that the Department underestimated the burden both for completion of Form ETA 9035/9035E and Appendix A, and the cost to employers associated with the Department's revisions. The Department thoroughly assessed the time and cost burdens associated with the completion and filing of LCAs. Based on the Department's calculation of the average time needed for all filers, it arrived at an estimated total average time burden associated with the preparation and submission of Form ETA 9035/9035E. As a result of a comment made during the 60-day period, the Department reassessed and adjusted the overall burden to ensure the most accurate estimate possible. For example, in response to comments received during the 60-day period, the Department changed its proposal to limit the collection of Appendix A to H-1B dependent and/or willful violator employers claiming an exemption for an H-1B

nonimmigrant worker solely on the basis of that worker's Master's or higher degree. As provided with the 30-day notice publication, the Department will not collect Appendix A in instances where both exemptions are claimed for the worker. As with all Paperwork Reduction Act (PRA) packages, the Department carefully calculated the public burden associated with its proposed revisions and will continue to evaluate the public burden for future PRA packages related to the Form ETA-9035/9035E to ensure continued accuracy.

C. The Department's Authority to Revise Forms ETA-9035/9035E and 9035CP

Two commenters questioned the Department's authority to make the proposed changes to the forms. One commenter stated the Department did not have authority to add new fields to the Form ETA-9035. Another commenter stated that the Department's changes would contravene existing regulations. As discussed in response to similar comments received during the 60-day comment period, the Department's proposed revisions are within the Department's statutory authority under the Immigration and Nationality Act (INA) to administer the LCA for the H-1B program. As stated, the Department's proposed changes constitute form revisions that do not alter employers' substantive legal obligations under the INA and corresponding regulations. The form revisions do not constitute rulemaking. Further, the revisions were made available for public inspection through the notice and comment process mandated by and in compliance with the PRA.

D. The Department's Proposed Changes to Forms ETA-9035/9035E and 9035CP

1. *Intended Place of Employment* (Section F)

The Department's proposed form requires the employer to identify all intended places of employment on the LCA, as prescribed by 20 CFR 655.730(c)(5). One commenter expressed concern that this change 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 commenter stated that section 655.734(a)(2) and the definition of "area of intended employment" at 20 CFR 655.715 have long been understood to give employers flexibility to move H-1B employees to new locations within the same area of intended employment without the need to file a new LCA. Under the proposed revision, the commenter believes that 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. Because of this confusion, the commenter feared that employers would file a new LCA for each location change, even if that change involves moving an employee just a block or two down the street. For these reason, the commenter believes that the proposed revision will add unreasonable burdens to businesses that rely on the H-1B program.

As previously stated, the requirement that employers identify all intended places of employment has long existed in the Department's regulations. The Department's addition of this language to the LCA merely clarifies an existing regulatory requirement, and does not alter this existing obligation. Furthermore, as the Department stated in its responses to the 60-day comments, current regulations require employers to identify only those places of employment that are *intended* at the time of LCA filing. When employers place H-1B workers at worksites not

contemplated at the time of filing, but within the area of intended employment established by an approved LCA, the regulations at 20 CFR 655.734(a)(2) require posting of notice at those worksites, but do not require the filing of new LCAs. This and the short-term placement provisions at 20 CFR 655.735 apply to places of employment not contemplated at the time of filing. Therefore, such places are not *intended* places of employment and cannot be included on the initial LCA. If an employer wants to move H-1B workers to worksites not contemplated at the time of filing, these provisions determine whether a new LCA must be filed. Thus, the commenter is correct that under current regulations, employers may move H-1B employees to new places of employment within the same area of intended employment without the need to file a new LCA, as long as those new locations were not intended at the time the original LCA was filed. If, at the time of filing, the employer plans to move its H-1B employees a block or two down the street, or elsewhere, inclusion of the secondary location on the LCA should not be particularly burdensome.

The same commenter recommended that in order to prevent any confusion about whether moving H-1B workers to new worksites requires the filing of new LCAs, the Department should instead require that employers provide only the city and state of employment. The Department declines to adopt this recommendation and will continue to require employers to provide, for each intended place of employment, "the worksite or physical location where the work will actually be performed," as proposed. This information is necessary for the following reasons: 1) the transparent administration of the program, 2) enforcement of the LCA, and 3) the protection of foreign workers and similarly employed U.S. workers. This requirement is consistent with program regulations, which require the collection of "all intended places of employment" and define "place of employment" as "the worksite or physical location where the work is actually performed." 20 CFR 655.715, 655.730(c)(5). Collection of the city and state of employment, rather than the physical worksite address, is insufficient to meet this regulatory obligation.

