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Remotely Relevant: Addressing Employment-Based Immigration Worksite Location Requirements in the Remote Workspace

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INTRODUCTION

In October 2021, Amazon announced that its offices would have the flexibility to be completely remote, laying the foundation of the remote office as a permanent fixture of the American workplace.[1] As of the end of 2021, powerful Silicon Valley technology companies had delayed a return to full-time in person work.[2] These tech giants also happen to be the biggest employers of immigrant and nonimmigrant workers.[3] In 2021, the top employers with H-1B nonimmigrant workers who work in specialty occupations[4] included Amazon, Apple, Facebook, Google, IBM, Microsoft, and more.[5] However, the decision to make the office

1 *Amazon Offering Teams More Flexibility as We Return to Office*, AMAZON (Oct. 11, 2021), https://www.aboutamazon.com/news/workplace/amazon-offering-teams-more-flexibility-as-we-return-to-office [https://perma.cc/F6QW-FG9T]. *See generally* Susan Lund, Anu Madgavkar, James Manyika & Sven Smit, *What's Next for Remote Work: An Analysis of 2,000 Tasks, 800 Jobs, and Nine Countries*, MCKINSEY & CO. (Nov. 23, 2020), https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries [https://perma.cc/245X-6NY7].

2 Karen Weise, *Amazon Expands Flexibility for Some Employees to Work from Home Indefinitely*, N.Y. TIMES (Oct. 11, 2021), https://www.nytimes.com/2021/10/11/business/amazon-office-remote-work.html (last visited Apr. 3, 2023).

3 *2020 H1B Visa Reports: Top 100 H1B Visa Sponsors*, MYVISAJOBS.COM, https://www.myvisajobs.com/Reports/2020-H1B-Visa-Sponsor.aspx [https://perma.cc/U5PE-AZEQ].

4 *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b).

5 *2021 H1B Visa Reports: Top 100 H1B Visa Sponsors*, MYVISAJOBS.COM, https://www.myvisajobs.com/Reports/2021-H1B-Visa-Sponsor.aspx [https://perma.cc/8W25-

remote may affect the future employment authorization of specialty occupation immigrant and nonimmigrants.

When applying for certain work visas, an employer must file with the U.S. Department of Labor (DOL) and is required to conduct a labor market test.[6] The purpose of the labor market test is to demonstrate that there are not sufficient U.S. citizen (USC) workers who are qualified for the job, and that the employment of a foreign national will not adversely affect the wages and working conditions of similarly, locally employed USCs.[7] The labor market test includes a prevailing wage determination (PWD) of occupations in the geographic area of intended employment, which measures the median wage of workers similarly employed.[8] However, now that many foreign nationals are working remotely, this throws the worksite location of noncitizen workers into doubt.

This Note argues that the current labor market tests of a worksite location requirement for immigrant visas, which require DOL Program Electronic Review Management (PERM), its accompanying Labor Certification Application, and Labor Condition Applications (LCAs) for specialty occupation nonimmigrant visas, are outdated in the remote workspace and must be addressed by the DOL through the lens of cooperative federalism.[9] Part I begins with a background on nonimmigrant specialty occupation visas and immigrant visas, then examines the DOL's PERM and its LCA. Part I also lays the groundwork for a proposal of a new labor market test by demonstrating cooperative federalism of the employment-based immigration process. Additionally, Part I addresses the looming offshoring of specialty occupation

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2DH7]; *see, e.g.*, *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, AM. IMMIGR. COUNCIL 1 (May 26, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy_0.pdf [https://perma.cc/69LG-DMR2].

6 *See generally* 8 U.S.C. § 1101(a)(15)(H); 8 U.S.C. § 1184(g)(8)(A); 8 U.S.C. § 1182(n)–(p); 20 C.F.R. § 655.700 (2023).

7 8 U.S.C. § 1182(a)(5)(A)(i). This Note will use the terminology "foreign national" and "noncitizen" instead of "alien" as used in the Immigration & Nationality Act to view immigration more humanely, which corresponds to the current administration's policies. *See* TROY A. MILLER, U.S. CUSTOMS & BORDER PROT., UPDATED TERMINOLOGY FOR CBP COMMUNICATIONS AND MATERIALS (Apr. 19, 2021), https://www.aila.org/infonet/terminology-communications [https://perma.cc/DQ5K-U46G].

8 20 C.F.R. § 656.40(b)(3) (2023); 8 U.S.C. § 1182(p)(4).

9 *See* Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 53 INT'L SOC. SCI. J. 67, 67 (2001). Cooperative federalism is one of the three models of modern federalism created by immigration scholar Peter Spiro where the "central government retains primary control and supervision over immigration decision-making, but enlists subnational authorities as junior partners and allows them some discretion to assert or account for particular subnational needs." *Id.* The legislative branch delegates administrative power to executive agencies to regulate immigration. *See generally* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671 (2007).

noncitizens with the rise of remote work, which demonstrates the stakes of this issue. Part II analyzes the current challenges of applying for immigrant and nonimmigrant visas in the remote workspace without a worksite location while following the DOL's so-called Farmer Memo.[10] Then, Part III proposes and examines solutions to ensure the efficacy of employment-based visas for remote work, arguing that the DOL should adopt a cooperative federalism model of remote work by splitting power between the federal DOL, the state DOL of the employer's worksite location, and the state DOL of the remote employee's actual location.[11]

I. BACKGROUND

A. *Nonimmigrant Visas*

A nonimmigrant visa is a temporary work visa for foreign nationals.[12] There are several visa classifications depending on the kind of work performed.[13] Nonimmigrant visa classifications for specialty occupations, particularly the H-1B visa, require an LCA, which submits a labor market test to the DOL.[14] A specialty occupation is defined by the Immigration and Nationality Act (INA)[15] as a job that requires specialized knowledge and a relevant bachelor's degree, or its equivalent, at minimum.[16] Specialty occupation nonimmigrant visas are used especially to supplement the country's labor force in technology-related fields.[17]

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10 *See generally* Memorandum from Barbara Ann Farmer, Adm'r for Reg'l Mgmt., U.S. Dep't of Lab., to All Reg'l Adm'rs (May 16, 1994) (Field Memorandum No. 48-94, Policy Guidance on Alien Labor Certification Issues), https://www.aila.org/infonet/dol-policy-guidance-on-alien-labor-cert-issues [https://perma.cc/XEC5-9MAA]; *see infra* Section II.A. The Farmer Memo got its name from the woman who issued the memorandum, the DOL Administrator for Regional Management Barbara Ann Farmer.

11 Spiro, *supra* note 9.

12 8 U.S.C. § 1184(a)(1).

13 *See generally* 8 U.S.C. § 1101(a)(15).

14 *Id.* § 1101(a)(15)(H).

15 The Immigration and Nationality Act (INA) is a federal law that contains many of the most important authorities of immigration law. *See generally* Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1953) (codified as amended at 8 U.S.C. § 1101).

16 A specialty occupation is defined as requiring "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1).

17 *Immigration Act of 1989 (Part 3): Joint Hearings on S. 358, H.R. 672, H.R. 2448, H.R. 2646, and H.R. 4165 Before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. on the Judiciary & the Immigr. Task Force of the H. Comm. on Educ. & Lab.*, 101st Cong. 788 (1990)

The main purpose of the LCA is to ensure that the wages and working conditions offered to nonimmigrants will not be less favorable than those available to USC workers.[18] Furthermore, the Immigration Act of 1990 created the LCA with the rationale to ensure that the needs of USC workers are balanced with the average salary of the physical location of employment.[19] Specialty occupation nonimmigrant visas include the H-1B visa, which will be described below.[20]

1. H-1B Nonimmigrant Visa

H-1B holders fill a critical need in the American market, as they are particularly popular among the science, technology, engineering, and math (STEM) fields.[21] For example, in 2021, Amazon filed over 14,000 LCAs for H-1B visa applications.[22] The purpose of the H-1B visa is to allow employers to hire people with specialized knowledge that employers cannot otherwise obtain from a USC worker.[23] In addition to salary and benefits, American employers pay approximately $5,000 to $30,000 in legal and government fees for a single H-1B petition.[24]

Before applying for an H-1B visa to United States Citizenship and Immigration Services (USCIS), the employer must file an LCA with the DOL to demonstrate satisfaction of the labor market test.[25] There is an annual cap of 65,000 visas, with 20,000 additional visas for applicants with a Master's or Doctorate degree from an American educational institution.[26]

Other specialty occupation visas that are subject to an LCA are nationality-specific because of international treaties. The H-1B1 visa is

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(IEEE-USA statement on legal immigration reform proposals); *see 2020 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 3; *2021 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 5.

18 Karen B. Koenig, *Temporary Work Authorization for Specialty Occupation Workers (H-1B)*, 1999 AM. L. INST.-A.B.A. CONTINUING LEGAL EDUC. 19, 30 (1999).

19 *Id.*; H.R. REP. NO. 101-955, at 121–22 (1990) (Conf. Rep.); Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 25 INT'L LAW. 995, 1004 (1991).

20 *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b).

21 *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, *supra* note 5, at 1. *See also 2020 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 3; *2021 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 5.

22 *2021 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 5.

23 *H-1B Program*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/immigration/h1b [https://perma.cc/H5KJ-GNF7].

24 Stuart Anderson, *The Outlook on H-1B Visas and Immigration in 2022*, FORBES (Jan. 3, 2022, 12:28 AM), https://www.forbes.com/sites/stuartanderson/2022/01/03/the-outlook-on-h-1b-visas-and-immigration-in-2022 [https://perma.cc/E6AN-A6PA].

