

National Foundation for American Policy

September 17, 2012

Contact: Stuart Anderson, 703-351-5042, press@nfap.com

New Report Finds Department of Labor Proposal on H-1B Visas Threatens Personal and Commercial Privacy

New Proposal Directed Against Skilled Foreign Nationals Could Benefit Identity Thieves and Discourage Hiring Key Personnel in the United States

Arlington, Va. – A Department of Labor (DOL) proposal aimed at the employment of skilled foreign nationals on H-1B visas will threaten personal and commercial privacy, make it harder for employers to serve customers, and discourage hiring skilled personnel to perform work in the United States, according to a new report released by the National Foundation for American Policy (NFAP), an Arlington, Va.-based policy research group. The DOL proposal to significantly change the labor condition application (LCA) would require employers to divulge information in a public access file, available to anyone upon request, that would include sensitive information about clients and revenue, as well as personal information on sponsored employees that would leave skilled foreign nationals vulnerable to identity thieves and disgruntled individuals who may seek to do them harm. It would also add new bureaucratic steps that would make it difficult to move employees quickly to serve customers.

A host of organizations are publicly opposing the proposal, including the U.S. Chamber of Commerce, the Information Technology Industry Council, American Council on International Personnel, Society for Human Resource Management, American Immigration Lawyers Association, NAFSA: Association of International Educators, and others.

“Since an H-1B visa is often the only practical way to hire a skilled foreign national long-term in America, DOL’s proposal will make it harder to attract and retain highly skilled and educated foreign-born scientists, engineers and professionals. That will encourage more work and projects to be done abroad,” said Stuart Anderson, executive director, National Foundation for American Policy, and former head of policy and counselor to the Commissioner of the INS (August 2001 to January 2003).

The author of the report, R. Blake Chisam, is a partner with Fragomen, Del Rey, Bernsen & Loewy and a former senior counsel to the House Judiciary’s immigration subcommittee. He

worked on the staff of Rep. Zoe Lofgren (D-CA). The report, "DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals," is available at www.nfap.com.

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

According to the NFAP analysis, if the Department of Labor's proposed form goes into effect it will lead to many troubling consequences:

- The extra time and expense, reduced flexibility and the burden of publicizing previously closely-held information means the form's new requirements will act as a type of tax directed against companies that hire skilled foreign nationals off U.S. college campuses or elsewhere.
- Since all information placed on a labor condition application becomes available to anyone in the public who requests the information (via a public access file), companies would be forced to disclose to competitors (and others) important commercial information. This may violate nondisclosure agreements with customers and would encourage work to be performed outside the United States.
- Simply because they choose to hire one or more foreign nationals, privately-held companies would be compelled to release such financial information as their annual revenues and salary structure, information often closely guarded by entrepreneurs and small businesses. Larger companies would be forced to perform complex calculations of financial information not always available.
- By requiring a new labor condition application to include – potentially months or years in advance – each place a skilled foreign national will work, the new form will prevent many companies from being able to serve customers in a timely and expected manner, making them less able to compete.

- Forcing employers to name in advance any individual who will work under the labor condition application (which is unprecedented) and at a single work location unrealistically requires companies to predict the future. This fails to recognize fast-changing business needs and interferes with serving customers.
- Mandating that personally identifiable information on individual foreign nationals be made public (including name, birth date, place of work, rate of pay) will expose the foreign-born to identity theft, harassment or possibly worse consequences. This will make it more difficult for America to attract and retain talent.
- The proposed form complicates the issue of who is permitted to sign the labor condition application and establishes questionable data linkages related to the permanent labor certification process. It would also add ambiguous questions that require guesswork on issues such as similarly employed workers that go beyond the form's purpose but for which employers could later be held liable.

"If DOL's proposal were implemented, the LCA process would be transformed from the streamlined, attestation-based system contemplated by Congress into a lengthy (and more expensive) process that would expand DOL's review authority beyond what is permitted by statute and its own regulations," notes the reports author Blake Chisam.

The new form would impede employer flexibility to meet urgent business needs, making U.S. companies and customers less competitive in the global marketplace. The proposals would require employers to publicly disclose sensitive personal and business information of current and prospective employees and clients, in contravention of federal agency recommendations on data privacy and potentially in violation of state privacy laws and private contracts. The NFAP report recommends that the Department of Labor withdraw its proposed changes to the labor condition application.

About the National Foundation for American Policy

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, former U.S. Senator and Energy Secretary Spencer Abraham and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.

2111 Wilson Blvd., Suite 700, Arlington, VA 22201
phone: (703) 351-5042 fax: (703) 351-9292 www.nfap.com