2. *Secondary Entity Name* (Formerly *Secondary Employer Name*) (Section F)

The Department's proposed form requires employers to provide the legal business name of any secondary entities with which H-1B workers will be placed. Following the comments received during the 60-day comment period, the Department decided to refer to those businesses at which H-1B workers are placed by employers seeking certification as "secondary entities" instead of "secondary employers." One commenter commended the Department "for its recognition that our members' clients are not 'secondary employers,'" and expressed support for the change in terminology. The Department reiterates that it made this change because the regulatory requirement to identify "[a]ll intended places of employment" requires identification of all secondary entities that qualify as "places of employment," whether or not placement with a secondary entity establishes an employment relationship between the secondary entity and the H-1B worker. Contrary to the commenter's assertion, this change does not indicate recognition that the clients of employers seeking H-1B certification are not secondary employers, but seeks to ensure that employers will list the names of all secondary entities on their LCAs, regardless of whether they qualify as secondary employers.

This commenter also stated that Congress did not authorize the Department to collect the names of secondary entities on the LCA. As explained previously, 20 CFR 655.730(c)(5) requires

employers to identify "[a]ll intended places of employment" on the LCA. The regulations at 20 CFR 655.715 define "place of employment" as "the worksite or physical location where the work actually is performed." In order to comply with this requirement, the Department has determined that employers must provide the names of secondary entities at which or with which they intend to place H-1B workers at the time of filing that qualify as "places of employment." Furthermore, it is reasonable to interpret "worksite or physical location where the work actually is performed" to include business names.

The same commenter stated that the collection of secondary entity information is not required for the Department to perform its statutory responsibility, and "'[an]other person or entity which owns or operates a place of employment' has absolutely no responsibility and no liability in the H-1B visa statute." The Department disagrees with the assertion that this information is not necessary to perform its statutory responsibility. The Department needs to know where H-1B workers are placed, and with whom, for the protection of both those workers and similarly employed U.S. workers. This program does not guarantee anonymity to employers or entities at which or with which applicants place foreign workers. Finally, whether the INA imposes responsibility or liability on secondary entities who do not participate in filing LCAs for their workers is irrelevant to whether the Department should collect secondary entity information for the execution of its statutory duties.

The same commenter also expressed concern that the collection of this information will generate negative publicity for the commenter's clients. The commenter stated that the disclosure of the secondary entity on the LCA will unfairly disadvantage businesses, compel the disclosure of proprietary information, and disrupt business innovation. Further, the commenter stated that the disclosure of the employer's name on the LCA violates the right to privately contract with other businesses. A second commenter stated that requiring the employer to disclose the name of the "end-client" may violate confidentiality agreements between the H-1B employer and that end client. This commenter further stated that in order to comply with the collection requirement, employers will have to review the terms of each contract, identify any restrictions, and obtain consent from the end client to disclose the information on the LCA. Additionally, this commenter asserted that making form changes that impede U.S. business operations and U.S. economic growth is irresponsible.

The Department is sensitive to commenters' concerns about the competitiveness of H-1B employer businesses and the confidentiality of business information. However, the H-1B visa program is voluntary and employers may choose whether to participate. As employers with concerns about disclosing the names of secondary entities may decide not to participate in the program, the Department is not strictly compelling disclosure. Furthermore, employers with such concerns may take advantage of the short-term placement procedures at 20 CFR 655.735, which permit short-term placement of H-1B workers at worksites unintended at the time of filing without filing a new LCA, as long as regulatory requirements are met. However, employers that choose to participate in the H-1B program must comply with all program requirements.