25 8 U.S.C. § 1101(a)(15)(H)(i)(b).

26 *Id.* § 1184(g)(1)(A)(vii), (g)(5)(C).

similar to the H-1B visa but is only available for Chilean and Singaporean nationals in specialty occupations.[27] The visa was created because of the Singapore-United States Free Trade Agreement and the Chile-United States Free Trade Agreement.[28] H-1B1 visas are limited to 5,400 Singaporeans and 1,400 Chileans per year.[29] The E-3 nonimmigrant visa is a specialty occupation visa exclusively for Australian nationals.[30] It was created via the Australia-United States Free Trade Agreement.[31] E-3 visas are limited to 10,500 individuals annually.[32] For the purposes of this Note, specialty occupation visas will be analyzed under the H-1B visa because it is not nationality-specific, and thus apply to a larger group of nonimmigrant visa holders.[33]

2. The Labor Condition Application

All applications for specialty occupation nonimmigrant visas listed above require that the employer receive an approved LCA for each potential noncitizen employee before applying to USCIS.[34] The purpose of the LCA is to ensure that a foreign national worker is paid a salary commensurate to a USC worker at the same work location and that the foreign national is not hired as a less costly alternative to a USC.[35] Once an LCA is approved by the DOL, an employer may continue the two-step process to apply to USCIS for its foreign national employees to be hired with an H-1B nonimmigrant visa.[36] USCIS then selects employers' applications pursuant to USCIS's caps and applicant eligibility.[37]

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27 *Id.* § 1101(a)(15)(H)(i)(b1).

28 *Id.* § 1184(g)(8)(A).

29 *Id.* § 1184(g)(8)(B)(ii).

30 *Id.* § 1101(a)(15)(E)(iii).

31 Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief of 2005, sec. 501 § (b)(11), Pub. L. No. 109-13, 119 Stat. 231.

32 8 U.S.C. § 1184(g)(11)(B).

33 *Id.* § 1184(g)(1)(A)(vii), (g)(5)(C).

34 *Id.* § 1184(g)(8)(A); *Id.* § 1182(n)–(p); 20 C.F.R. § 655.700 (2023). *See generally Labor Condition Application for Nonimmigrant Workers Form ETA-9035 & 9035E*, U.S. DEP'T OF LAB., https://flag.dol.gov/sites/default/files/2019-09/ETA_Form_9035.pdf [https://perma.cc/XL93-7RTY].

35 Desiree Goldfinger & Philip K. Sholts, *Challenges in Employment-Based Immigration 'Location, Location, Location'*, FED. LAW. 35 (May 2017), https://www.fedbar.org/wp-content/uploads/2017/05/LE-based-immigration-pdf-1.pdf [https://perma.cc/LS8T-RNFY].

36 20 C.F.R. § 655.700(b)(2)–(3).

37 *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, *supra* note 5, at 2–3.

B. *Immigrant Visas*

Every year, the United States gives legal permanent residency (LPR) status, commonly referred to as a green card, to approximately one million noncitizens.[38] Those classified under an employment-based immigrant visa provide needed skills to the American workforce.[39] The INA gives five preference categories of employment-based immigrant visas: "(1) people of extraordinary ability; (2) professionals with advanced degrees; (3) skilled and unskilled 'shortage' workers for in-demand occupations (e.g., nursing); (4) categories of 'special immigrants';[40] and (5) immigrant investors."[41] For the second and third categories, an employer must use PERM to apply for and receive an approved labor certification application.[42] The logical path for an employer to sponsor a specialty occupation nonimmigrant worker (such as an H-1B visa holder) for a green card is through the second or third based employment categories.[43]

1. Program Electronic Review Management

The DOL's PERM process is initiated by an employer to grant LPR status.[44] The INA delegates the DOL to certify the permanent employment of second and third preference green card applicants.[45] The DOL created this approach to streamline a formerly two-tiered process between state employment securities agencies, where the job was physically located, and the federal DOL.[46] The PERM process is a multi-step operation.[47]

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38 WILLIAM A. KANDEL, CONG. RSCH. SERV., R46291, THE EMPLOYMENT-BASED IMMIGRATION BACKLOG 4 (2020).

39 *Id.*

40 Special immigrants are defined in myriad ways, including former employees of the American government, religious workers, special immigrant juvenile status holders, veterans of the American military, and more. 8 U.S.C. § 1101(a)(27).

41 KANDEL, *supra* note 38.

42 8 U.S.C. § 1182(a)(5). No labor certification is required for the first preference category. 8 C.F.R. § 204.5(h)(5) (2023); Kazarian v. U.S. Citizenship & Immigr. Servs., 596 F.3d 1115, 1120 (9th Cir. 2010).

43 Vignaswari Saminathan, *An Analysis of the United States Employment Immigration System in Attracting and Retaining Skilled Workers and the Effects of its Dichotomous Objectives—Competitiveness Versus Protectionism: A Case For Reform?*, 32 PACE L. REV. 149, 150 (2012); Sean Ashoff, *F-1 Student Visas and the Student Debt Crisis*, 39 J.L. & COM. 95, 101–2 (2020).

44 20 C.F.R. § 656.17 (2023).

45 *Id.* § 656.2(c)(3).

46 *Id.* §§ 655–656.

47 *Id.* § 656.17.

In preparation for initiating PERM, an employer needs to demonstrate that it tried to recruit a USC worker for no more than 180 days in order to prove that a USC would not be better suited for the job than a foreign national.[48] This includes a physical Notice of Filing (NOF) advertisement for the job and recruitment.[49] Additionally, the employer needs to conduct a PWD in order to conduct a labor market test.[50] For the labor market test, PERM requires the location of intended employment in order to assess the job opportunity.[51] An area of intended employment is defined as within normal commuting distance of the address of the workplace.[52]

The PERM process is then started when the employer files ETA Form 9089 with the DOL, which analyzes local labor market needs and average wages in the physical location of the position, conducting a PWD.[53] Once submitted, applications are screened, and then certified, denied, or selected for audit.[54] An employer's application can be selected for PERM audit randomly or if the selection criteria of the applicant are flagged as problematic.[55] If approved, the employer can file an employment-based immigrant visa petition with USCIS.[56] Then, the employer may file for adjustment to LPR status.[57] In addition to paying salary, employers spend approximately $10,000 to $15,000 in legal and administrative fees to sponsor an employee for LPR.[58]

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48 *Id.* § 656.17(e)(1)(i).

49 *Id.* § 656.17(e)(1)(i)(B); *Id.* § 656.17(e)(1)(ii).

50 *Id.* § 656.40(b)(3); 8 U.S.C. § 1182(p)(4).

51 20 C.F.R. § 656.17(f)(4).

52 *Id.* § 656.3.

53 *Id.* § 656.17(a)(1). *See generally Application for Permanent Employment Certification ETA Form 9089*, U.S. DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/9089form.pdf [https://perma.cc/Y2US-PF8S].

54 20 C.F.R. § 656.17(b). The DOL has not disclosed the criteria that trigger an audit. Ben A. Rissing & Emilio J. Castilla, *Testing Attestations: U.S. Unemployment and Immigrant Work Authorizations*, 69 ILR REV.: J. WORK & POL'Y 1081, 1090 (2016).

55 20 C.F.R. § 656.20(a). *See also* AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON & DANIEL MONTALVO, LABOR CERTIFICATION HANDBOOK § 4:1 (2021). For example, Facebook settled with the U.S. Department of Justice in October 2021 for a civil penalty of $4.75 million and $9.5 million in damages regarding its use of PERM after an audit revealed a preference for recruitment of foreign workers. *See* Press Release, U.S. Dep't of Just., Settlement Agreement with Facebook, Inc. (Oct. 19, 2021), https://www.justice.gov/opa/press-release/file/1443336/download [https://perma.cc/4F3R-ZHBG]; David McCabe, *Facebook Will Pay Up to $14 Million to Settle Claims It Favored Foreign Workers*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/10/19/technology/facebook-foreign-workers.html (last visited Apr. 3, 2023).

56 8 U.S.C. § 1153(b)(2)(C).

57 *Id.*

58 Anderson, *supra* note 24.

C. *Immigration and Federalism*

Immigration law today is mostly regulated by the federal government.[59] However, prior to the end of the nineteenth century, immigration was subject largely to state regulation.[60] The plenary power doctrine has since expanded federal control over immigration.[61] In 1889, the Supreme Court held in *Chae Chan Ping v. United States* that the federal government has the exclusive power to control immigration because of constitutional and extra-constitutional concerns, creating the plenary power doctrine.[62] The rationales for upholding federal authority in immigration law are justified by notions of sovereignty, a united voice in foreign affairs, and uniformity of naturalization.[63] While the plenary power doctrine preempts most state action in the context of immigration, states maintain some authority.[64] Congress grants key power to the states to control traditional state powers, including criminal law and employment law.[65]

Indeed this shared power can be seen in the DOL labor certification processes.[66] The DOL issues regulations for employers to demonstrate that a proffered wage meets the average wage in the relevant physical location.[67] State calculations for noncitizens' average wages in a particular field influence the DOL's decision to green light candidates for immigration applications based on whether their proffered wage is sufficient to not adversely affect local USC wages and working conditions.[68] Thus, the DOL's state workforce agencies' information causes state determination to have an effect on the DOL's final decision.[69] Since the passage of the Immigration Reform and Control Act (IRCA) and the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA),[70] which expanded federal immigration power, immigration

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59 U.S. CONST. art. I, § 8, cl. 4; Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 476 (2018).

