U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-1B, H-1B1, and E-3 Programs
Round 1

February 17, 2011

Preliminary Note:

For purposes of these FAQs, "LCA" and "ETA Form 9035/9035E" are interchangeable.

GENERAL INFORMATION

Question: Which visa classifications require the filing of a Labor Condition Application (LCA)?

Answer: An employer seeking to file an H-1B, H-1B1, or E-3 visa application must first file an LCA with the Department. The H-1B visa classification includes workers in specialty occupations and fashion models of distinguished merit and ability. The H-1B1 visa classification includes workers in specialty occupations and is limited to nationals of Singapore and Chile. The E-3 visa classification includes workers in specialty occupations and is limited to nationals of Australia.

Question: What is the definition of a "specialty occupation"?

Answer: For purposes of the H-1B, H-1B1 and E-3 programs, the Department's regulations define a specialty occupation as an occupation that requires theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's degree or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States.

Question: Can I file the LCA by fax?

Answer: No. The Department does not accept LCAs filed by fax.

Question: How do I obtain H-1B Disclosure Information?

Answer: You can access H-1B disclosure information from our website at http://www.flcdatacenter.com.

Question: How do I file an H-1B complaint?

Answer: Complaints should be filed with the Wage and Hour Division local office which has jurisdiction over the physical location of the employer. Check the 'blue pages' in the local telephone book or http://www.dol.gov/whd/america2.htm#Map.

The form to file a complaint (Form WH-4) can be downloaded at http://www.dol.gov/whd/forms/fts_wh4.htm.

Complaints on not fulfilling the attestations and pay go to the Wage and Hour Division, while complaints of fraudulent or misrepresented applications (e.g. the company does not exist or never employs the individuals, or someone who is not a representative of the employer signs the application) go to the Office of Inspector General (OIG) which then generally works with the Department of Justice (DOJ) to investigate. The Wage and Hour Division will forward fraud cases appropriately.

APPLICATION FILING

Question: How does an employer initiate the process to hire an H-1B, H-1B1 or E-3 worker?

Answer: In order to employ a nonimmigrant worker in H-1B, H-1B1 or E-3 status, an employer must complete and file electronically the Labor Condition Application (LCA), through the iCERT Portal System no more than 6 months before the initial date of intended employment. Employers with physical disabilities or those who lack Internet access may file by mail but must first receive permission from the Office of Foreign Labor Certification (OFLC) to do so.

Question: How does an employer petition to file an LCA by mail?

Answer: Employers with physical disabilities or those who lack Internet access and cannot electronically file the ETA Form 9035E through the iCERT Portal System must petition the Administrator of OFLC for approval to file an LCA on the ETA Form 9035 in paper format by mail. The employer must send the written request to:

Administrator, Office of Foreign Labor Certification
Employment & Training Administration
U.S. Department of Labor
Room C-4312
200 Constitution Avenue, NW
Washington, DC 20210

The employer's written request must establish the need to file by mail, and include an explanation of physical disability or lack of Internet access. The employer should be

prepared to submit supporting documentation if requested by the OFLC. The OFLC Administrator must approve the request before the employer may file by mail.

Question: May I use the same LCA to request multiple positions?

Answer: Yes. An employer may use a single LCA to request multiple positions where they are in the same visa category and job classification, and are either all part-time or all full-time positions. However, an employer must file separate LCAs for:

1. Workers in different visa categories, e.g. an H-1B position and an E-3 position may not be requested on the same ETA Form 9035/9035E;
2. Nonimmigrant workers in different job classifications, e.g. a computer systems analyst (Standard Occupational Code 15-0051.00) and a software engineer (SOC 15-0032.00) must be listed on separate applications;
3. Full-time or part-time positions; and/or
4. Exempt and non-exempt nonimmigrant workers for H-1B dependent employers and/or willful violators as indicated in Item I of the LCA.

Question: May one LCA list multiple places of employment?

Answer: Yes. An employer's ETA Form 9035/9035E must list all of the places of intended employment that are identified at the time of filing. The ETA Form 9035E (electronic format) can accommodate up to three places of intended employment. For employers who have received pre-approval to submit an LCA by mail, since the ETA Form 9035 (paper format) can only accommodate one place of intended employment, the employer may submit an attachment identifying up to two additional worksites. An employer may file additional LCAs to identify additional places of employment beyond the three places listed on the original application.

Employers should note that the LCA must reflect an appropriate prevailing wage that corresponds to each place of intended employment; i.e. it must be the prevailing wage for the area of intended employment as defined by the Department's regulations.

