

**Justification Supporting Statement Appendix A to
APPLICATION FOR PERMANENT EMPLOYMENT CERTIFICATION
OMB Control No. 1205-0451**

This is an appendix to the Office of Management and Budget's (OMB) supporting statement for the Application for Permanent Employment Certification OMB Control No. 1205-0451. This appendix includes a summary of all public comments received in response to the 60-day notice the Department of Labor (Department or DOL) published in the *Federal Register* on July 20, 2020 at 85 FR 43877, which are referred to in Question 8 of the supporting statement. The Department received comments from 10 members of the public – nine of these submissions contained comments that were within the scope of the proposed changes. The comments have been reviewed, considered, summarized, and addressed. A comment summary and the Department's responses follow.

I. Form ETA-9089 Application for Permanent Employment Certification.

Support for the Department's Proposed Revisions

A law firm, a trade association, an institute of higher education and a private citizen (4 commenters) expressed their support for the proposed revisions to Form ETA-9089; they were generally supportive of the Department's efforts to provide greater clarity on program requirements, reduce overall reporting burden and promote greater efficiency and transparency in the issuance of labor certification decisions.

The institute of higher education expressed that replacing the paper-based labor certification decision with an electronically issued Final Determination, eliminating duplicative fields, reorganizing for sections and creating a specific Appendix D were noticeable improvements.

The law firm expressed their appreciation for changes that would "create an efficient labor certification system that minimizes the burden of collecting information while also enhancing the quality of requested information and attempting to clarify requirements."

The trade association commented that it appreciates that OFLC is concerned with efficiency, an example of which is the auto-population of information from the Form ETA-9141 to Form ETA-9089.

Lastly, the private citizen expressed that he considered that changes to the new Form ETA-9089 to be "great."

As these commenters recognize, the Department's proposed revisions seek to streamline the collection of information, increase program transparency, and clarify existing employer obligations. As a result, the Department has determined that, for the most part, it will retain its proposed revisions. While the proposed changes are largely being retained, the Department is making some modifications to some of its originally proposed changes, based on the comments it received in

response to the 60-day *Federal Register* notice. The Department’s responses and decisions regarding the additional modifications are discussed in detail below.

A. Burden Imposed by the Department’s Proposed Revisions

Although the commenters expressed their generic support for the proposed revisions, a few have expressed concerns that the changes would be burdensome. For example, one law firm commented that, while it applauded OFLC’s commitment to integrity and efficiency of the labor certification process, it was concerned that the proposed changes requested more detail regarding a foreign worker’s qualifications, education, skills and abilities, a foreign worker’s job site, an employer’s special requirements, and “evidence that no other U.S. worker is qualified for the proffered position.” The commenter also stated: “[T]he DOL appears to be collecting information that is not within its function to collect.” With respect to the collection of information not being within OFLC’s authority to collect, DOL respectfully disagrees as the information requested on the proposed Form ETA-9089 has always been within the purview of the Department to collect to support a determination that the foreign worker sponsored for permanent employment meets the requirements of the employer’s job opportunity. The difference is that the additional clarifying information being requested is being placed on the form itself – without which an application may be more likely to being subjected to audit or supervised recruitment. Requesting this information on the Form ETA-9089 will ensure that certain cases can be adjudicated more effectively if the employer has the opportunity to provide additional information on the application, and will improve overall case processing efficiency. With respect to comments received addressing particular aspects of the form, those comments are discussed below.

Form ETA-9089 Section A: Employer Information

COMMENT: A trade association commented that for questions A.3-A.9 regarding the physical address of the worksite, due to the global COVID-19 pandemic, employers across the United States are reconsidering a need for an actual physical worksite due to ongoing work-from-home orders. Also, the trade association encouraged OFLC to provide employers the utmost flexibility in recognizing a variety of legitimate employer addresses.

RESPONSE: ETA has established business practices that allow employers to validate the employer physical addresses that have remained effective during the pandemic. As a result, ETA has decided not to further modify the forms as a result of this comment.

COMMENT: Moreover, two other commenters – a trade association and law firm – raised concerns about question A.14 “Number of current employees on payroll in the area of intended employment.” A trade association proposed that the Department revise the question to read only the number of current employees and omit those on payroll in the area of intended employment. In addition, the same commenter advised revising the instructions for this section to direct an employer to enter only the total number of employees currently employed by the U.S. employer. The reason the trade association gave for this proposal was it would align with the current Form

ETA-9089 Section C.9 and correlating General Instructions entry believing that such a request elicits sufficient detail from employers to address any OFLC compliance concerns. Furthermore, a law firm on behalf of clients, proposed that the Department revise this section so the question asks the number of current employees on payroll in the area of intended employment.

RESPONSE: The job opportunity is specific to the geographic area of intended employment, whether it is an actual worksite or the headquarters location, and the worksite location(s) is the area where U.S. workers will be impacted. Therefore, that is the area for which the employer must list the number of individuals employed. The Department declines to adopt this proposal.

COMMENT: A law firm, on behalf of its clients, proposed that the Department revise the instructions for question number A.14, regarding the number of employees in the geographic area of intended employment, on the proposed form to specify that, if the worksite is unknown, the geographic area of intended employment is the United States to allow the employer to use its total number of domestic employees.

RESPONSE: The Department has decided to forego this suggestion as the instructions as written do not require revision as the regulatory definition of area of intended employment requires the employer to have at least one worksite designated in order to receive a prevailing wage determination and to conduct the required recruitment along with the Notice of Filing requirements. Because the job opportunity is specific to the geographic area of intended employment whether it is an actual worksite or the headquarters location, the number of employees in the geographic area of intended employment helps the Department determine the number of U.S. workers that would be potentially directly impacted. This requirement narrows the previous broader requirement of the number of employees, whether foreign or domestic, to the actual geographic area of intended employment in congruency with the actual job opportunity.

COMMENT: A private citizen suggested that questions A.16, “Is the employer a closely held corporation, partnership, or sole proprietorship in which the foreign worker has an ownership interest?” and A.17, “Is there a familial relationship between the foreign worker and the owners, stockholders, partners, corporate officers, and/or incorporators?” of this Section be rephrased to address foreign worker influence, arguing that many attorneys, employers and foreign workers believe that they can modify their influence by removing themselves from corporate responsibilities before filing a PERM application. The private citizen reasoned that it is in the public interest that the questions about foreign worker influence should be modified to include past and present engagement.

RESPONSE: The changes proposed to the language in the questions only ask for knowledge about closely held corporations and familial relationships. The Department, however, maintains that what questions A.16 and A.17 request is that the employer provide information about the foreign worker if the employer is a closely held corporation, partnership, or sole proprietorship in which the foreign worker has ownership or interest or if there is a familial relationship at the time of filing of the application. The Department contends that assessing past and no longer ongoing engagement goes

beyond the reach of the prohibitions established at 20 CFR 656.12. As a result, the Department declines to adopt this suggestion.