60 *See, e.g.*, Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUMBIA L. REV. 1833 (1993).

61 Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

62 Ping v. United States, 130 U.S. 581, 603 (1889).

63 Saucedo, *supra* note 59, at 477.

64 *Id.* at 473.

65 *Id.* at 474.

66 *Id.* at 491.

67 *Id.*

68 *Id.*

69 Rissing & Castilla, *supra* note 54, at 1089.

70 *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324(a)); Illegal Immigration Reform and Immigration

scholars have argued for a better balance of power between the federal government and the states.[71]

This Note argues for reshaping remote, employment-based specialty occupation immigration into a cooperative federalist system, where the federal government grants state DOLs more responsibility for selecting remote noncitizens for labor certification, while simultaneously sharing power with the federal government.[72] Given the inefficiencies of the federal DOL and USCIS to effectively handle modern remote work for approximately thirty years,[73] cooperative federalism is the next step.

D. *Addressing Offshoring*

With the expansion of remote work, there is the possibility of a nativist backlash arguing that foreign nationals should be offshored to their countries of origin.[74] There is a host of arguments in favor of offshoring, such the ability to cut costs for employers.[75] Particularly, employers would save on salary for foreign national employees and fees of visa sponsorship.[76] However, with offshoring, prolific American companies could be seen as condoning controversial foreign labor practices.[77] For example, studies have shown that offshored companies in India have difficulty adhering to labor laws.[78] Studies have also shown the consequences of offshoring include American unemployment,

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Responsibility Act of 1996, Pub L. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.)).

71 Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1638–39 (1997). Peter Spiro has introduced the "steam-valve" federalism, which argues against the presumption against state-level action in immigration law. *Id.*

72 Spiro, *supra* note 9.

73 *See* Memorandum from Barbara Ann Farmer, *supra* note 10; "one of today's biggest challenges in employment-based immigration is an outdated immigration system that does not take into account the mobility of the modern worker." Goldfinger & Sholts, *supra* note 35, at 41; Spiro, *supra* note 9.

74 At the beginning of the pandemic, the Trump administration prevented nonimmigrant and immigrant workers from returning to the United States, arguing the preservation of employment opportunities for United States citizens. JORGE LOWEREE, AARON REICHLIN-MELNICK & WALTER A. EWING, PH.D., AM. IMMIGR. COUNCIL, THE IMPACT OF COVID-19 ON NONCITIZENS AND ACROSS THE U.S. IMMIGRATION SYSTEM 5 (Mar.–Sept. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system_0.pdf [https://perma.cc/5GLQ-ZC7H].

75 *See* Alexandre Dolgui & Jean-Marie Proth, *Outsourcing: Definitions and Analysis*, 51 INT'L J. PROD. RSCH. 6769, 6770–71 (2013).

76 *See* Anderson, *supra* note 24.

77 Dolgui & Proth, *supra* note 75, at 6772.

78 Carolyn Penfold, *Off-Shored Services Workers: Labour Law and Practice in India*, 19 ECON. & LAB. RELS. REV. 91, 95 (2009).

declining living standards, deindustrialization, and legal issues of employment-at-will.[79] Offshoring particularly affects jobs in information technology (IT), which are often held by noncitizen workers.[80] Offshoring remote noncitizen workers would prevent immigrant and nonimmigrant visas from undergoing a labor market test because the DOL would no longer regulate their foreign jobs and salaries.[81] This could harm both foreign national workers and USC workers because foreign nationals could be undercut for salaries, and USCs could lose job opportunities because American employers could pay foreign nationals abroad less without regulation from the DOL.[82]

Although the possibility of offshoring looms, the reaction of employers during the array of travel bans during the COVID-19 pandemic serves as strong evidence that employers largely do not want to offshore their foreign workers employed on immigrant and nonimmigrant specialty occupation visas. In June 2020, President Donald Trump suspended the entry of certain foreign nationals, including H-1B visa holders and PERM applicants who were outside the United States, to reduce the spread of COVID-19.[83] Large companies, such as Microsoft and Tesla, rallied behind their foreign national employees.[84] Large employers of immigrant and nonimmigrant workers, including Amazon, Apple, Google, Facebook, Salesforce, Spotify, and more, filed an amicus brief supporting foreign nationals who filed for injunction.[85] This

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79 Dolgui & Proth, *supra* note 75, at 6776; Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMP. & LAB. L. 1, 19 (2017); Donald C. Dowling Jr., *U.S.-Based Multinational Employers and the Social Contract Outside the United States*, 26 ABA J. LAB. & EMP. L. 77, 77–78 (2010).

80 *The H-1B Visa Program: A Primer on the Program and Its Impact on Jobs, Wages, and the Economy*, *supra* note 5, at 1; Robert W. Bednarzik, *Restructuring Information Technology:Is Offshoring a Concern?*, MONTHLY LAB. REV. 11, 13–18 (Aug. 2005).

81 *See* 20 C.F.R. § 656.40(b)(3) (2023); 8 U.S.C. § 1182(p)(4).

82 "[A] lot of jobs are shifting to developing countries like China because a company doesn't want to pay American wages and benefits." Roya Wolverson, *Outsourcing Jobs and Taxes*, COUNCIL ON FOREIGN RELS. (Feb. 11, 2011, 7:00 AM), https://www.cfr.org/backgrounder/outsourcing-jobs-and-taxes [https://perma.cc/NLP5-HCR5].

83 Proclamation No. 10052, 85 Fed. Reg. 38263 (June 22, 2020).

84 The following was tweeted by Brad Smith, CEO of Microsoft, following the announcement of the travel ban: "Now is not the time to cut our nation off from the world's talent or create uncertainty and anxiety. Immigrants play a vital role at our company and support our country's critical infrastructure. They are contributing to this country at a time when we need them most." @BradSmi, TWITTER (June 22, 2020, 9:02 PM), https://twitter.com/bradsmi/status/1275232627453288450 [https://perma.cc/U7MU-5TBB]; @elonmusk, TWITTER (June 22, 2020, 11:08 PM), https://twitter.com/elonmusk/status/1275264504725528576 [https://perma.cc/PQ37-8KU2].

85 Gomez v. Trump, 485 F. Supp. 3d 145, 165 (D.D.C. 2020); Amicus Brief of Leading Cos. & Business Organizations in Support of Plaintiffs' Motion for Preliminary Injunction, Gomez v. Trump, 485 F. Supp. 3d 145 (D.D.C. 2020) (No. 1:20-cv-01419). Although the effort at securing

demonstrates that employers remain committed to the employment of foreign nationals on the ground in the United States, even when performing their work remotely. Therefore, this Note offers a solution to keep specialty occupation noncitizen workers in the United States to keep the economy stable and meet the needs of American employers.

II. ANALYSIS

The physical worksite location requirements for DOL certification has proven to be a challenge in the remote workspace, both during the COVID-19 pandemic and even before the rise in the popularity of telework.[86] It is unclear under current guidance how a foreign national working remotely in the United States can apply for PERM, for an immigrant visa, or for a specialty occupation nonimmigrant visa without an official worksite location.[87] Now, during the revolution of white-collar American work,[88] there is still a lack of modern guidelines on how employers can effectively apply for certification of their remote noncitizen workers located in the United States, with the backdrop of decreasing relevancy of the physical worksite location.[89]

For example, an H-1B specialty occupation nonimmigrant employee with LCAs who is working in locations within the United States other than those that were certified violates the terms of their visa.[90] Additionally, they must be paid pursuant to the prevailing wage of their physical worksite area.[91] Thus, it is unclear how to conduct a nonimmigrant worker's PWD if their physical location differs from or conflicts with the location of their employer. Furthermore, an employee with a filed PERM for a green card could be stuck in the same location

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the injunction was unsuccessful, President Biden later suspended the rule. *Gomez*, 485 F. Supp. 3d at 204 (D.D.C. 2020); Proclamation No. 10149, 86 Fed. Reg. 11847 (Feb. 24, 2021).

86 Cyrus Mehta, *The Future of Work and Visa Rules in the Age of COVID-19*, INSIGHTFUL IMMIGR. BLOG (Sept. 14, 2020), http://blog.cyrusmehta.com/2020/09/the-future-of-work-and-visa-rules-in-the-age-of-covid-19.html [https://perma.cc/Q3KU-LZ97] ("While the debate on the relevancy of the office will continue even after the pandemic, US visa rules have not been able to cope with remote work.").

87 Goldfinger & Sholts, *supra* note 35, at 37.

88 *See* Lund, Madgavkar, Manyika & Smit, *supra* note 1.

89 Mehta, *supra* note 86.

90 *See* 8 U.S.C. § 214.2(h)(4)(iii)(B)(2); *see also Combating Fraud and Abuse in the H-1B Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program [https://perma.cc/77ZT-X6XF].

