ImmiCore Law

A Professional Law Corporation

Labor Condition Application ("LCA")

The H-1B nonimmigrant category is a temporary visa classification that is initially valid for three years. The first step in obtaining this classification is to file a labor condition application (LCA) with the U.S. Department of Labor (DOL). The employer must prepare and submit a labor condition application form, Form ETA 9035E of Form9035.

A. Required Attestations

In completing the form, the employer makes the following 4 affirmations:

(1) **Wages:** The employer attests that the H-1B worker(s) will be paid the "prevailing wage rate" for the occupation. The required wage rate is the higher of the prevailing wage for the occupation in the area of intended employment or the actual wage paid to similar employees of the employer in the same occupation at the work site. The employer also affirms that it has offered H-1B worker(s) benefits "on the same basis and in accordance with the same criteria" as similarly situated U.S. workers; (See 20 CFR 655.731).

(2) **Working Conditions:** the employment of the H-1B worker will not adversely affect the working conditions of other similarly employed workers. (See 20 CFR 655.732).

(3) **Strike, Lockout, or Work Stoppage:** there is no strike, lockout, or work stoppage in the course of a labor dispute affecting the employer's employees in the occupation at the worksite. (See 20 CFR 655.733);

(4) **Notice:** a notice of the LCA filing has been provided to other workers at the location **on or within 30 days before the date that the LCA is filed with the ETA**. Notice may be accomplished by posting a hard copy of the LCA or a written summary with specific information about the LCA in two conspicuous locations at the work site for **10 consecutive business days**. Alternatively, notice of the LCA filing may be posted electronically (i.e., sent directly by e-mail or electronic newsletter or posted to a company home page on either the Internet or the company's Intranet). In the unlikely event that the occupation is unionized, notice should be accomplished instead by giving a copy of the LCA or a written summary to the appropriate bargaining representative. (See 20 CFR 655.734).

B. Additional Attestations if Employer is H-1B Dependent or Engaged in Willful Violations of LCA Requirements (Not required if the Employee is Exempt, i.e. workers who will receive a salary of at least $60,000 or who have attained a master's degree or higher in the relevant field).

Employers that are "H-1B" dependent or that have engaged in willful violations of the LCA requirements must make additional attestations. These employers must affirm that they have not displaced a U.S. worker during the period commencing 90 days before the filing of an H-1B petition

and ending 90 days after the filing of the petition. Such employers must also confirm: (1) that they have taken good-faith steps toward recruitment of U.S. workers for the job for which H-1B nonimmigrants are sought and (2) that they have offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B nonimmigrant who the employer seeks to hire. Only if an LCA if filed exclusively for "exempt employees" does a dependent employer or willful violator not have to make these attestations.

As part of the LCA process, employers are required to document that they have complied with the attestations listed on the LCA. Although none of this documentation needs to be submitted to the DOL, some of it must be available for public inspection. The rest must be maintained for review in the event of a DOL investigation. The LCA materials should be kept separate from other employment records. Documentation which must be made available for public inspection should be kept in its own file and apart from the other documentation required for LCA purposes as well from the personnel information regarding the specific H-1B workers. Separation of these records will avoid a confidentiality breach and an unnecessary disclosure of compensation data.

Public Inspection Obligations

The public inspection documentation must be made available within one day after filing the LCA with the DOL. The documentation may be located at the employer's principal place of business in the United States or at the location where the H-1B worker will be employed. Any person or group, whether or not "aggrieved" by the employer's conduct, may request to see the H-1B public inspection file. The file must be made available to the requester within one business day of the request. The employer must maintain these records for at least one year after the end of the period of employment indicated on the LCA or, if a timely complaint is filed, until the complaint is resolved.

The documentation which must be maintained for public inspection includes:

1. A copy of the certified LCA (Form ETA 9035E) signed and dated by the employer and cover pages (Form ETA 9035CP);

2. A statement of the current rate of pay for each H-1B workers admitted under the LCA;

3. A copy of the prevailing wage determination for each area of employment;

4. A memorandum explaining how the employer calculated the actual wage for the job, without identification of the H-1B worker or other workers similarly employed to the H-1B worker for purposes of determining the actual wage;

5. Evidence of (1) notification to the bargaining representative or (2) posting of the notice of the LCA filing, including the dates and locations of the posting;

6. Summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B nonimmigrants;

7. Statements as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits and/or, where applicable, a statement that some/all H-1B nonimmigrants are receiving "home country" benefits;

8. Where the employer undergoes a change in corporate structure and chooses to assume the LCA obligations of the previous employer, a sworn statement by a responsible official of the new employing entity that it accepts all obligations, liabilities and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and EIN of the new employing entity;

9. Where the employer utilizes the definition of "single employer" to determine H-1B dependency status, a list of any entities included as part of the single employer in making the determination;

10. Where the employer is H-1B dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers.

The documentation which is <u>not</u> required to be made available for public inspection includes:

1. The certified LCA containing original signature of the employer (if submitted electronically);

2. Payroll records showing the wage rate for all of the employer's employees in the same job at the place of employment. This documentation is not limited to employees with experience and qualification similar to the H-1B worker, although the H-1B worker only needs to be compared to this latter group of employees for purposes of determining the actual wage rate;

3. Data used to establish the actual wage rate for the H-1B worker. This data should document arithmetically how the employer's wage system, described din the memorandum in the public inspection file, was applied to calculate the H-1B worker's rate of pay;

4. Data underlying the prevailing wage determination, if applicable. The employer is only required to include a general description of the prevailing wage source and methodology in the public inspection file. The raw data underlying a wage survey should be maintained by the employer apart from the public inspection file, in cases in which a wage survey is used by the employer as a prevailing wage source;

5. A copy of any document given to employees describing the benefits and eligibility for the benefits and participation rules, documents describing any rules the employer ha s for differentiating among employees with regard to benefits, evidences as to the benefits chosen by and provided to employees and evidence of any "home country" plans;

6. Documentation on working conditions. The employer may be required to produce evidence that the H-1B worker is receiving working conditions equivalent to U.S. workers if the DOL undertakes an investigation;

7. Evidence that a copy of the LCA was given to the H-1B workers on or before the first day of employment;

8. With regard to H-1B dependent employers and willful violators, records regarding the circumstances under which each U.S. worker, in same locality and same occupation as the H-1B worker, left the employer in the period from 90 days before to 90 days after the filing date of the employer's petition;

9. With regard to H-1B dependent employers and willful violators, documentation of recruitment methods used, the content of the ads and postings, and the compensation terms, and documentation employer has received or prepared concerning treatment of applicants.

Filing of LCA

Most LCAs must be filed electronically (using Form ETA 9035E) through the DOL's website as of January 4, 2006. Only in limited circumstances (e.g. physical disability, lack of Internet access) will mail-in applications be permitted (using Form ETA 9035). Prior permission from the DOL must be obtained in order to submit LCAs by mail. Filings by fax are no longer accepted under any circumstances. An LCA will be certified by the DOL within minutes (if filed electronically) or within several days (if filed by mail). Certified LCAs returned electronically must be printed and signed by the employer immediately after ETA provides the electronic certification. Only after the LCA is filed may a petition be filed with the USCIS to obtain permission to hire the H-1B worker.

Form I-129 & Beneficiary's Credentials

The USCIS petition is filed on Form I-129 with the USCIS Service Center having jurisdiction over the place of employment. The USCIS petition must be accompanied by documentation that the job to be filled by the H-1B worker involves a "specialty occupation," one requiring a bachelor's or higher degree to enter the field. The petition must also be accompanied by evidence that the H-1B worker has the necessary credentials to fill a position involving a specialty occupation. If the worker has a foreign degree, that degree must be evaluated by a recognized degree evaluation service. If the

worker is lacking the degree usually required to enter the occupation, his or her education and experience must be evaluated to determine whether his or her overall credentials are the equivalent of the usually-required degree. Credentials evaluations require extensive documentation and are usually time-consuming and expensive, but are absolutely required in cases in which the normal university degree is lacking.

Premium Processing

The USCIS Service Center may take several months to adjudicate the H-1B petition unless expedited processing is requested. In the latter case, an additional fee is required but the employer should receive a response within 15 days. Only after the petition is approved may the H-1B worker take the approval to a U.S. consulate to obtain an H-1B visa to enter the United States. If the petition has indicated that the H-1B worker is already in the United States in valid status, the worker may commence employment for the employer once the H-1B petition is approved. Approval of an initial H-1B petition may be given for up to three years, and extensions of stay may be granted to a maximum period of stay for six years (although the law permits extensions beyond the six years in limited circumstances).

Obligations After Approval

The employer has several continuing obligations once the initial approval has been received. If the H-1B worker is assigned to work sites not listed on the original LCA, additional steps must be taken. These steps must include a new posting at the additional work site or the filing of a new LCA (with a new prevailing wage determination, actual wage calculation, and posting) depending on whether the new work sites are within an area of employment listed on the original LCA. Any material changes in the employment described in the H-1B petition must be approved by the USCIS through the filing of an amended petition. The USCIS interprets assignment to additional work sites requiring a new LCA to be a material change requiring the filing of an amended petition.

The employer also has an obligation to produce its LCA documentation to any requester (the public inspection file) or to the DOL (all documentation). The DOL may investigate the employer's LCA based either on a complaint from an "aggrieved" party or on its own initiative. A DOL finding that the employer has violated the LCA requirements, such as through "willful" failure to pay the required wage rate or "substantial" failure to post a notice of the LCA filing, could result in penalties including a $1,000 fine per violation, payment of back wages, and debarment from filing LCAs or permanent labor certifications, or obtaining approval of H, L, O, and P nonimmigrant or employment based immigrant petitions for at least one year.

Finally, the employer has an obligation to pay the cost of return transportation for any H-1B worker whose period of employment is terminated prior to the expiration date of the worker's status. The USCIS expects the employer to meet this obligation, although it does not directly verify compliance.