Form ETA-9089 Section B – Employer Point of Contact Information

A trade association expressed general support for the revisions because the changes would eliminate confusion by making this section more applicable to in-house counsel, as the Department has clarified that these individuals can fill out both Section B and Section C.

COMMENT: A private citizen stated the definition of the term “employee” is too narrow to properly construe different types of employment relationships, whether contract workers, full-time employees, part-time employees abroad, etc. for the purpose of being the point of contact for the PERM application.

RESPONSE: The Department declines to implement the private citizen’s suggestion of redefining the term employee as this definition is established in 20 CFR 656.3 as an employee of the employer who is authorized to act on behalf of the employer in labor certification matters.

Form ETA-9089 Section C: Attorney or Agent Information

COMMENT: Two private citizen raised concerns about the revisions to Section C. The commenter asked whether the form can capture information about agents who are also attorneys. A different private citizen lamented that there is a lack of distinction between attorneys and agents on both this proposed form and the Form ETA-9141 as the questions in Box C are used to identify the person who will act as agent, whether an attorney or not. Contrastingly, a trade association offered general support for the revision: “This section is also clearer and more descriptive, allowing the preparer to distinguish between whether she or he is an attorney or agent.”

RESPONSE: The Department has considered the comments of the private citizens regarding this section and has concluded that it will modify the language in this section and accompanying instructions to add clarity.

Form ETA-9089 Section D: Foreign Worker Information

COMMENT: A trade association supported the revision in commending OFLC for “creating an Appendix A to Form ETA-9089 for completion of information about the foreign worker and his/her credentials.” Moreover, the trade association suggested a revision to the wording of a question to ask whether the agent or attorney represents both the employer and the beneficiary for the application, given that dual representation related to PERM applications is generally permitted, subject to applicable ethics laws regarding conflicts of interest and waivers to such conflicts.

RESPONSE: The Department took this comment into suggestion for this section and decided to revise the language on both the form and accompanying instructions to align with the regulatory language in defining Agent as stated in 20 CFR 656.3.

Form ETA-9089 Section E: Job Opportunity and Wage Information

COMMENT: Two trade associations expressed support for the revision to Section E. One appreciated that question E.2 on the proposed form recognized an exception for supervised recruitment and stripping away questions about the particulars of the prevailing wage determination. In addition, another trade association commended “attempting to reduce user clerical error by automatically importing data from the ETA-9141 and transferring such data onto the ETA-9089” and providing fields that “allow an employer to provide additional details related to the offered wage in Section E.5.” The commenter recommended changes as this field requires that the preparer of the form would manually have to enter “NONE” into the field where there is no additional information to include. The commenter further recommended that changes be made to include fields on the Form ETA-9089 for the job duties, job requirements, special skills, licenses, and certifications which have been imported from the Form ETA-9141 so that users can confirm that the data has been imported correctly and completely prior to submitting the application.

RESPONSE: The Department reviewed the proposed question E.5 and has decided to not to adopt the commenter’s suggestion but has decided to make this field a conditional field for employers to use to provide additional details relating to the offered wage. If an employer needs to provide more information other than the allowed 500 characters relating to the offered wage, the employer could provide that utilizing Appendix C. The Department respectfully declines to add the additional fields to the section, as doing so will invite a greater possibility of user error by requiring applicants to transcribe all of this additional information without error.

Form ETA-9089 Section F: Area of Intended Employment Information

Also introduced in the July 20, 2020 proposal to revise Form ETA-9089, the Department added a new section F to the form to allow the employer an opportunity to provide clarifying information for potential roving employees and to ensure and verify that the worksite location is the same as the location noted on the Form ETA-9141.

COMMENT: A law firm expressed that this proposed revision “undermines that the intent of a roving employee by requesting the employer to identify every worksite location where work will be performed despite being defined as an employee whose worksite may be relocated to a yet-to-be determined location.” In addition, the commenter objected that the introduction of Section F and Appendix B of the proposed Form ETA-9089 will increase the employer’s overall reporting burden and increase susceptibility to potential reporting violations.

RESPONSE: The Department believes the proposed form will address multiple worksites via the Form ETA-9141 that will be used by the employer to clarify information for potential roving

employees that will be subsequently used to compare the worksite noted on the proposed form to ensure and verify that the worksite locations are the same. Thus, the Department has concluded that it will maintain its proposed revisions without change.

As for specific subsections for Section F, the subsections were broken down into parts in which commenters from trade associations, an institute of higher education and a law firm on behalf of its clients provided additional comments below.

Part F.a Worksite Information

COMMENT: An institute of higher education remarked that the term “geographic area is not well defined, but appears to be different from the [Metropolitan Statistical Area (MSA) and Occupational Employment Statistics (OES)] area or the area on intended employment referenced in Section A.” The commenter believes this would be confusing and suggested clarifications so that it is clear what the different terms mean. A law firm suggested revising the question and instructions as neither explains how to answer this question if the worksite is unknown. In addition, a private citizen commented that the worksite issues in this question offers four worksite options; however, there should be an additional “box e. Other” to allow for clarification. Contrastingly, a trade association supported changes to Section F.a.1 that allow employers an opportunity to clarify the “nature of the physical location at which the position is located” and recommended adding an “other” or free text section to provide additional details and greater flexibility given how the nature of work and worksites is evolving.

RESPONSE: After considering these comments by all three commenters regarding this section, the Department has concluded that the instructions, as written in support of the proposed form, provide adequate explanations and examples of geographic areas that could be used. The proposed form will address multiple worksites via the Form ETA-9141 that allow employers to clarify information for potential roving employees that will be subsequently used to compare the worksite noted on the proposed form to verify that the worksite locations are the same.

In addition, the Department has structured section F.c. on the form to allow employers to address MSA for worksites that are not known or are dispersed over a wide area. The Department will maintain the proposed changes to the form without making any further modification in response to this comment.

Part F.b. Additional Worksites, and Part F.c. Other Definable Geographic Area

COMMENT: Two trade associations and a law firm, on behalf of its clients, provided comments regarding identifying the geographic area(s) where work will be performed. One of the trade associations expressed that employers could be confused in completing this part of the proposed form because the proposed Form ETA-9089 and instructions should be clarified if employers mark “No one specific worksite or physical location” because if some other definable geographic area is completed in Part c.1, they would not be required to complete Appendix B.

RESPONSE: The Department contends that if F.a.1.d. is selected, the employer must identify the worksite(s) listed in Appendix A on the prevailing wage determination Form ETA-9141 filed with the National Prevailing Wage Center on Appendix B of the Form ETA-9089 as failure to provide that information may result in a denial, or further scrutiny of the application.