91 8 U.S.C. § 1182(t)(1)(A)(i)(II).

until their LPR approval.[92] For example, if a foreign national chooses to move and wants their offered position to be in their new location, the PERM process must restart for local labor certification, which is likely the case for a position that is moved remote.[93] This Note later proposes that a shift to a cooperative federalist model for remote specialty noncitizen workers, creating a new remote labor market test with the states, would resolve the issues analyzed below.[94]

A. *Nonimmigrant Visas*

The main guidance on specialty occupation nonimmigrant visa holders working somewhere other than the physical worksite location specified on their LCA, within the United States, is found in the 1994 DOL Farmer Memo.[95] The Farmer Memo provides instructions on how to phrase travel and relocation requirements for employers' LCAs and recruitment advertisements.[96] Additionally, it states that for noncitizen workers who will work at various unanticipated worksites in the United States, employers should indicate this situation on the employee's LCA, accompanied by a short statement explaining why it is not possible to predict worksite locations.[97] The memo also asserts that the location of telecommuters in the United States for recruitment purposes is a company's headquarters.[98] The DOL clarified in 2015 that the Farmer Memo remains the controlling guidance for employees who do not work at a fixed location in the United States, for example, for telecommuters.[99] The DOL confirmed again in 2020 at the onset of the COVID-19

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92 *See* 20 C.F.R. § 656.17(d)(4) (2023); *AILA Notes from DOL OFLC Quarterly Stakeholder Meeting PERM, H-1B and PWD Issues*, AM. IMMIGR. LAWS. ASS'N (Dec. 5, 2017), https://www.aila.org/infonet/minutes-dol-perm-h-1b-stakeholder-meeting-12-05-17 (last visited Apr. 3, 2023) (Question 16).

93 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 5:9.

94 *See infra* Section III.C.

95 Memorandum from Barbara Ann Farmer, *supra* note 10.

96 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 8:13.

97 Memorandum from Barbara Ann Farmer, *supra* note 10 ("[Employers' LCAs] should indicate that the alien will be working at various unanticipated locations throughout the [United States]. A short statement should also be included explaining why it is not possible to predict where the work sites will be at the time the application is filed.").

98 *See id.* ("Applications involving job opportunities which require the beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located.").

99 *Quarterly Stakeholder Meeting (H-1B, Prevailing Wage, and PERM)*, AM. IMMIGR. LAWS. ASS'N 6–7 (June 16, 2015), https://www.aila.org/infonet/minutes-from-dol-stakeholder-meeting-06—16-15 (last visited Nov. 17, 2021).

pandemic that the Farmer Memo is still the prevailing guidance.[100] Although the Farmer Memo provides some guidance on which worksite location is used for the LCA when that location is unclear, the memo is almost thirty years old, and even before the COVID-19 pandemic, did not sufficiently address a proper labor market for today's remote worker.[101]

At the start of the COVID-19 pandemic, the DOL addressed office closures and offered guidance on how to manage LCAs when nonimmigrant workers were no longer working at the listed and approved physical worksite location in the United States.[102] For those with an already approved LCA with an unintended worksite change, such as working from home, this situation does not warrant a new LCA filing.[103] However, this applies only in the limited case when a nonimmigrant worker performs work off-site for a thirty-day period and maintains an office and lives within the geographic area of the physical worksite.[104] This workaround may not be viable for a permanent remote office situation because it seems to only serve as a short-term solution.[105]

Employers risk a great deal financially based on whether the law completely allows future remote work in the United States for their specialty occupation nonimmigrant employees because they may be found to have misrepresented a material fact regarding an LCA's worksite location.[106] If an employer is not in compliance with laws and regulations regarding LCAs, including a misrepresentation of a material fact, it is subject to a civil monetary penalty of approximately $1,900 per violation, in addition to the existing costs of merely filing for noncitizen job applicants.[107] The employer could also be subject to disqualification from approval of petitions for up to three years or other administrative remedies, which would temporarily prevent its hiring of foreign nationals altogether.[108]

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100 *See COVID-19 Frequently Asked Questions*, U.S. DEP'T OF LAB., EMP. TRAINING ADMIN., OFF. OF FOREIGN LAB. CERTIFICATION 5 (Mar. 20, 2020), https://www.foreignlaborcert.doleta.gov/pdf/DOL-OFLC_COVID-19_FAQs_Round%201_03.20.2020.pdf [https://perma.cc/QG4S-TJP8].

101 Goldfinger & Sholts, *supra* note 35, at 39–40.

102 *See generally COVID-19 Frequently Asked Questions*, *supra* note 100.

103 *Id.* at 5 (citing 20 C.F.R. § 655.734 (2023)).

104 *Id.* (citing 20 C.F.R. § 655.735).

105 Cora-Ann Pestaina, *LCA Posting Requirements at Home During the COVID-19 Pandemic: Do I Post on the Refrigerator or Bathroom Mirror?*, INSIGHTFUL IMMIGR. BLOG (Apr. 8, 2020), http://blog.cyrusmehta.com/2020/04/lca-posting-requirements-at-home-during-the-covid-19-pandemic-do-i-post-on-the-refrigerator-or-bathroom-mirror.html [https://perma.cc/6HXK-9HYR].

106 *See, e.g.*, *supra* note 55 and accompanying text.

107 20 C.F.R. § 655.810(b)(1)–(b)(3) (civil monetary penalties are routinely adjusted for inflation); Anderson, *supra* note 24.

108 *Id.* § 655.810(d)–(e).

1. The Labor Condition Application's "Area of Intended Employment" and Notice Requirements

Now that a specialty occupation nonimmigrant visa holder may be working remotely, there is an open question of how to define the worker's area of intended employment in the United States as required by the LCA.[109] To fulfill the LCA's "area of intended employment" listing requirement,[110] an employer must get a DOL-certified LCA for each area of intended employment for the employee, unless it is a short-term placement.[111] Currently, an H-1B visa's location requirement for an "area of intended employment" is defined as an area within normal commuting distance of the worksite location.[112] This definition may vary: a single metropolitan statistical area (MSA) or a primary metropolitan statistical area (PMSA) are deemed within normal commuting distance.[113] However, a consolidated metropolitan statistical area (CMSA) will not automatically be deemed within normal commuting distance.[114] These area designations are important for conducting accurate labor market tests. At the onset of the COVID-19 pandemic, the DOL clarified that an employee may continue working for their employer within their area of intended employment.[115] However, if the employee moves or works somewhere not in commuting distance within the United States, it appears that the foreign national is no longer within the bounds of their LCA. Although MSA, PMSA, and CMSA are used to statistically measure spatial income differences between metropolitan labor markets, they have an even more defined role to play in this Note's proposal of a new remote labor market.[116]

The H-1B visa also requires notice when the nonimmigrant worker's place of employment changes outside the physical area of employment in

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109 *Id.* § 655.734(a)(2).

110 *Id.* § 656.3 (2023).

111 *Fact Sheet #62J: What Does "Place of Employment" Mean?*, U.S. DEP'T OF LAB. WAGE & HOUR DIV. (2009), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs62J.pdf [https://perma.cc/DRU9-GKP8]; *see* ITServe All., Inc. v. Dep't of Homeland Sec., No. 1:20-cv-03855, 2022 U.S. Dist. LEXIS 28993, at *9 (D.D.C. Feb. 17, 2022).

112 20 C.F.R. § 655.715 ("Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed.").

113 *Id.* For a detailed explanation of how the Census Bureau classifies metropolitan areas, including MSAs, PMSAs, and CMSAs, see CENSUS BUREAU, U.S. DEP'T COM., GEOGRAPHIC AREAS REFERENCE MANUAL 13-1–13-7 (1994), https://www2.census.gov/geo/pdfs/reference/GARM/Ch13GARM.pdf [https://perma.cc/3S7X-3J33].

114 20 C.F.R. § 655.715.

115 *COVID-19 Frequently Asked Questions*, *supra* note 100.

116 *See* Edward L. Glaeser & Joshua D. Gottlieb, *The Economics of Place-Making Policies*, BROOKINGS PAPERS ON ECON. ACTIVITY 155, 162 fig. 1 (Spring 2008).

the United States, which, during the move to fully remote work, created absurd results.[117] Here, the employer must obtain a new LCA and file an amended H-1B petition.[118] An employer must provide notice on its website or physical notices at the place of employment in at least two conspicuous places, where they must be available for public inspection.[119] However, when an employee transitions to remote work at home, outside the geographic metropolitan area, they are put in an uncomfortable position. They can either post their hard-copy LCAs publicly outside their home, which include personal information like their annual salary range,[120] or post electronic LCAs. The latter option is not advisable to employers because it is unclear which employees must be notified of the new LCA and through which electronic medium.[121] When presented with this predicament before the COVID-19 pandemic, the DOL responded that it does not expect nonimmigrants to post the LCA at their homes, but the employer must file a new LCA. [122] These two pieces of guidance taken together are unclear. The DOL reaffirmed its stance in 2020 during the COVID-19 pandemic.[123] Lack of clarity in notice requirements for specialty nonimmigrant workers places the employer in danger of a DOL audit, penalty fees, and other more costly consequences.[124]

2. Minimal USCIS Guidance

The DOL almost exclusively regulates specialty occupation nonimmigrant labor.[125] USCIS, which does not directly address worksite locations in its regulations of specialty occupation nonimmigrant visas, has provided minimal guidance for off-site work in the United States.[126] USCIS via administrative memoranda has consistently taken the position that an employer of specialty occupation nonimmigrant visa workers

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117 *See* 8 U.S.C. § 1182(n)(1)(C); Pestaina, *supra* note 105.

118 20 C.F.R. § 655.734(a)(1); Pestaina, *supra* note 105.

119 *See* 20 C.F.R. § 655.734(a)(1); Pestaina, *supra* note 105; *see also COVID-19 Frequently Asked Questions*, *supra* note 100.

120 Pestaina, *supra* note 105.

121 *See* Cyrus Mehta, *The Nuts and Bolts of Complying with the H-1B Notice Requirements*, INSIGHTFUL IMMIGR. BLOG (Mar. 25, 2019), http://blog.cyrusmehta.com/2019/03/the-nuts-and-bolts-of-complying-with-the-h-1b-notice-requirements.html [https://perma.cc/V2WE-5EHP].