Current regulations require H-1B employers to identify "[a]ll intended places of employment on the LCA." 20 CFR 655.730(c)(5). "Places of employment" include secondary entities that qualify as worksites under 20 CFR 655.715. These requirements are not new. To the extent that

revisions to the LCA change employers' current practices, the Department has provided sufficient notice for employers to come into compliance. The Department disagrees that such revisions are irresponsible—rather, the Department asserts that they are necessary to ensure program transparency and protect both U.S. and H-1B workers. Finally, the Department has considered concerns raised about proprietary business information and has concluded that the disclosure of names and locations of secondary entities does not violate protections for such information. Under the current regulatory requirement it is sometimes possible to glean the secondary entity's identity by analyzing the worksite location and comparing it to known business addresses, this is however administratively burdensome and hinders the Department's ability, and the transparency to the public, to determine where H-1B workers are placed. Further, although there are legal protections for certain categories of commercial information, they do not apply here.

3. *Appendix A* (Section H.5):

The Department has proposed to add Appendix A to Form-ETA 9035/9035E, which collects the number of H-1B nonimmigrant workers for which H-1B dependent or willful violator employers will seek exempt status based solely on the worker's attainment of a Master's degree or higher in a specialty related to the intended employment; the name of the institution that awarded the degree; the field of study in which the degree was awarded; the date on which the degree was awarded; and documentation substantiating the degree information. Two commenters expressed concerns with this proposal.

One commenter stated that, unless the statute and the regulations are amended, the Department cannot require employers to submit the information required by Appendix A. Another commenter stated that the collection of the Appendix A information does not serve any practical utility for the Department, and that it would be wasteful and add no value. Further, the commenter stated that the inclusion of Appendix A data is irrelevant to the Congressional purpose of the LCA. The Department maintains that its proposed collection of educational information and documentation constitutes form revisions that do not alter employers' substantive legal obligations under the INA and accompanying regulations. The statute does not preclude the Department from collecting information that is reasonable and necessary for administering the LCA process under the H-1B visa classification. In accordance with 20 CFR 655.737(e), the employer will continue to designate on the LCA that the LCA will be used only to support H-1B petition(s) and/or request(s) for extension of status for "exempt" H-1B nonimmigrants. In order to assess whether the H-1B dependent or willful violator employer may be subject to the statutory obligations regarding non-displacement and recruitment of U.S. workers, the Department maintains that it is necessary and reasonable for this limited group of employers to disclose information that establishes the obvious bona fides of their request to employ one or more H-1B nonimmigrant workers in exempt status. Where the H-1B dependent or willful violator employer is seeking a statutory exemption based on the annual minimum wage rate threshold, the LCA has historically collected wage offer information that the Department reviews as prima facie evidence demonstrating compliance with the statute and regulations. Similarly, the collection of educational and degree documentation using the Department's proposed Appendix A will provide prima facie evidence as to whether these employers are subject to the statutory obligations based on the educational attainment threshold for H-1B

nonimmigrant workers. Because the statutory non-displacement and recruitment obligations must be met prior to filing the LCA or H-1B petition, the Department maintains that collecting educational and degree documentation using the proposed Appendix A, at the time of filing, will better safeguard the employment and non-displacement of U.S. workers before the LCA is certified and H-1B petition is filed with the Department of Homeland Security (DHS). The proposed collection of information on the Appendix A, in aggregate form, will provide greater transparency to the public and disclose the manner and frequency with which H-1B dependent or willful violator employers are using the educational attainment threshold to claim an exemption from the statutory requirements for the non-displacement and recruitment of U.S. workers in these job opportunities.

One commenter also stated that requiring the Appendix A information could be a violation of the PRA. The Department maintains that its proposed collection of Appendix A information is consistent with PRA requirements. For this, the Department has asserted its need for the proposed collection of the Appendix A information and its supporting documentation for the LCA, to ensure that the educational attainment designation entered on the Department's LCA is complete and without obvious errors or inaccuracies. The Department's proposed collection will provide greater transparency to the public and disclose the manner and frequency with which H-1B dependent or willful violator employers are using the educational attainment threshold to claim an exemption from the statutory requirements for the non-displacement and recruitment of U.S. workers in these job opportunities. Further, the Department published this proposal, affording the public with opportunities to comment during both the 60-day and 30-day comment periods. The Department has assessed the Appendix A proposal in light of the public comments received, and the Department previously modified its proposal with publication of the 30-day notice to limit the Appendix A collection to those H-1B employers claiming exemptions for workers based on the Master's or higher degree exemption, only.