COMMENT: Alternatively, the commenters suggested modifying the question in Part b.1 by adding “specific” to read: “Will work be performed in specific geographical areas other than the one identified in Section F.a above?” The trade association contended that employers may then mark “No” for Part b.1 then mark “N/A” for Part b.2 so employers can proceed with completing Part c.1 with the assurance that Appendix B is not required.

RESPONSE: The Department declines to make this proposed revision and contends that an employer must have a work location(s) even if it is the headquarters location as stated in the Policy Guidance on Alien Labor Cert. Issues FM 48-94 (hereinafter *Farmer memo*.¹)

COMMENT: The law firm on behalf of its clients stated that “if the worksite is unknown then the employer has nothing to include on Appendix B and requiring more than the headquarters address would be redundant and burdensome;” furthermore, if the employer does not know where the “permanent employee will be placed, the prevailing wage will be derived from the area of the staffing agencies headquarters.” Moreover, another trade association commented similarly that, while Sections F.a through F.c “offer an opportunity for employers with clearly defined areas of intended employment to provide this information,” it would be unclear from the instructions how to complete the fields if the information is unknown. As it relates to the Section F.c, both the trade association and the law firm on behalf of its clients advised that the Department should address the issue of unknown potential worksites by revising the form and instructions.

RESPONSE: In response to these comments, the Department has decided to modify the instructions to provide clarity for employers who have employees that will be employed at additional worksites, but foregoes revising the questions on the form as suggested. Moreover, the Department would like to reiterate that every employer must have a work location(s) designated, even if it is the entity’s headquarters as stated in the Farmer memo. Therefore, if an entity checks box F.a.1.d. on the proposed form, the employer must identify the worksite(s) disclosed on Appendix A of the Form ETA-9141 when the prevailing wage determination is requested.

Form ETA-9089 Section G: Additional Job Opportunity Information and Other Requirements

COMMENT: The proposed revisions to Section G were commended by a trade association for addressing many of the issues in the form which currently result in audits. The commenter believes the proposal to divide Section G of the current form into two parts can help reduce the volume of audits. The commenter, however, encouraged the Department to clarify the instructions to state “certain answers to Questions 1 to 5 may result in audit or denial and that the employer should

¹ See Attachment 1.

complete one section of Appendix C in order to explain the answer that may result in the audit or denial.” The commenter further stated that “they would encourage the Department to include its interpretation of the “Kellogg language” in the Note for Number 4 so that employers are clearly aware of the consequence if they select “I DO NOT ACCEPT” when answering this question.² In the proposed instructions, the Department indicates that if the employer answers “Yes” to any of Questions 6 through 12, the employer “must” complete one section of Appendix C, but do not specify the consequences of a failure to do so. The commenter requested that the Department mimic the current PERM system to include warning indicators in the system when an employer fails to complete (or improperly completes) a question on the new form. Finally, the commenter asked the Department to allow up to 3,500 characters (not 1,500 characters) for each answer in Appendix C, as employers would not be able to provide sufficiently detailed answers to complex business necessity questions with the lower character limit. Therefore, as they opine further, this character limitation may result in an increase in the number of audits due to incomplete answers, negatively impacting the Department’s goal of efficient adjudications.

RESPONSE: The Department appreciates that the trade association understands its goal in promoting transparency through the changes that are being made to the form; however, the Department would like to point out this form is not intended to identify every audit or denial flag or to substitute the requirement to know and understand the regulatory requirements associated with filing an application. The Department anticipates implementing a system check that would require the employer to fill out Appendix C before the application could be submitted, even if the content provided were insufficient to adjudicate the case without it going to audit.

In addition, the request of the trade association to interpret case law or inform an employer how to complete a form is beyond the scope of 20 CFR 656.10 and outside of the role of the Department defined in 20 CFR 656.3(c)(1). The Department would also like to point out that Appendix C is not intended to be used to provide extra documentation as required via an audit or request for information but can be reused as many times as need to complete a clarification. Accordingly, the Department disagrees that increasing the character limit to 3,500 characters is necessary because Appendix C is not intended to satisfy the potential needs of all stakeholders and adjudicate every case but rather to increase overall efficiency.

COMMENT: A private citizen commented that for question G.1 that “it is black letter law that some permanent jobs, including airline pilots, have less than 35 hours.” The commenter stated that the Department should provide an option to clarify, if an employee works less than 35 hours that if it would be necessary to provide the work schedule that shows the employee qualifies as full-time employment for the occupation.

RESPONSE: In response to this comment, the Department has decided to rephrase the question to include the term “generally” that will read “Is this a permanent position offering full-time

²*Matter of Francis Kellogg*, 1994 INA 00465 (Feb. 2, 1998) (*en banc*). This is specific language that is only required on the Form ETA-9089 when the foreign national qualified for the offered position only on the basis of the employer’s alternative requirements.

employment of generally 35 hours or more?” The Department appreciates the comment and recognizes that not all occupations as noted by the commenter that are considered permanent employment occupations work restrictions require 40 hour workweeks; however, the Department does not believe further clarification is necessary as further changes to accommodate only a limited few occupations could cause confusion for the vast majority of PERM filers where none now exists.

COMMENT: While other parts of this section received support from commenters, an attorney, a private citizen, and a trade association recommended further clarifications. The trade association recommended “for question G.2a that the one-year of paid experience as a live-in household domestic service work be qualified with full-time basis to reflect the regulatory language at 20 CFR 656.19(b)(2).” For question G.2b and G.2c, one trade association recommended replacing the word work contract with the term employment agreement to reflect regulatory language at 20 CFR 656.19(b)(2). For question G.3, a trade association recommended “foreign diploma/degree be replaced with either foreign degree or foreign educational equivalent to align with regulatory language at 20 CFR 656.3. The latter will provide for greater flexibility beyond diploma/degree.”³

RESPONSE: The Department has evaluated these comments and agrees that the language being proposed by the trade association for questions G.2a, G.2b, and G.2c should be changed to reflect the regulatory language in accordance to 20 CFR 656.19(b)(2). The Department has revised both the form and accompanying instructions to reflect these modifications. However, as it relates to question G.3, the question is tailored specifically for the employer to distinguish if a foreign degree or diploma equivalent to a U.S. degree or education equivalency would be accepted; accordingly, revising the question as suggested by the trade association changes the purpose of the question. The Department has determined it will not make the proposed change to G.3 in response to this comment.

COMMENT: For questions G.4 and G.4b, a trade association recommended that the word “working” be replaced with the term “employed,” so question G.4 would read: “Is the foreign worker currently “employed” for the employer submitting this application?” They further recommended adding a question to determine which process is being employed by which an employer is willing to accept any suitable combination of education, experience or training, so that the employer answers G.4b only if the basic labor certification process is being employed. A private citizen advised that more options should be provided in G.4 to include relationships where the work is being performed using a contract with a third party or other close relationship.