122 *Id.*; *AILA-DOL Wage and Hour Division (WHD) Meeting*, AM. IMMIGR. LAWS. ASS'N 4–5 (Oct. 13, 2017), https://www.aila.org/infonet/minutes-dol-wage-hour-division-meeting-10-13-17 (last visited Jan. 2, 2023).

123 *COVID-19 Frequently Asked Questions*, *supra* note 100, at 5.

124 20 C.F.R. § 655.810(b)(1)–(b)(3); Pestaina, *supra* note 105.

125 20 C.F.R. § 655.00.

126 Goldfinger & Sholts, *supra* note 35, at 36.

must file an amended visa petition for any material changes to the terms and conditions of employment.[127] The DOL's COVID-19 pandemic guidelines reaffirmed that if a nonimmigrant with a certified LCA has a material change in employment, then an amended LCA is required.[128]

In its first decision regarding what constitutes a material change, the USCIS Administrative Appeals Office held in *In re Simeio Solutions* that an H-1B worker's place of intended employment is material in the terms and conditions of employment.[129] Thus, if this material change places the worker in a new geographical area, a new LCA is required.[130] The decision clarified that an LCA's effectiveness for a nonimmigrant worker depends on the specificity of the place of employment.[131] Yet, *In re Simeio Solutions* does not have a clear benefit to nonimmigrant workers or to the DOL.[132] One of the only noticeable effects of the decision was administrative delays in H-1B nonimmigrant workers' ability to move worksite locations, which made it more difficult for employers to meet their clients' demands as workplaces became more mobile, even prior to the COVID-19 pandemic.[133] The District Court for the District of Columbia recently reaffirmed *In re Simieo Solutions* in *ITServe Alliance, Inc. v. Department of Homeland Security*, holding that employers must file an amended H-1B visa petition when an employee moves because it is a material change in employment.[134] This decision prioritizing physical

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127 *See* Memorandum from James J. Hogan, INS Exec. Assoc. Comm'r, Operations, (Oct. 22, 1992), *reprinted in* 69 INTERPRETER RELEASES 1448, App. II (Nov. 9, 1992); Memorandum from T. Alexander Aleinikoff, INS Exec. Assoc. Comm'r. (Aug. 22, 1996), *reprinted in* 73 INTERPRETER RELEASES 1231, App. III (Sept. 16, 1996) ("An amended H-1B petition must be filed in a situation where the beneficiary's place of employment changes subsequent to the approval of the petition and the change invalidates the support labor condition application."); Letter from Isaiah Russell Jr., INS Acting Branch Chief, Bus. & Trade Servs. Branch, to Nathan Waxman (Mar. 12, 1997), *reprinted in* 74 INTERPRETER RELEASES (West) 934, App. II (June 9, 1997) ("An amended petition need not be filed in a situation where the alien is transferred to another location where the petitioner had previously obtained a certified labor condition application."); Letter from Thomas W. Simmons, INS Branch Chief, Benefits & Trade, to Shirley Tang (Nov. 12, 1998), *reprinted in* 75 INTERPRETER RELEASES (West) 1740, App. IV (Dec. 21, 1998) ("An amended petition need not be filed to reflect the change in job locations. After the transfer, the alien is still working for the same employer and the employer already has a labor condition application on file for the new location."); Letter from Efren Hernandez III, Dir., Bus. & Trade Branch, U.S. Citizenship & Immigr. Servs., to Lynn Shotwell, Am. Council on Int'l Pers., Inc. (Oct. 23, 2003) ("As long as the LCA has been filed and certified for the new employment location . . . no amended petition would be required regardless of when the LCA was filed and certified, as long as certification took place before the employee was moved.").

128 *COVID-19 Frequently Asked Questions*, *supra* note 100, at 5.

129 *In re* Simeio Solutions, LLC, 26 I. & N. Dec. 542, 548 (AAO 2015). This decision clarifies and does not depart from USCIS's past policy guidance. *Id.* at 547 n.7.

130 *Id.*

131 *Id.* at 548.

132 *See generally id.*; Goldfinger & Sholts, *supra* note 35, at 37.

133 Goldfinger & Sholts, *supra* note 35, at 37.

134 ITServe All., Inc. v. Dep't Homeland Sec., 590 F. Supp. 3d 27, 29 (D.D.C. 2022).

location is intensely problematic and in need of change. State authorities, which are more knowledgeable of their economies' needs, as opposed to federal authorities, may be better attuned to local needs, thus, leading to a modern solution.

B. *Program Electronic Review Management*

There are few DOL regulations addressing the modern remote workplace for employers to sponsor employees for green cards.[135] This was already a challenge for PERM applicants, which the COVID-19 pandemic only exacerbated.[136] There are multiple moving parts to the PERM process that are affected by remote work.

1. The Notice of Filing

The employer's NOF must state the physical location of the job it intends to offer to the noncitizen employee in advertisements for the position.[137] In the principal relevant decision *In re Symantec Corp.*, the Board of Alien Labor Certification Appeals (BALCA) held that content requirements for advertisements of positions are required to inform job applicants of travel requirements in NOFs.[138] However, BALCA later held that travel requirements must be advertised on the employer's website for recruitment, but its omission in other types of job postings does not violate the regulations.[139] The DOL's inconsistencies on travel requirements in NOFs—highlighted by these two conflicting decisions—contribute to PERM labor certification's unnecessary complications when a job includes remote work.[140]

2. The Green Card's Prevailing Wage Determination

The Office of Foreign Labor Certification (OFLC), a branch of the DOL dedicated to foreign national labor, states that if a foreign national

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135 Goldfinger & Sholts, *supra* note 35, at 37.

136 *See AILA Notes from DOL OFLC Quarterly Stakeholder Meeting PERM, H-1B and PWD Issues*, *supra* note 92; FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, Preliminary Materials.

137 20 C.F.R. § 656.17(e)(1)(i)(B), (f) (2023).

138 *In re* Symantec Corp., 2011-PER-01856, 4 (Bd. Alien Lab. Cert. App. July 30, 2014) (en banc) (citing 20 C.F.R. § 656.17(f)).

139 Synergy Global Techs. Inc., 2016-PER-00817, 4 (Bd. Alien Lab. Cert. App. Dec. 6, 2016).

140 Goldfinger & Sholts, *supra* note 35, at 38. During the COVID-19 pandemic, the DOL has not eased requirements for a physical NOF in the office. *COVID-19 Frequently Asked Questions*, *supra* note 100, at 6.

works from home in a region of unintended employment different than the employer's headquarters, the labor market test, or PWD, should be done for the employee's physical worksite.[141] Although this guidance differs from the Farmer Memo for telecommuters,[142] it raises identical issues as to whether a PWD truly provides a fair labor market test because it does not necessarily correspond to the average wages of where the remote employee works.[143]

3. Travel Requirement Or Relocation Requirement

It is unclear if a position that is completely remote would be considered a travel or a relocation requirement, which affects where the PWD should be conducted.[144] BALCA has only considered the question of whether relocation and travel differ, not remote work.[145] It is possible that working remotely is currently considered a travel requirement for the purposes of PERM.[146] In this scenario, DOL regulations require that an employer filing a PERM application inform any applicants of travel requirements for the offered position through PERM job advertisements.[147] Yet, the listed travel cannot exceed the job requirements.[148] Moreover, the employer must be able to demonstrate a logical nexus between the job advertisement and the position described in the PERM application.[149]

BALCA distinguishes job posting travel requirements from relocation requirements in PERM applications.[150] In the case of *In re Patel Consultants Corp.*, BALCA stated that travel to multiple unanticipated locations for training and interaction with clients only

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141 *DOL Stakeholders Liaison Meeting Minutes*, AM. IMMIGR. LAWS. ASS'N (Mar. 15, 2007), https://www.aila.org/infonet/dol-liaison-minutes-03-15-07 (last visited Nov. 11, 2021).

142 *See* Memorandum from Barbara Ann Farmer, *supra* note 10.

143 *See supra* Section II.A.1.

144 Goldfinger & Sholts, *supra* note 35, at 38.

145 *Id.*

146 *Id.* at 39–41.

147 20 C.F.R. § 656.17(f)(4) (2023).

148 *Id.* § 656.17(f)(6).

149 Labor Certification Process for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77325, 77347 (Dec. 27, 2004) (to be codified at 20 C.F.R. §§ 655–656) ("As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer's application, the employer will meet the requirement of apprising applicants of the job opportunity. . . [e]mployers need not specify the job site, unless the job site is unclear.").

150 *In re* Patel Consultants Corp., 2011-PER-00535, at 1 (Bd. Alien Lab. Cert. App. Feb. 27, 2012) (denying certification due to the employer's inconsistent use of language pertaining to travel in its advertisements and ETA Form 9089).

suggests that the job opportunity includes assignments that need travel.[151] Meanwhile, relocation implicates that the employer requires the employee to move to a new location.[152] In the context of remote workspaces, the current regulations and *In re Patel Consultants Corp.* leave open questions as to whether the remote worker has the freedom to relocate.[153] Thus, it is unclear if *In re Patel Consultants Corp.* is applicable to the remote worker.

For unanticipated worksites that require relocation, BALCA has held that an employer may answer "no" to the travel question in a PERM form for PWD.[154] However, BALCA only reached this conclusion in *In re Technology Consultants-MA, Inc.* because the employee's position had a primary worksite location in Michigan, which required relocation.[155] In a remote work situation, it is unclear if an employer would require an employee's relocation for a primary physical worksite. Therefore, the application of *In re Technology Consultants-MA, Inc.* to the modern remote worker is murky.