One commenter stated that it is unclear how the Department will review the Appendix A information for obvious inaccuracies, how employers will submit the Appendix A documentation, and what will be done with these documents after they are submitted. The Department will review the Appendix A information for obvious inaccuracies and completeness to ensure that, for example, prospective H-1B workers have met the Master's degree or higher threshold, received a degree from an academic institution that obviously exits, and that the year in which the degree was attained is obviously accurate. In terms of the submission of Appendix A documentation, the Department plans to implement an electronic document upload feature in the electronic filing system for collection of Appendix A documentation. With the Department's request for OMB approval, the Department has requested delayed implementation of the forms, including Appendix A, to permit adequate time to make technology modifications to the electronic filing system to accommodate the filing of Appendix A and supporting documentation. Employers will submit Appendix A and its documentation with the LCA at the time the electronic application is filed. Employers with disabilities or those employers who receive prior special permission to file by mail due to lack of internet access can submit Appendix A and its documentation with the mailed filing.

In terms of record retention, the Department's retention of the Appendix A and the supporting documentation will last for a period of five years, in accordance with the Department's record

retention schedule with the National Archives and Records Administration. The LCA and its documentation must be retained for the same period of time following the date a final determination letter is issued or final action occurs on the LCA, including a withdrawn application.

Another commenter stated the name of the H-1B worker does not appear on the form and that the Department has no basis or process in place for anyone to verify whether the education data is accurate. The Department notes that the Appendix A form does not propose to collect any identifying information from the H-1B dependent or willful violator employer about the prospective H-1B nonimmigrant worker(s). The Department will review the Appendix A information and the supporting documentation for obvious errors and completeness of the information provided.

Both commenters claimed the Appendix A information was duplicative of documentation employers submit to United States Citizenship and Immigration Services (USCIS) in support of an H-1B petition. One commenter stated that the Department has failed to explain how the new requirement will assist USCIS in adjudications of H-1B petitions, when USCIS ultimately determines whether the employee qualifies for the exemption. The other commenter echoed that it is USCIS' responsibility to confirm the H-1B worker's education. The Department maintains that its proposed collection of information through Appendix A is necessary for administering the LCA process under the H-1B visa classification. Pursuant to 20 CFR 655.737, H-1B dependent or willful violator employers are subject to the attestation obligations regarding displacement and recruitment of U.S. workers for all LCAs that are filed on and after March 8, 2005, unless the LCA is used only for the employment of exempt H-1B nonimmigrants. Thus, although the USCIS I-129 petition may collect similar information, the classification of the employer's dependency or willful violator status and other information related to the prospective employment of exempt H-1B nonimmigrants is based on the LCA. The Department's collection of this information during the LCA process will ensure that the educational attainment designation made by H-1B dependent or willful violator employers on the Form ETA-9035/9035E, and accompanying Appendix A, is complete and without obvious errors or inaccuracies, thereby ensuring key statutory provisions related to non-displacement and recruitment of U.S. workers, as designated on the LCA, are fully safeguarded by the Department prior to DHS's review of the petition.

The commenter also asked for guidance in interpreting the Appendix A instructions for employers who claim the master's degree exception, where an employee has a "master's or higher degree (or its equivalent)." The commenter sought clarity in determining what would be acceptable "equivalency," and stated that 20 CFR 655.737(d) only indicated 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." The commenter asked the Department to specify those "appropriate sources of expertise."

In terms of the information that the Department will consider with Appendix A, the Department's proposed instructions require applicants to provide a degree, transcript, or an official letter from an academic institution to substantiate the exemption designation based on a master's or higher degree (or its equivalent). Equivalency cannot be established through

experience or through demonstration of expertise in the academic specialty (*i.e.*, no "time equivalency" or "performance equivalency" will be recognized as substituting for a degree issued by an academic institution). 20 CFR 655.737(d)(1). "Master's or higher degree (or its equivalent)" means a foreign academic degree from an institution that 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. For the Department's review of Appendix A documentation, any document in a foreign language must be accompanied by a full and complete English language translation. As provided, the Department's regulation at 20 CFR 655.737(d) permits the Department to consult with appropriate sources of expertise to make an equivalency determination. The request for disclosure of appropriate sources of expertise is beyond the scope of this PRA process; however, the Department will use its available resources in compliance with applicable regulatory standards for review of the LCA.