RESPONSE: The Department agrees with the commenters to the extent of revising the language in the instructions to read “Indicate whether the foreign worker is employed by the employer listed in this application...” to match the regulatory language for question G.4 to eliminate the term work contract and change it to employment contract. However, the Department disagrees with revising

³ This same trade association encouraged the Department to “strike specific reference to question E.1 on Form ETA-9141, or otherwise broaden this language to make clear that it could also apply to alternate requirements.” This comment seeks to make changes to the Form ETA-9141, which is part of a different information collection, and is beyond the scope of the proposed changes to OMB Control Number 1205-0451 that were offered to the public for notice and comment.

question G.4b, as in the situation where a foreign worker is working for the employer and does not meet the primary requirement but potentially qualifies on the alternative requirements, the employer should abide by and apply the regulatory language established in 20 CFR 656.17(h)(4)(ii).

COMMENT: Furthermore, a private citizen expressed that the word “substantially” is missing from the form and would lead to “misinterpretation and misapplication of the Kellogg Rule by officers adjudicating, analyzing, or readjudicating I-140 petitions at sister agencies.”

RESPONSE: The Department disagrees with this comment as the *Kellogg* language as stated in the comments is not related to whether the primary and alternative requirements are “substantially equivalent,” as “substantially equivalent” applies to all alternate requirements as defined in 20 CFR 656.17(h)(4)(ii); however, the language outlined in the *Kellogg* decision is specific to how the foreign worker potentially qualifies versus the primary requirements. As a result, the Department has determined not to modify the form in response to this comment.

COMMENT: As for question G.5 a trade association recommended that G.5 be amended from “employed by” to “while working for the employer, including as a contract employee” to align with regulatory language at 20 CFR 656.17(i)(3)(1). A private citizen also suggested that the word “solely” in G.5 be changed as it “does not conform with the limited definition of the prohibition to use employment, training, or skills gained with the employer which may have been gained as little as 1% with the employer and 99% in a relationship with some other employer.”

RESPONSE: The Department has evaluated these comments and has decided to revise both the form and accompanying instructions to align with the regulatory language as suggested by the trade association. However, the Department maintains that the term “solely” does not limit the employers as this question is specifically intended to determine if there is other relevant experience the foreign worker gained other than that gained with the employer. The foreign worker or the employer could document that work history utilizing Appendix A.

COMMENT: For questions G.7 and G.8, a trade association and private citizen commented that the instructions require any employer whose requirements exceed the [specific vocational preparation (SVP)] to provide a brief explanation of the business necessity for those requirements, when they are not required by regulation. In addition, these commenters requested that the instructions be modified such that “should OFLC require additional business necessity evidence that it will issue an audit rather than outright denying if there are remaining questions on business necessity.”

RESPONSE: The Department disagrees with these commenters as the form and instructions are not meant to identify a ground for denial or create audit flags, but rather serve as uniformed tools to collect information that is regulatory required, thus it declines to further revise the form in response to these comments.

COMMENT: A private citizen further commented that G.7 does not “resolve the question of percentage of employment in each of the two occupations” as the private citizen opined that

Department has taken the position that any percentage of a combination of occupations, even as little as 1%, would result in the selection of the occupational title with the higher wage. The commenter considered this to be unreasonable as there is no occupational title listed in the DOT or SOC which does not contain some minimal elements of other occupations. The Department has determined that this suggestion would require a regulatory revision and is beyond the scope of addressing within the context of this form.

With regard to question G.8, the commenter further added question G.8 that the word “proficiency” imbedded in the question is not defined by PERM regulation but is a term of art that needs definition and clarification, suggesting a “selection of competency levels plus an option to state ‘other’ for additional interpretations depending on the employer’s need.”

RESPONSE: The Department has considered these suggestions and has determined that defining the word “proficiency” would require a regulatory change, which is beyond the current PRA action that seeks to revise this form under current regulatory provisions. In addition, this question allows the employer to define what level of proficiency is required for the job opportunity, if any at all, allowing the employer the opportunity to provide more details if applicable. As a result, the Department has determined not to further modify the form based on this comment.

Form ETA-9089 Section H: Recruitment Information

An employer is required to submit attestations regarding the types and dates of its efforts to recruit U.S. workers. The Department has codified at 20 CFR 656.17(e) and (f) the type of recruitment steps that must be performed to test the U.S. market. The regulations require employers to recruit for able, willing, qualified, and available U.S. workers at prevailing wages and working conditions.

COMMENT: A private citizen suggested that question H.1a does not define “profession” and opined that the PERM rule definition resembles the definition of the H-1B specialty worker and the prevailing wage guidance in relying solely on the fact that an occupation appears on the DOL’s list of professions.

RESPONSE: The Department has considered the comment and determined that defining the term “profession” would require a regulatory change beyond the scope of proposed changes to the form. As a result, the Department declines to modify the form to address the comment.

COMMENT: As it relates to question H.1e, a group of individual attorneys on behalf of their clients suggested that the Department provide clarity for USCIS adjudicators by having the question revised to reflect text such as: “None of the above apply because this application is for a professional athlete or coach.” A law firm expressed confusion regarding the question and suggested breaking this question referencing the Notice of Posting section into two parts—one with the physical notice and one with the bargaining representative—and the second list would then be optional or only required if it was the employer’s customary practice, including electronic in-house postings and ones for private households. The commenter suggested that the section and list of

options implied that the physical notice is not required with the Department including options for both a bargaining representative and no bargaining representative in the same list for electronic, in-house and private household listing. Furthermore, the trade association commented on question H.1f that it would potentially increase user error if the box is incorrectly checked because this could result in an erroneous summary denial.

RESPONSE: According to 20 CFR 656.10(d)(2), a notice of filing is only required for private households if the household employs one or more U.S. worker at the time the application for labor certification is filed. Therefore, the Department maintains that the questions as written should not cause confusion if employers follow the requirements outlined in the regulations.

Part H.b. Occupation Type

COMMENT: The Department received a comment from a trade association expressing support for including Schedule A in Section H.b.1d along with the other filing types in the subsection, but requested the “convenience of having a specific Appendix to report the recruitment specifically for a college or university teacher under the competitive recruitment process in a section H.b.1c.” A group of individual attorneys on behalf of their clients recommended, as it pertains to professional athletes or coaches, moving Section H.b to the very beginning of the form as a standalone section along with other technical revisions.

RESPONSE: The Department’s proposed changes were made to streamline the collection of information and notes that it would be both impractical and undermine this goal by accommodating the requested changes to accommodate certain classes or groups of filers. The Department has made one change to address a typographical error in H.b.1e to state that the “application is *for* a professional athlete” (emphasis added), but otherwise decided to maintain the changes as proposed.