4. Classification as a Roving Employee

Although simply classifying a remote worker as roving appears to be a solution for a proper labor market test, it does not exactly fit the mold of a remote worker. For the purposes of PERM labor certification, a roving employee travels to various unanticipated locations as part of their employment.[156] A PERM applicant working remotely can be classified as a roving employee.[157] The main guidance on roving employees stems from the Farmer Memo,[158] which suggests that the NOF, recruitment, and

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151 *Id.* at 2.

152 *Id.* ("'[T]ravel to various unanticipated locations to interact with clients and train end users for short and long term assignments'–connotes only that the job opportunity would require travel for short and long term assignments. Travel for long term assignment is not the same as relocation. Relocation implies that the employer will be requiring the incumbent to move to a new location rather than just travel to it.").

153 *See generally* Goldfinger & Sholts, *supra* note 35, at 38.

154 *In re* Tech. Consultants-MA, Inc., 2013-PER-02117, at 6 (Bd. Alien Lab. Cert. App. Oct. 27, 2017).

155 *Id.* ("This conclusion is supported by Employer's thorough explanation of the nature of its business, which requires employees to relocate to different geographic areas depending on the contract at that time.").

156 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 1:5.

157 *Id.* § 2:51.

158 *Practice Alert: DOL Confirms 1994 Farmer Memo Remains in Effect for PERM Travel Issues*, AM. IMMIGR. LAWS. ASS'N (June 5, 2018), https://www.aila.org/infonet/practice-alert-dol-confirms-1994-farmer-memo (last visited May 7, 2023).; *Quarterly Stakeholder Meeting (H-1B, Prevailing Wage, and PERM)*, *supra* note 99, at 7 ("The 1994 Barbara Farmer memo remains the

the PWD should be done within the physical area of the employer's headquarters.[159] Further, the memo suggests that the PWD for roving employees should be sought for all of their multiple physical areas of employment, provided that the multiple physical worksite locations are known.[160] This can add to employer's costs to conduct multiple certifications for each and every employee's physical worksite location.[161] Otherwise, it is unclear if the PWD should only be conducted for headquarters.[162]

The DOL has not offered much additional guidance on how to process a PERM labor certification for a roving employee.[163] Generally, BALCA has held that the NOF, posting, and recruitment should all have matching travel or relocation requirements when an employer applies for PERM for a roving employee.[164] In the leading case, *In re Infosys Ltd.*, the employer, in its PERM application and advertisements, described a job posting's primary worksite as its headquarters, Plano, Texas, "and various unanticipated locations."[165] The OFLC audited the PERM application, and then denied it because "various unanticipated locations throughout the U.S." described a travel requirement rather than a relocation requirement.[166] The employer appealed the decision, arguing

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controlling guidance on issues relating to employees who do not work at a fixed location."); FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 2:51 ("As to the listing of the worksite when constant travel is required (roving employee cases), DOL indicated, in February 2013 and June 2018 stakeholder meetings, that the 1994 Farmer memo (FM 48-94) remains valid guidance."). *See generally* Memorandum from Barbara Ann Farmer, *supra* note 10.

159 *Quarterly Stakeholder Meeting (H-1B, Prevailing Wage, and PERM)*, *supra* note 99, at 7 ("Consistent with that memorandum, for most telecommuting situations, the company headquarters would be the location of the job for prevailing wage and recruitment effort purposes.").

160 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 1:5 ("The prevailing wage in these situations should be sought for multiple areas of employment (e.g., if the multiple worksite locations are known) or at the employer's headquarters (in roving employee situations where the work locations are not known).").

161 *Id.*

162 *Id.*

163 Goldfinger & Sholts, *supra* note 35, at 39.

164 *In re* Nova Software, Inc., 2012-PER-00518, at 3 (Bd. Alien Lab. Cert. App. Dec. 23, 2014) ("[T]he Board finds that the CO properly determined that the Employer's failure to include the travel requirement in its advertisements in a newspaper of general circulation was a valid reason to deny certification."); *In re* Techdemocracy LLC, 2012-PER-00499, at 3 (Bd. Alien Lab. Cert. App. Nov. 24, 2014) ("The Employer failed to submit an ETA Form 9089 with job duties and requirements that did not exceed those found in the newspaper advertisements, job order, and notice of filing. Accordingly, the denial of certification must be affirmed.").

165 *In re* Infosys Ltd., 2016-PER-00074, at 1 (Bd. Alien Lab. Cert. App. May 12, 2016).

166 *Id.* at 2–3 ("The denial was based on the Employer's failure to comply with three specific regulatory requirements: 20 C.F.R. § 656.17(f)(3)—the obligation to '[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought;' 20 C.F.R. § 656.17(f)(4)—the requirement that advertisements 'must indicate the geographic are [sic] of employment with enough specificity to apprise applicants of any travel

that the worksite description was a good faith attempt to accurately describe the roving nature of the position in accordance with the Farmer Memo; thus, the PERM's denial created a new roving employee standard.[167] BALCA ultimately reversed and remanded the OFLC's denial of the PERM application, conceding OFLC's lack of both formal and informal guidance on whether to classify roving employees as having a travel or relocation requirement.[168] BALCA's decision in *In re Infosys Ltd.* confirms that employers should follow the Farmer Memo for roving employees.[169] However, classifying a remote worker as a roving employee in practice appears to be a bandage for outdated rules and regulations.[170] It is not exactly accurate to say that someone who works remotely is roving because it is unknown if their remote office in the United States changes location.[171] Issues of physical location of a home office will be further discussed later in this Note.[172]

5. Classification as a Telecommuter

While there is some promise in the current telecommuting guidelines for PERM applicants regarding remote work, it appears to cause confusion for adjudicators because applications often trigger audits.[173] The DOL states that its roving employee policy is also applicable to a telecommuting employee.[174] Thus, the Farmer Memo is applicable, similar to nonimmigrant specialty occupation visas for telecommuters.[175] For a position permitting or requiring telecommuting, an employee can perform work anywhere in the United States.[176]

The OFLC states that telecommuting is an employment benefit that must be disclosed in an employer's job description to ensure a valid

requirements; and 20 C.F.R. § 656.17(i)(1)—the requirement that the job be described with the employer's actual minimum requirement.").

167 *Id.* at 4.

168 *Id.* at 10–11.

169 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 2:51.

170 *See generally* Memorandum from Barbara Ann Farmer, *supra* note 10.

171 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 1:5.

172 *See infra* Section II.B.6.

173 *See generally In re* Cogsdale Support Ltd., 2012-PER-00941 (Bd. Alien Lab. Cert. App. Jan. 27, 2015).

174 *Quarterly Stakeholder Meeting (H-1B, Prevailing Wage, and PERM)*, *supra* note 99, at 7.

175 *See generally* Memorandum from Barbara Ann Farmer, *supra* note 10; Goldfinger & Sholts, *supra* note 35, at 39.

176 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 2:63.

market test.[177] However, in accordance with BALCA's holding in *In re Symantec Corp.*, telecommuting does not need to be disclosed via additional recruitment measures.[178] More in line with OFLC, Thomson Reuter's Immigration Labor Certification Handbook considers that if remote work remains an option or requirement for PERM positions beyond the COVID-19 pandemic, employers must list the employment term in recruitment for the position and in the NOF.[179] If an employer were to change its policies and require hybrid work or work completely in person, the employer should state its conditions for the future employment offered through PERM.[180] However, it can be difficult for employers to predict what an offered position may look like several years down the line, with the now everchanging workplace or even when an employee decides that remote work better fits their lifestyle.[181] If an employer states that a job is in a specified physical location, but then the position ends up being remote within the United States, this situation could trigger an audit.[182] Therefore, an employer's use of PERM telecommuting guidelines may create incessant bureaucratic red tape through constant auditing rather than promoting the seamless hiring of remote PERM applicants.

6. The Home Office as a Physical Worksite Location

BALCA has held that listing a primary worksite as a home office on a PERM application is unduly restrictive and prevents USC applicants from applying for the job opportunity.[183] The inability to list a primary

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177 *Stakeholder Questions Submitted for DOL Stakeholder Meeting*, U.S. DEP'T OF LAB. 12 (Feb. 13, 2013), https://www.ilw.com/books/ThePERMBookOnlineLibrary/8.%20AILA%20DOL%20Stakeholder%20Meeting%20Notes%20March%202007%20to%20Present/Old%20Aila%20Stakeholder%20Notes/14%202013,February%2013.pdf [https://perma.cc/W6JS-4EKX].

178 *In re* Comput. Scis. Corp., 2012-PER-00642, at 2 (Bd. Alien Lab. Cert. App. July 9, 2015) ("Because the [certifying officer] denied the application solely on the grounds that two of the employer's additional recruitment advertisements did not meet a content requirement with which they need not comply [namely the inclusion of the language 'may require work from home office'], we reverse denial of certification in accordance with *Symantec Corp* . . . ."); Goldfinger & Sholts, *supra* note 35, at 39. *See generally In re* Symantec Corp., 2011-PER-01856 (Bd. Alien Lab. Cert. App. July 30, 2014).

179 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 2:63.

180 *Id.*

181 *Id.*; Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL'Y 203, 204–05 (2021); Lund, Madgavkar, Manyika & Smit, *supra* note 1.