This same commenter also worried that the Appendix A would virtually eliminate the use of "multiple-slot" LCAs for H-1B dependent employers claiming the Master's degree exemption, because employers rarely know the names and educational backgrounds of foreign beneficiaries who will be placed at a single location. Consequently, employers will be forced to file an LCA for each foreign beneficiary and will bear the associated burden and recordkeeping requirements. The Department reiterates that the employer has the choice of filing the LCA for one or more workers to perform work in the occupational classification and area of intended employment. The Department's proposed revisions to the Form ETA-9035/9035E and Appendix A are flexible enough to permit employers to seek multiple workers on a single LCA as long as those workers are subject to the same exemption(s). Furthermore, pursuant to 20 CFR 655.760(a), the Department's regulations require the employer to place in its public access file a list of "exempt" H-1B nonimmigrants within one working day of filing the LCA if the employer is claiming the exemption. This means that the employer must have identified the H-1B nonimmigrant(s) subject to the education-based exemption and collected all credential information justifying the basis of such exemption(s) at the time of filing the LCA, or it would be unable to comply with the existing regulatory requirement.

Based on the comments received during the 60-day comment period, the Department previously clarified in the form instructions that the Department will collect Appendix A only in instances in which the employer claims the Master's or higher degree for the H-1B worker as the only statutory exemption claimed. Further, based on commenters' questions about when to file Appendix A, the Department is clarifying in the form instructions that the exemption(s) claimed on a single LCA must be consistent for all workers subject to the LCA.

E. Changes Proposed by Commenters

Commenters recommended that the Department make additional revisions to Forms ETA-9035/9035E and 9035CP, as well as other changes to the H-1B program. The Department's responses follow.

1. *Entry of the Number of Workers Per Visa Classification* (Section B.7, Form ETA 9035CP)

One commenter acknowledged the Department's revision clarifying the Form ETA-9035CP instructions for completing items B.7(a) through (f) on Form ETA-9035/9035E, which the commenter requested during the 60-day comment period. In its prior response, the Department clarified the instructions as follows: (1) for the total unique number of worker positions being requested for certification, applicants should count each worker once; and (2) if an individual fits into more than one category, applicants should indicate so in items (a) through (f).

2. *Electronic Storage of the LCA Public Access File* (Sections I & J, All Forms)

One commenter acknowledged the Department's clarification of requirements for electronic file storage. Proposed section I of Forms ETA-9035/9035E and 9035CP requires the employer to indicate whether its public disclosure information will be located at the employer's principal place of business or the place of employment. Proposed Section J provides notice of the employer's obligations to maintain public disclosure information. During the 60-day comment period, this commenter stated that the physical space required for the maintenance of paper-based files can be burdensome, and asked whether electronic storage of the public disclosure information is permissible. This commenter also sought guidance regarding the effect of proposed Section J on the employer's ability to electronically store public disclosure information and asked which box it should check if it chooses to store this information electronically. In its response to the 60-day comments, the Department clarified that an LCA public access file meeting the requirements of 20 CFR 655.705(c)(2), 655.730(c)(3), 655.760, and 20 CFR 655 Subpart I may be stored electronically, as long as employers provide effective access, and if the employer elects to store the public access file electronically, the employer must make the file available and accessible at the particular location(s) selected on the form.

F. Complaints Regarding Employer Misuse of Immigration Programs

One commenter stated opposition to employers' use of the program forms to bring foreign workers into the United States to pay "slave wages" to foreign workers and deceptively misrepresent the jobs on the applications. The commenter stated that U.S. workers should be given U.S. jobs. Further, the commenter stated that fashion models did not need to use the program. The commenter stated that employers desire to pay foreign workers less while falsely attesting to pay more; that notice should be provided to local residents when employers state that they cannot find U.S. workers; and that the H-1B program should be shut down. The Department concludes that this comment is outside of the scope of the form revisions, as it does not address the proposed revisions and does not recommend changes for the Department to address in connection with this information collection. Moreover, the INA permits U.S. employers to hire H-1B workers, provided the employers submit attestations that the wages and working conditions of the workers will not adversely impact the wages and working conditions of similarly employed U.S. workers.

I. Form WH-4:

The Department did not receive any comments on the proposed revisions to the WH-4 information collection during the 30-day comment period.