Part H.d. Additional Recruitment Requirements for Professional Occupations

COMMENT: A trade association suggested changes regarding whether “it is necessary for radio and/or tv advertisements to be plural when the other fields included in section H.d are singular,” asking that the entire list be written as singular similar to the other supplemental recruitment provisions.

RESPONSE: The Department agrees and has revised the other supplemental recruitment provisions so that all be written in singular.

COMMENT: A private citizen pointed out that question H.d allows for more than three recruitment events to be listed and that the “option to list more than three seems to be a form of rulemaking that may be interpreted to mean that three forms of recruitment may deserve more favorable discretion.”

RESPONSE: The Department reiterates that the form and the regulation do not limit employers to only the three required multiple additional recruitment steps, and further, the employer’s election to

perform additional recruitment beyond what is required by regulation should not be restricted, particularly in the context of the proposed changes to the form. Accordingly, the Department declines to modify the form or instructions to restrict employers from performing additional recruitment beyond those minimally required by regulation.

Part H.e. Notice of Posting

The employer must provide notice of filing of the Form ETA-9089 and must be able to document that the notice was provided to the bargaining representative, or if there is no bargaining representative, by posting the notice to the employer's employees at the facilities or location(s) of employment, as indicated in Form ETA-9089 – Appendix B, in accordance of 20 CFR 656.10(d). The notice of posting includes the required notice of filing as well as any conditional posting requirements.

COMMENT: A trade association expressed that the phrase “customary practice” does not appear in the regulations and could cause confusion, suggesting the Department replace it in H.e.1b, H.e.1c and H.e.1d and the accompanying instructions with the normal procedure for similar positions to be consistent with the regulations at 20 CFR 656.10(d). This commenter also recommended combining H.e.1c and H.e.1d, as splitting the two apart would result in confusion due to it being unclear whether Section H.e.1d refers to electronic or print and that the Department remove the phrase “at least one time” from Section H.e.1c as it considered it to impose a requirement that is *ultra vires* to the regulations. This trade association recommended removing H.e.1f as the notice requirement is mandatory for employers seeking permanent certification for employment opportunities.

Moreover, a law firm on behalf of its clients expressed that “[u]nless there is a bargaining representative the Department’s notice regulation requires that employers post notice at the facility or location of the employment. But the regulations do not specify where the employer should provide notice if the facility or location of the employment is unknown.” Accordingly, the commenter proposed that the Department should clarify this question and answer it in the instructions to new Section H.e.

RESPONSE: The Department has agreed to revise the language for questions under Section H.e. as suggested by the trade association to align with the regulatory language and change the term “customary practice” to normal practice along with other regulatory language relating to this section. However, as it relates to question H.e.1c the Department has determined that, although 20 CFR 656.10 does not mandate how many times the notice must be posted, it does require that it be posted at least one time. Therefore, there is no limit on the number of times the notice of filing can be posted, but it does have to be posted as is indicated on this proposed form. As a result, the Department declines to implement this proposal. Lastly, the Department declines the trade association’s suggestion as both H.e.1c and H.e.1d serve two distinct purposes specific to the notice of filing .

COMMENT: In addition, a private citizen noted that question H.1e had a typographical error to state that “None of the above apply because this application is *for* a professional athlete” (emphasis added).

RESPONSE: The Department reviewed the typographical error that was pointed out and revised the question to correct the typographical error.

Form ETA-9089 Section I: Employer Labor Conditions Statements

COMMENT: A trade association asked why the Department is changing this section when the regulation has not changed. It further expressed that the Department has not clarified whether employers will be required to “obtain a new prevailing wage determination and adjust the offered salary based upon the prevailing wage determination before the foreign worker completes the adjustment of status process through USCIS or is admitted by Customs and Border Protection on an immigrant visa.”

RESPONSE: The comment would require the Department revise the PERM regulations. As a result, the Department declines to modify the form to address this comment.

COMMENT: The Department also received comments from a group of individual attorneys on behalf of their clients. The commenter stated that, “Because professional sports teams are exempt from the normal PERM recruitment process, sports team employers should not be subject to the blank attestation on Form ETA-9089.” The commenter suggested that the Department exempt professional team sports from the attestation numbered 1-10 in this section.

RESPONSE: The Department has considered the suggestion from the commenter and has decided to revise both this section on the proposed form and accompanying instructions to include the language “Applications for Professional Athletes must attest to only condition statements 1-7.” This change will ensure that employers of professional athletes will only be required to attest to the attestations which are relevant to such cases and which they are already attesting too on the current Form ETA-750A. Furthermore, upon implementation, when the filer indicates that the application is for a professional athlete, the Department will implement a system change that will ensure that only attestations 1-7 will appear when signing the document.

Form ETA-9089 Section J: Preparer

This section was designed for a preparer of an application that is a person other than the one identified in either Section B (employer point of contact) or Section C (attorney or agent) of the application.

COMMENT: A trade association referenced a similarity to the Form ETA-9035 Labor Condition Application for Nonimmigrant Workers, and asked the Department to ensure that leaving the preparer’s section blank would have no negative impact to this proposed application.

Moreover, a private citizen opined that the Department has conflated differing situations with varying meanings of the word “preparer” as the attorney could serve in differing roles, such as that of an agent. The private citizen further questioned the estimated burden it would take to complete the proposed form. In addition, the private citizen raised that question D of the section does not allow the employer to indicate that someone typed the information onto the form other than the agent or attorney.

RESPONSE: The Department asserts that the instructions for this section are clear and concise as proposed without further clarification on defining the term “preparer.” Therefore, the Department has decided not to further modify the proposed form in response to these comments.

II. Form ETA-9089 – Appendix A: Foreign Worker Information

The Department’s regulations require an employer to demonstrate that it is seeking to employ a foreign worker in the United States for performing skilled or unskilled labor because there are not sufficient U.S. workers able, willing, qualified, and available to perform such skilled or unskilled labor. The Department is proposing a new Appendix A by moving information from Sections D, J, and K on the current form to consolidate relevant information about the foreign worker and to resolve the issue of not having a space to list special skills, certifications, etc. Seven commenters, including two law firms, two private citizens, two trade associations, and an institute of higher learning commented on the Department’s proposed addition of Appendix A to the Form ETA-9089.

COMMENT: The institute of higher education noted that it would be helpful if the form language for Section B of the appendix matched the form instructions and clarified that only diplomas or degrees need to be listed if they are used to qualify the foreign worker for the position. The commenter also expressed that Sections C and D of the appendix are helpful additions, but opined that many of the questions in Section C do not necessarily apply particularly for licenses and certifications. As a result, the commenter recommended deleting the reference to training in Section C and incorporating training into Section D and changing the wording of the questions of section C so that employers are directed to report only the relevant information.