182 FRAGOMEN, SHANNON & MONTALVO, *supra* note 55, § 2:51. *See generally In re* Cogsdale Support Ltd., 2012-PER-00941 (Bd. Alien Lab. Cert. App. Jan. 27, 2015).

183 *In re* Siemens Water Techs. Corp., 2011-PER-00955, at 4 (Bd. Alien Lab. Cert. App. July 23, 2013).

worksite as a home office presents a severe obstacle for remote PERM applicants. In *In re Siemens Water Technologies Corp.*, the employer appealed its PERM application denial, arguing that there is no regulation that requires advertisements to indicate that the physical location of an employee is a home office.[184] The employer relied on the meeting minutes from the March 2007 Stakeholders Liaison Meeting with OFLC.[185] At the meeting, OFLC was asked to confirm if the PWD and recruitment can take place in the employee's region of intended employment if their employer requires they work in a region other than the location of the employer's headquarters. OFLC answered that recruitment could be done for the physical worksite location.[186] The American Immigration Lawyers' Association (AILA) inferred from OFLC's response that PERM applications can be conducted where the physical worksite is a home office, but, it may trigger an audit.[187]

BALCA stated that the employer's reliance on the OFLC minutes was misplaced because OFLC did not address physical location in advertisements for PERM job opportunities where the employee would work from home.[188] However, BALCA noted the OFLC minutes demonstrated that the employer did not err in conducting recruitment where the employee resides or by listing the employee's address as the primary worksite.[189] Ultimately, BALCA upheld the employer's PERM application denial because the advertised PERM position was less favorable to USCs than that offered to the current foreign national employee.[190]

Yet, BALCA's decision appeared to leave open an interesting possibility for telework recruitment. BALCA later examined this issue in *In re Hewlett-Packard Co.*, where the employer posted its NOF at the current employee's house in Boston, Massachusetts, while the employer's headquarters are located in Palo Alto, California.[191] Appealing the PERM application's denial, the employer argued that its posting was permitted within OFLC's bounds of telecommuting expressed by the agency in the March 2007 stakeholder meeting, consistent with BALCA's decision in *In re Siemens Water Technologies*

184 *Id.* at 1.

185 *Id.*

186 *Id.* at 3.

187 *DOL Stakeholders Liaison Meeting Minutes*, *supra* note 141.

188 *In re Siemens Water Techs. Corp.*, 2011-PER-00955, at 4.

189 *Id.*

190 *Id.*

191 *In re* Hewlett-Packard Co., 2015-PER-00644, at 1 (Bd. Alien Lab. Cert. App. June 27, 2019).

Corp..[192] BALCA ultimately agreed with the employer's argument that the OFLC minutes were not clear.[193] However, it clarified that "[a] true teleworking employee is not required to 'work from home.'"[194] Furthermore, BALCA affirmed the adjudicator's denial of the PERM application because of the program's legislative history, which required collaboration with local labor departments, since the job opportunity is inextricably linked to the locality of the filing.[195]

Additionally, BALCA addressed its opening for a possibility of telework recruitment in *In re Siemens Water Technologies Corp.*[196] BALCA clarified its statement, "that the Employer did not err in conducting" recruitment where the foreign national employee resides or by listing their address as the primary worksite, was mere dictum and of no legal importance.[197] Considering these two leading, yet conflicting BALCA decisions, it is unclear if recruitment and PWD can be conducted for the physical location of a modern remote worker in the United States.

A lack of clear guidance from BALCA, DOL, OFLC, and USCIS regarding remote positions for PERM applications has resulted in the inconsistency of adjudications.[198] BALCA itself has acknowledged that this situation may create due process concerns on how to address an employee's work location in the PERM process.[199] Clearly, the issue of a PERM certification for remote work must be resolved once and for all as the modern remote workspace takes a permanent hold in the reality of the American white-collar worker.[200]

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192 *Id.* at 1, 3 ("If the 9089 form shows the worksite [for a telecommuter] at a designated location other than headquarters, the PWD and recruitment would be for the worksite."). The minutes of the OFLC's Stakeholder Meeting on March 15, 2007, are not publicly available, but are quoted within the case. *Id.* at 3 n.3.

193 *Id.* at 3.

194 *Id.*

195 *Id.* at 3–4; *See also* 20 C.F.R. §§ 655–656; *see supra* Section I.B.1.

196 *In re Hewlett-Packard Co.*, 2015-PER-00644, at 4 n.5.

197 *Id.*

198 Goldfinger & Sholts, *supra* note 35, at 39.

199 *In re* Infosys Ltd., 2016-PER-00074, at 10 (Bd. Alien Lab. Cert. App. May 12, 2016) (highlighting that "OFLC has issued neither formal nor informal guidance concerning the relocation question. There is simply nothing in the record suggesting how this Employer could have known that the [certifying officer (CO)] expected it to disclose the possibility of relocation. While the Employer's due process concerns were raised in its Request for Reconsideration. . . . that issue is not addressed in either the CO's denial of reconsideration or the CO's brief to the Board" and explaining in its holding that "[t]he CO's apparent concession reinforces our conclusion that due process concerns compel a reversal.").

200 Lund, Madgavkar, Manyika & Smit, *supra* note 1.

III. PROPOSAL

This Part analyzes two proposals that have been offered previously, which fall short of being satisfactory, and one new proposal, which could modernize the labor certification of noncitizen remote workers in specialty occupations. Section A looks at a proposal to eliminate the primary worksite location, which proves to be an inadequate solution because it lacks local market involvement. Section B then examines a proposal to change to a federal PWD, which would also be insufficient because it removes local labor concerns entirely from the equation. Lastly, to address the need for shared federal and state power over employment-based immigration, this Note proposes a new labor certification methodology for remote noncitizens by setting up a two-part certification process between the employer's worksite location and the employee's physical worksite location. This Part sets forth these proposals in greater detail below.

A. *Elimination of the Primary Worksite Location*

AILA wrote during notice and comment for the latest USCIS H-1B form that "primary worksite location" should either be removed or be defined to accommodate for the hybrid and remote workspace.[201] Furthermore, AILA distinguishes between USCIS's requirement of a work location and a primary worksite location, which evidences its argument that a primary location does not need to be included in an H-1B nonimmigrant visa application to allow for remote work.[202] However, AILA's comments may be incompatible with federalist principles, which take into account states' and metropolitan areas' prevailing wages and

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201 Agency Information Collection Activities; New Collection: Petition for a Nonimmigrant Worker: H-1 Classifications, 86 Fed. Reg. 46263 (proposed Aug. 18, 2021); *AILA Submits Comments to USCIS on New Proposed Form I-129H1*, AM. IMMIGR. LAWS. ASS'N, at 3 (Oct. 18, 2021), https://www.aila.org/infonet/comments-to-uscis-on-new-proposed-form-i-129h1 [https://perma.cc/8NTX-B4GF] ("The request for a primary location is also unnecessary given that many businesses, considering technological advancement and COVID-19 precautions, are affording employees the opportunity to work remotely.").

202 *AILA Submits Comments to USCIS on New Proposed Form I-129H1*, *supra* note 201 ("Precisely because USCIS relies on the work location where the intended beneficiary will perform the duties, there is no need for a *primary* location to be included." (emphasis in original)). In addition, the draft instructions of the H-1B form indicate that the primary U.S. office address may determine which USCIS processing center the petition must be filed, but AILA argues that USCIS can easily use the employee's worksite location as determinative for a filing address. *Id.* *See generally* U.S. CITIZENSHIP & IMMIGR. SERVS., PREVIEW FORM I-129H1 INSTRUCTIONS FOR PETITION FOR NONIMMIGRANT WORKER H1 CLASSIFICATIONS 5 (Oct. 2, 2020), https://www.regulations.gov/document/USCIS-2021-0015-0002 [https://perma.cc/WQ5P-65VP].

locally available USC workers.[203] Therefore, a new proposal that incorporates cooperative federalism, which prioritizes the employer's worksite location and the employee's physical location in tandem, is needed.[204]

B. *A Federal Prevailing Wage Determination*

Although there is the possibility of making the PWD federal in order to remove worksite location completely from the equation, it is unlikely to be successful because it completely eliminates states and localities from the PWD. This course of action has been done in the past with the H-2B program. Here, a PWD would be conducted for the national average of similarly employed workers, rather than only for the specific area of intended employment.[205]

The DOL proposed a similar change to the H-2B program in 2005, where it would have eliminated the DOL's local PWD.[206] The H-2B program allows employers to hire nonimmigrants to perform manual, nonagricultural labor and is primarily used by small businesses in construction, hospitality, landscaping, and food service.[207] Like PERM's legislative history, the H-2B program worked with State Workforce Agencies (SWAs) to conduct a PWD.[208] During notice and comment rulemaking, the agency received comments in opposition, focusing on the loss of the DOL's expertise in reviewing the needs of local labor from noncitizens.[209] Due to these concerns, the agency withdrew the proposed rule.[210] If a federal PWD were to be applied to remote noncitizens in specialty occupations, the DOL may face similar backlash.

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203 *See supra* Section I.C.

204 Spiro, *supra* note 71, at 1638–39.

205 20 C.F.R. § 656.40(b)(3) (2023); 8 U.S.C. § 1182(p)(4).

206 Post-Adjudication Audits of H-2B Petitions in All Occupations Other Than Excepted Occupations in the United States, 70 Fed. Reg. 3993, 3994–95, 3997 (proposed Jan. 27, 2005).

207 *Industries with High Prevalence of H-2B Workers*, U.S. DEP'T LAB. (2023), https://www.dol.gov/agencies/whd/data/charts/industries-h2b-workers [https://perma.cc/TE7H-5RB9]; *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

208 Comité de Apoyo a Los Trabajadores Agrícolas v. Solis, 2010 WL 3431761, at *3–4 (E.D. Pa. Aug. 30, 2010).

209 Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 29942, 29943–44 (proposed May 22, 2008).

210 *Id.* at 29944.

C. *Cooperative Federalism Applied to Remote Labor Certification*

Instead of the current procedures outlined in Part II, this Note proposes a new labor market test for remote nonimmigration specialty occupation visas and for PERM applicants, which is decentralized to incorporate cooperative federalism. State DOLs would communicate with each other when a remote worker lives in one metropolitan area, but the employer is located in another metropolitan area.[211] The home state DOL can conduct a PWD within the employee's physical location, which in turn allows them to account for the employee's contribution to the economy and lessens brain drain to the largest American cities.[212] The state DOL where the employer is located would also conduct a PWD for their metropolitan area of work. The employer's state DOL gets the benefits of the quality of work from a remote noncitizen applicant wherever they may be based in the United States.

While American companies may be tempted to offshore their labor rather than go through this process, economic interests would militate against adopting these measures.[213] There have been across-the-board corporate preferences for a greater supply of labor in the United States.[214] Additionally, foreign corporations may not want to work in states that appear unreceptive to noncitizens in general, or to their noncitizen workers.[215] Thus, a state is incentivized to participate in this program because anti-immigrant policies could result in the loss of investment and exports.[216] This element may hinge on the existence of immigrant communities within certain states, which will reinforce competitive economic incentives to adopt this program.[217]

A cornerstone of this proposal is that further recognizing labor certification as a state and local concern would not displace federal

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211 *See generally* 20 C.F.R. § 655.715 (2023) (Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed.); Glaeser & Gottlieb, *supra* note 116, at 162 fig. 1.

212 Davon M. Collins, Note, *Toward A More Federalist Employment-Based Immigration System*, 25 YALE L. & POL'Y REV. 349, 377 (2007).

213 Spiro, *supra* note 71, at 1641; *Immigration and the American Dream*, AFL-CIO (Feb. 23, 1995), https://aflcio.org/about/leadership/statements/immigration-and-american-dream [https://perma.cc/S876-SQ7H] ("Unfortunately, [immigrants'] legitimate concerns about the future are being exploited by politicians and hate-mongers who are determined to make immigrants the scapegoats for a wide variety of economic and social problems."); *see supra* Section I.D.

214 *See generally* Brief of Leading Companies and Business Organizations et. al. as Amici Curiae Supporting Plaintiffs, Gomez v. Trump, 485 F. Supp. 3d 145 (D.D.C. 2020) (No. 1:20-cv-01419), 2020 BL 342253.

215 Spiro, *supra* note 71, at 1641.

216 *Id.*

217 Spiro, *supra* note 71, at 1644.

authority to regulate immigration law.[218] While the plenary power doctrine renders immigration law as mostly federal, it is clear that a multi-sovereign regime has emerged in practice, as demonstrated by the current labor certification system and its legislative history.[219] In this proposal, states would only be given greater input in admission for qualified applicants to multiple state DOLs, while the federal DOL would supervise.[220] Although some scholars fear that delegating more immigration power to the states leaves immigrant workers vulnerable to nativism and anti-immigrant sentiment,[221] periodic congressional oversight and economic incentives should regulate this concern.[222] Indeed, Congress has a role to play in enforcing states' employment laws by creating a national floor, such as federal minimum wage and child labor laws.[223] States must affirmatively ratify this program so that the state DOLs are to act like more than mere "field offices."[224] Each state DOL can produce a slate of desired applicant criteria of which remote workers in fields that it desires can be submitted to Congress and the federal DOL.[225] With state ratification, this program can avoid anti-commandeering issues, like, for example, issues raised with the Patient Protection and Affordable Care Act.[226]

Remote employment-based immigration does not need to remain an exclusively federal concern under the guise of the Farmer Memo; however, it can be divided more into federal and state power.[227] While some immigration matters are better left to federal power, there can be benefits of modernization to diversify the centers of decision-making of remote work in the United States. It is thus the goal of the program to provide a framework for the federal and multiple state DOLs to partner

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218 Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 617 (2008).

219 *Id.* at 641; Saucedo, *supra* note 59, at 491–92. *See generally* 20 C.F.R. §§ 655–656 (2023).

220 Collins, *supra* note 212, at 362.

221 *See generally* Arizona v. United States, 567 U.S. 387 (2012) (striking down Arizona's law allowing police to arrest someone they believe to be undocumented because removal is a federal issue).

222 Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 527 (2001); Collins, *supra* note 212, at 388–89.

223 Collins, *supra* note 212, at 365.

224 *Id.* at 368.

225 *Id.* at 369.

226 *See, e.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (citing Printz v. United States, 521 U.S. 898, 933 (1997)). For a more detailed examination on the constitutional issues involved in delegating immigration powers to the states, which is outside the scope of this article, *see* Christian Vanderhooft, *Delegating Immigration Admission Powers to the States*, 89 U. CIN. L. REV. 910 (2021).

227 *See generally* Memorandum from Barbara Ann Farmer, *supra* note 10; Collins, *supra* note 212, at 389.

to provide a fair labor market test for the employer and employee location.

CONCLUSION

As demonstrated, the worksite location requirements for the PERM process for immigrant visas and LCAs for specialty occupation nonimmigrant visas have lost their relevance during the revolution of the white-collar remote workspace within the United States under current DOL guidelines. Although on its face foreign nationals working outside the office appears to be a novel legal issue, remote work within the United States has been an insurmountable hurdle in the immigration space since telework gained popularity in the late twentieth century.[228] It is possible to apply for both kinds of visas for telework, but adherence to the Farmer Memo appears to be unsustainable.[229] It would be in the interest of employers—especially influential Silicon Valley tech companies who are some of the largest employers of foreign nationals—to modify the current guidelines to save costs on audits and appeals, and to retain their employees' valid immigration status.[230]

The United States claims to value business growth through an agile workforce to effectively respond to the changing needs of the American business.[231] While American companies have swiftly shifted to remote work to accommodate the COVID-19 public health crisis and the revolution of the white-collar workforce, employment-based immigration law remains virtually unchanged.[232] Today's labor certification process for PERM and LCAs for specialty occupation visas do not meet the needs of the American office because outdated physical worksite location requirements are now increasingly onerous for the modern remote workspace.[233] As such, cooperative federalism proves to be a useful tool

228 Goldfinger & Sholts, *supra* note 35, at 35.

229 *See id.* at 39–40. *See generally* Memorandum from Barbara Ann Farmer, *supra* note 10.

230 *See 2020 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 3; *2021 H1B Visa Reports: Top 100 H1B Visa Sponsors*, *supra* note 5; *see also* 20 C.F.R. § 656.17(d)(4) (2023); *Combating Fraud and Abuse in the H-1B Visa Program*, *supra* note 90.

231 *Employment & Training Administration, Mission*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/eta/about/mission [https://perma.cc/2JQS-DLSN].

232 Goldfinger & Sholts, *supra* note 35, at 35. To attract foreign workers and stimulate their economy, some countries, including Costa Rica, Estonia, Iceland, and more, created digital nomad visas, which enable a foreign national to stay and work in the country while recognizing the new future of white-collar work. *See* Jenny Gross, *So, You Want to Become a Digital Nomad*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/26/business/remote-work-taxes.html (last visited Mar. 24, 2023).

233 Goldfinger & Sholts, *supra* note 35, at 1.

to effectively regulate specialty occupation noncitizen workers to fairly apply local labor market tests.[234]

As of writing this Note, in the midst of the height of the Omicron variant of the COVID-19 pandemic, businesses that had transitioned back to in-person work are now delaying their return to office plans and completely returning to the remote workspace.[235] It appears that the remote office's permanence may be sealed into the fabric of the white-collar worker, particularly in tech.[236] Therefore, the time is ripe for the DOL and USCIS to finally accommodate the needs of American business trends by addressing the physical worksite location requirements for remote specialty occupation noncitizen employees in the United States.

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234 *See supra* Section III.C.

235 Annie Nova, *Amid Another COVID Surge, Schools and Businesses Find Plans Disrupted Once Again*, CNBC NEWS (Jan. 1, 2022, 12:20 PM), https://www.cnbc.com/2022/01/01/amid-another-covid-surge-schools-and-businesses-find-plans-disrupted-.html [https://perma.cc/JF2P-PL55]; Stephan Kahl et al., *Omicron Suddenly Upends the World's Return to the Office*, BLOOMBERG (Dec. 19, 2021), https://www.bloomberg.com/graphics/2021-return-to-office [https://perma.cc/HH48-FJCW]; Kaia Hubbard, *Out of Office: Indefinitely*, U.S. NEWS & WORLD REPORT (Dec. 10, 2021, 6:00 AM), https://www.usnews.com/news/the-report/articles/2021-12-10/remote-work-extends-toward-two-years-as-omicron-pushes-more-companies-to-delay-return-to-office (last visited Jan. 2, 2023).

236 Lund, Madgavkar, Manyika & Smit, *supra* note 1 ("Management, business services, and information technology have the next highest potential [for remote work], all with more than half of employee time spent on activities that could effectively be done remotely . . ."); *Amazon Offering Teams More Flexibility as We Return to Office*, *supra* note 1; Weise, *supra* note 2.