RESPONSE: The Department disagrees with the commenter as question B.a.1 asks the employer to list the U.S. diploma/degree attained relevant to the job opportunity, and the instructions inform the filer to identify any relevant diplomas/degrees attained that qualify the foreign worker for the job opportunity for which the employer is seeking permanent labor certification. Therefore, the language on both the form and instructions is accurate and does not require modification. In addition, the Department disagrees with the commenters’ remarks regarding Sections C and D because the revision, as suggested, could potentially limit an employer interpretation of the word “training,” given that employers may include training as a part of a job, education, or experience attained by the foreign worker. The Department has reviewed these comments and suggestions for revising Section B, C and D of this appendix and decided to not further modify the proposed form in response to these comments.

COMMENT: A law firm appreciated DOL’s efforts to consolidate information but expressed concerns about a “lack of clarity concerning documents employers should submit with the labor certification application.” The commenter expressed that Section G of the appendix does not specify whether an employer is required to utilize a credentialing service if they accept a foreign diploma or degree equivalent to a U.S. diploma or degree, requesting the Department provide additional guidance to clarify the exact requirements employers must meet to qualify a foreign worker’s education and experience. The commenter believes the proposed form creates confusion because the Department would be deciding matters that have been delegated to USCIS to decide.

RESPONSE: The Department reiterates that its responsibility in accordance to 20 CFR 656.17(i) is to evaluate the employer’s actual minimum requirements which includes reviewing the qualifications of the foreign worker. In addition, the Department would like to emphasize that both the proposed form and the current form are used by other government agencies, including USCIS.

COMMENT: Another law firm commented that Section B of the appendix has no separate place to put foreign degrees and diplomas, opining that “[i]f the U.S. designation is simply to denote U.S. degree equivalency then the language should reflect that sentiment or just take out U.S. altogether.”

RESPONSE: The Department reiterates that the employer should only indicate a foreign degree or its equivalent in this section if they have entered “yes” to G.3 on the proposed form. Therefore, the Department declines to make further changes in response to these comments.

COMMENT: A private citizen asked whether an “alien registration number need[s] to be provided,” pointing out that some foreign workers have temporary – not permanent – alien registration numbers, or some may confuse alien registration numbers with IRS taxpayer numbers or other numbers issued by state entities, such as a driver’s license or state taxpayer return identification numbers.

RESPONSE: In response to this comment, the Department has revised the instructions to indicate that the employer should enter the foreign worker’s class of admission that was known at the time of filing of this proposed form.

COMMENT: A private citizen stated that the term “GED” is not defined by regulation with respect to question B.1, that Section C of the appendix overlaps employment and education information that might be inconsistent with the information gathered on the Form ETA-9141, and further that there is no instruction for paid or unpaid training.

RESPONSE: The Department has stated that all education requirements are based on the United States educational system and foreign worker qualifications are based on what the employer will accept as selected on the application.

COMMENT: A private citizen pointed out that Sections B and D of the appendix do not capture addresses of the organizations.

RESPONSE: Appendix A is designated for information relating solely to the foreign worker, so the additional information is not needed.

COMMENT: One trade association noted that Section D of Appendix A now asks for the U.S. diploma/degree attained relevant to the job opportunity and allows for several entries. The commenter stated that it “does help if the minimum requirements for a job are a few different degrees, but it could also be confusing to some as to whether all of the foreign worker’s degrees must be listed.” The commenter recommended the Department specify that only degrees that are being used to meet the minimum requirements should be listed and also that the Department refrain from using the verbiage “U.S. diploma/degree attained” because many foreign workers have foreign degrees and will be confused as to how or where to insert that education. Finally, the trade association did commend the Department for “generously allow[ing] 3,500 characters to describe the details of the job” and not asking for “contact information for the employer, which can be difficult to obtain for positions occupied a long time ago.”

RESPONSE: The Department reiterates that the employer should only indicate a foreign degree or its equivalent in this section if they have said “yes” in G.3 on the proposed Form ETA-9089. Also, as noted in the instructions for this appendix, if the foreign worker does not hold relevant U.S. diplomas and/or degrees, the employer could identify the educational attainment by checking the “Other” box and listing that information along with the foreign worker’s field of study and other relevant pertaining to the position. Accordingly, the Department declines to modify Appendix A in response to these comments.

COMMENT: Another trade association applauded the Department for ensuring Appendix A can be used to support National Interest Waivers so that self-petitioning individuals or their employers can use Appendix A with the submission to USCIS rather than the outdated ETA Form 750B. The commenter also appreciated the option to enter “FNU” for questions A.1 and A.2 of the appendix for the foreign worker given that not all individuals have names that fall within the Western naming conventions, while also agreeing with the Department’s decision to remove the employer’s telephone number and the name of the foreign worker’s supervisor, as in many circumstances the actual supervisor is no longer with the employer or the former employer is no longer in business.

The commenter advised further revisions to Appendix A to either remove A.12 “class of admission” as the nonimmigrant status or lack of status of the foreign worker is not relevant to the application, or alternatively clarify the instructions or otherwise indicate that a blank field will not result in negative consequences to the adjudication of the application. The trade association further recommended capturing the information in the proposed Sections C and D of this appendix under one section such that an employer can provide the information in chronological order. The commenter suggested revising Section C to allow for the insertion of skills, knowledge obtained during training, coursework, certification and licensures periods to allow the preparer to align skills

and knowledge obtained, eliminating Section D to allow the preparer to align skills and knowledge obtained with the employment experience subsection that is currently in Section E of the appendix, and increasing the character limit in question 1c.

RESPONSE: The Department appreciates recognition of our efforts to streamline the collection of information and agrees that further revisions to the instructions for this part of the appendix will provide greater clarity. The Department points out that Section C is for non-employment training and Section D is specific to actual work experience that could be separate for certifications, licenses and training, and if necessary, an employer can submit an additional Appendix A to provide additional space for work history.

COMMENT: A commenter recommended that the instructions for Section E of this appendix be amended to include experience gained, whether paid or unpaid experience, in light of statutory sections such as INA 245(i) and (k) and increasing the character limit in Section E.a.1 (employer name).

RESPONSE: The Department declines to implement this recommendation to amend the instructions as the Department has included a note in the instructions for this appendix that states “This may include, but is not limited to: paid and unpaid experience, internships, apprenticeships, etc...” Section E.a.1 does not have a character limit.

III. Form ETA-9089 – Appendix B: Additional Worksite Information

The Department’s proposal of new Appendix B is to ensure all places of employment are identified and to ensure the work will not be performed in the geographic areas other than those the employer identified. The Department received comments about this appendix from a law firm and a trade association.

COMMENT: The law firm opined that Appendix B creates two major concerns. It stated the Department “does not offer guidance concerning prevailing wages the employer must implement.” This commenter also suggested the Department would create confusion in common situations when a worker performs work at end-client locations, and an employer will need to account for the prevailing wage at each location the employee performs work. The commenter stated the Department does not provide any guidance concerning the prevailing wage that should be used and how employers should determine the prevailing wage between different locations.

RESPONSE: The Form ETA-9141 will require that the employer submit an Appendix A for worksites outside of the primary BLS Metropolitan or Non-Metropolitan Statistical Area in order to receive additional prevailing wage determinations for the multiple locations. The Department replicated the proposed Appendix B from the Appendix A of the newly revised Form ETA-9141, which allows employers to list multiple known worksites for which it has received a prevailing wage determination. The information for the additional worksites listed in Appendix B allows the employer to provide the worksites that are outside of the MSA listed as the primary worksite and

allows the Department to determine if the employer has conducted proper recruitment and to verify the validity of the prevailing wage determination for the specified additional worksites.

IV. Form ETA-9089 Appendix C: Supplemental Information

The Department's proposal of a new Appendix C allows the employer the opportunity to provide additional information for determining whether the foreign worker's qualifications meet those required for the job offered. Appendix C allows employers to explain their specific need for special requirements that are not considered normal for the occupation in which the offered job is classified.

COMMENT: A trade association commented that it welcomed the addition of a separate section, with up to three subsections in the event the foreign worker holds more than one training certification or license, which it believes will lead to more accurate drafting and adjudication. The trade association welcomed the change of the date format; however, they also suggested some revisions to this appendix, including changing the title in C.a.1.a to "Name or description of training and/or coursework received, rather than using experience (as per the form) or training experience as per the instructions."

RESPONSE: The Department has decided to forego this suggestion as Section C allows for any type of various scenarios to include training as this allows the employer to provide information in the way that it sees fit and is not limited. Section C of this appendix could not be associated with actual work experiences as the note to this section in the instructions references any relevant completed training programs, coursework, and/or training experience other than employment that qualify the foreign worker for the job opportunity for which the employer is seeking permanent labor certification.

COMMENT: A comment from a law firm stated that employers need to know if they will have an opportunity as part of an audit to respond to a decision regarding business necessity or whether the Department will make a determination based solely upon the information provided in this appendix.

RESPONSE: The Department wants to reiterate that additional documentation should not be provided when submitting the form as applications may still be subjected to auditing, as necessary. Appendix C has been created to give an employer an opportunity to explain common situations that might result in audit, but it is not a replacement for the audit process. The Department believes providing a limited space for the employer to clarify certain responses will mean that certain cases might avoid being referred to audit, but further adding the option of providing additional documentation would eliminate any efficiency gained as more and more documentation must be reviewed. If such additional documentation is necessary to resolve an issue with the application, then an appropriate review of that additional documentation necessitates the case being audited.

COMMENT: The trade association requested that the Department confirm in the instructions whether the preparer should list skills and knowledge gained during non-completed training and/or

coursework periods as the instructions under Section C only asks for completed training programs, coursework and/or other training. Other suggestions from the trade association include, inserting a “Yes” or “No” option asking whether the foreign worker received dated documentation for completion of training or coursework” along with revised instructions to accompany this change.

RESPONSE: The Department has decided to forego this suggestion and determined there is no need to revise the instructions, as requested, to confirm whether the preparer should list skills and knowledge gained during non-complete training and/or coursework.

COMMENT: The trade association also stated that they welcomed the opportunity for free-form boxes, such as Appendix C, stating that the “space will allow for explanation of special circumstances of the application and provide supplemental information.” The commenter also recommended including additional space for a total of 5,000 characters.

RESPONSE: The Department would like to point out that an employer can submit multiple copies of Appendix C to provide additional information for determining whether the foreign worker’s qualifications meet those required for the job offered if necessary to avoid submitting additional documentation. Therefore, the Department has decided to forego this suggestion of providing additional space to increase characters limits.

COMMENT: Another statement made by a law firm was, if the term “normal” refers to the technical skills listed in the OES, clarification is needed as to whether all technical skills must align or merely some. Their reasoning was employers need to know if they will have an opportunity as part of an audit to respond to a DOL decision regarding business necessity or whether the DOL will make a determination based upon the information provided in appendix C.

RESPONSE: The Department recognizes the trade association’s concerns in possibly having to explain the specific need for special requirements not considered “normal” for the occupation in which the job is classified. The Department would like to point out that “normal” is determined to be the job requirements, in terms of education and work experience, that exceed the specific vocational preparation levels assigned to the occupation as shown in the O*NET job zones.

V. Form ETA-9089 Appendix D: Special Recruitment for College and University Teachers

To comply with its obligations under 20 CFR 656.18(b), an employer may recruit for college and university teachers under 20 CFR 656.17 or must be able to document the foreign worker was selected for the job opportunity in a competitive recruitment and selection process through which the foreign worker was found to be more qualified than any of the U.S. workers who applied for the job. The Department’s proposal to create a new Appendix D expanded the fields compared to the current form, so that it would allow the employer to provide more detailed information explaining why the foreign worker was more qualified than the U.S. worker who applied for the job.

COMMENT: An institute of higher education was supportive of the revisions to this appendix. One trade association commended the Department for providing this section as a stand-alone document as it would help identify filings under the optional special recruitment and documentation procedures for college and university teachers. However, the commenter did voice a concern stating that it “is concerned that listing three different entries under Name(s) of national professional journal, educational organization publication or other publication is misleading.” The commenter also requested that the Department provide additional space for the use of electronic versions of the listed recruitment efforts that must run for at least 30 days in accordance with Department’s answers to Frequently Asked Questions.⁴

RESPONSE: The Department declines to make this suggested revision as the proposed form has additional fields that are optional and not mandatory, and the form allows for multiple forms of recruitment to be noted.

COMMENT: A trade association also commended the Department for allowing up to 3,500 characters in this appendix to allow colleges and universities to fully explain all other recruitment used as part of the special optional recruitment procedure for university/college teachers. They also suggested that the Department allow for a similar 3,500-character option in the other text fields on the proposed Form ETA-9089.

RESPONSE: The Department declines to make this change as the employer may submit multiple Appendix D documents as is necessary to capture this information.

COMMENT: Moreover, an institution of higher education expressed that it appreciated the Department’s efforts in streamlining the collection of information and the Department’s attempt to increase program transparency. The commenter further advised that questions 2 through 4 appears to create an allowance for advertisements in publications other than a national professional journal as required by regulation 20 CFR 656.18(b)(3). It suggested splitting questions 2 through 4 so that the employer is directed to provide the name of the national professional journal that was used to advertise the position in one question and to provide space for the additional advertisements in the separate questions. In addition, it suggested that the Department revise the form and instructions to make clear or describe all other recruitment conducted by the employer for the position, including a requirement that the sources used must be provided in a separate statement and also be included on this appendix.

RESPONSE: The Department declines to implement this recommendation as the employer has the ability to conduct multiple forms of recruitment in addition to what is outlined in 20 CFR 656.18(b) that could be outlined using multiple submissions of Appendix D if necessary. The Department also maintains that if additional documentation is required, the application may be subjected to audit or a request for information may be issued. The Department, however, has considered the comments made by the institution of higher education and made revisions to the form to better align with regulatory language of 20 CFR 656.18, making it mandatory that the employer complete the fields

⁴ See <https://www.dol.gov/agencies/eta/foreign-labor/faqs/print>.

on this Appendix relating to the filing of special recruitment for college and university teachers. The Department decided to forego other comments made by all three entities suggesting cosmetic changes and/or system modification and maintain the proposed form as written.

VI. Form ETA-9089 – Final Determination: Permanent Employment Certification Approval

Where the employer’s application has met all the regulatory requirements, including the criteria for certification at 20 CFR 656.24, the Department will complete and electronically send the new Final Determination to the employer and, as applicable, the employer’s authorized attorney or agent.

COMMENT: A trade association recommended that the Department revise this document to reflect details of the job opportunity such as the employer’s job title, job description, job requirements, and job location. The trade association stated that they were “concerned that when it comes to the Form I-140 stage at USCIS employers will be issued RFEs [Requests for Evidence] to provide more details about the job opportunity.” They also suggested that the title and in the certification box on the proposed form be written as Employer Labor Condition Statements and requested that the Department reflect it as the Employer Labor Certification Statements to mirror the regulations found at 20 CFR 656.10(c).

Further, a private citizen commented that this proposed document lacks elements required by USCIS, which are the proffered wage, petitioner address, beneficiary’s date of birth, area of intended employment, and petitioner’s Doing Business As (d/b/a) name. The commenter stated that it is not clear that USCIS will have electronic access to the prevailing wage document, Form ETA-9089 and appendices.

The same commenter noted that page number 17 of the instructions relating to the final determination permanent employment labor certification approval should be clarified to indicate which agency is being referenced. Another private citizen noted that the term “employee” is too narrow to properly indicate the different types of employment relationships in the instructions for the Section B employer point of contact information and should be revised.

RESPONSE: The Department took into consideration the comments made by all commenters. Information provided on the Final Determination satisfactorily provides the information needed for agencies, such as USCIS, to make appropriate determinations. The Department and the Department of Homeland Security have entered into a memorandum of understanding, which allows each agency to see real time case information of the other agency; the information provided on the Final Determination provides USCIS with the information necessary to access any information it needs to adjudicate Form I-140. Lastly, the Department considered the suggestion made by the trade association and declines to make the suggested changes, which will not have any substantial affect to the appearance of this section.

VII. Other Comments Received Not Pertaining to Form ETA-9089

Several commenters that include a group of individual attorneys on behalf of their clients and a trade association have provided comments that the Department has determined not to be directly related to the form.

A group of individual attorneys' comments focused more on the special handling of professional athlete cases, stating that, since professional sports team cases would now be filed electronically, they urged the Department to devise a mechanism where cases are diverted to Certifying Officers that will adjudicate professional athlete cases only. In addition, this commenter also suggested that the Department provide a mechanism that will allow electronic submission of supporting documents relating to professional athlete cases. The Department considers these comments to be outside the scope of notice of comment, but assures the commenter that the Department's staff are fully capable of handling these special cases regardless of assignment to a particular Certifying Officer.

In addition, the commenter expressed doubts as to the estimated burden it will take to complete various aspects of the form. As the Department indicated in its previous filing, the Department plans to leverage technology to ensure that certain information will be auto-populated and will reduce overall burden as it pertains to filings as a whole – not just as it might apply to a certain class of filers. Planned technology enhancements, in conjunction with the revised form, will allow users to file and submit additional documentation electronically in support of the professional athlete case, meaning the burden on the employer is reduced as opposed to the current manual system.

A trade association requested that the Department provide guidance in the form instructions concerning how an employer may update Section A of the Form ETA-9089 in the event there is a change in address within the same Metropolitan Statistical Area for which a new prevailing wage is not required. The trade association question stemmed from the understanding that sections of this proposed form, to include Section A, will be auto-populated from the Form ETA-9141 and the employer's worksite address must be the same information stated on the Form ETA-9141 once the proposed form is implemented into OFLC case management system. It is the Department's intent to provide employers the ability to update contact information. The employer however will not have the ability to update the employer's worksite address information due to regulatory guidance stipulate that worksites must be approved while employers are seeking a prevailing wage determination. However, the Department will consider this as a suggested system modification upon implementation of the proposed form.

The trade association's comments on OFLC providing fields that allow an employer to provide additional details related to the offered wage in Section E.5 centered on system modifications. They requested that the Department mitigate the risk of human error in the proper completion of the form where a drafter has left this field blank, and encourage the Department to consider auto populating this field to reflect NONE. The Department determined this to be a system modification request that will be considered once the revised forms are fully implemented in the OFLC case management system.

Moreover, this same trade association expressed concerns about the proposed form being implemented electronically and suggested that the Department allow employers the ability to electronically update the employer point of contact and attorney or agent information in the event that there is a change to both before filing and after filing the proposed form. The Department will consider this as a suggested system modification upon implementation of the proposed form. Furthermore, the same trade association also suggested the Department build within OFLC's case management system the ability to perform automatic "self-checks" to enhance the efficiency of system review and reduce user error. The commenter suggested, as examples, that the system check the "YES" box once Appendix A has been completed online to avoid a denial if the preparer inadvertently checks this as "NO," also encouraging the Department to program its system to generate an error message if the advertising dates entered are outside the 30 day to 180 day timeframe required to file an application. The Department will consider this recommendation upon implementation of the electronic form in OFLC's case management system. The Department further reminds the commenter that system checks are meant to address inconsistencies with respect to the filer's answer to the questions on the form, they are not intended to eliminate all human error. A system check can be used to address a response that is incompatible with other responses, but cannot be set up in a way to completely cure human error where the applicant still responds in some other unsatisfactory way.

Additionally, this same trade association requested clarification on how an attorney can update this section on the Form ETA-9089 in the event there is a change in representation both before and after filing a prepared Form ETA-9089. It further asked the Department to allow the preparer of the form to modify the pre-populated data if there is any change to the attorney or agent or if there is a need to clarify requirements that are consistent with the Form ETA-9141. The Department understands the need for such functionality and will take them into consideration with implementation of the proposed form. The Department currently envisions the user having the ability to update contact information on the application, as currently is available in the PERM Online System.

Last, this commenter suggested for the area of intended employment section of the proposed form that the Department ensure the system is able to import information about travel from the Form ETA-9141 to the proposed form, ranging from travel requirements for the offered position to worksite information, so that employers can provide consistent information in both the prevailing wage determination process and PERM process. The Department will consider this recommendation upon implementation of the electronic form in OFLC's case management system.