Question: How does an employer in the Commonwealth of Northern Mariana Islands (CNMI) initiate the process to hire an H-1B, H-1B1 or E-3 nonimmigrant worker?

Answer: The LCA filing process for an employer in the CNMI is the same as the LCA process outlined above.

FILING AN LCA THROUGH THE ICERT PORTAL SYSTEM

Question: When I submit an LCA through the iCERT Portal System, will I receive notification of the status of my application?

Answer: Yes. When you submit an LCA through the iCERT Portal System at http://icert.doleta.gov, you will receive a courtesy email confirming that your application has been submitted. You will also receive an email when your application has been processed, providing you with the final determination on your application. If you do not receive email notification of the final determination after seven (7) working days, you may check the status of your LCA by logging onto the iCERT Portal System. If you cannot obtain status of your LCA from the iCERT Portal System, please contact the LCA Help Desk at LCA.Chicago@dol.gov. For technical or system problems concerning the iCERT Portal System or the submission of your LCA, please contact the iCERT Portal System Help Desk at OFLC.Portal@dol.gov.

Please note: You may check the status of your LCA at any time after submission by logging onto the iCERT Portal System.

Question: I just received a denial of an LCA giving the reason of an invalid Federal Employer Identification Number (FEIN) as assigned by the Internal Revenue Service (IRS). How do I correct this?

Answer: A denial for the FEIN value means that the FEIN entered in Section C.12 of the ETA Form 9035E by the employer could not be currently verified by the OFLC as a valid nine digit FEIN assigned by the IRS. When the employer receives a denial of an LCA on this ground, it also receives additional instructions from Chicago National Processing Center (CNPC) on how to resubmit an LCA. In order for the employer to overcome the issue identified on the denial determination for any future LCAs submitted using the denied FEIN, the employer will first need to submit at least one document that clearly displays the FEIN and the name of the employer associated with the unique identification number. Such documents may include:

- Other documentation showing the FEIN and name of the employer
- Documentation from IRS noting assignment of FEIN
- Federal or State tax return (only acceptable with a preprinted label) or a preprinted tax coupon
- Documentation from employer's financial institution showing employer's FEIN
- Articles of incorporation, business license, or other certifications of business existence
- Secretary of State or Corporation Commission registration documents
- Official and/or government documents

In order to expedite the process, you may either fax, email as a PDF attachment, or mail

the requested information to the following:

FAX: (312) 353-6757. On the cover page of the fax, please write "LCA Business Verification Team Proof of Valid FEIN", or

EMAIL: LCA.Chicago@dol.gov. In the Subject Line, please write "LCA Business Verification Team Proof of Valid FEIN", or

MAIL: Attn: LCA Business Verification Team Proof of Valid FEIN
U.S. Department of Labor ETA
Chicago National Processing Center
11 West Quincy Court
Chicago, IL 60604-2105

The employer will be notified via email after the requested information has been reviewed. Only then should the employer submit a new LCA.

Question: I am filing on behalf of a new company, created through a recent merger. How do I get the information to DOL to avoid a denial?

Answer: The employer who is a "new" company (created through a merger, acquisition, sale, etc.) may submit the documentation described above to establish its new FEIN. It may then file an LCA.

Question: What contact information should I enter in Section D (Employer Point of Contact Information) of the LCA Form ETA 9035 & 9035E?

Answer: The employer must enter the contact information of the employee who is authorized to act on behalf of the employer. This cannot be an agent or attorney, unless the agent or attorney is a direct employee of the employer.

LCA REQUIREMENTS

Question: What are the LCA requirements?

Answer: In order to prevent an adverse effect on the U.S. workforce, an employer applying to temporarily hire a nonimmigrant worker in H-1B, H-1B1 or E-3 status must attest that it has met or will meet the following requirements:

- *Wages*: Pay the required wage to the workers for whom it will file a petition supported by the LCA for the duration of the authorized period of employment;
- *Working Conditions*: Provide the nonimmigrant workers working conditions that will not adversely affect the working conditions of U.S. workers similarly

employed, such as hours, shifts, vacation periods, and benefits based on the same criteria as those the employer offers to its U.S. workers;

- *No Strike/Lockout*: Ensure that there is no strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment at the time of filing the ETA Form 9035/9035E; and
- *Notice*: Notify its U.S. workers that it intends to hire an H-1B, H-1B1 or E-3 nonimmigrant worker by either providing notice of the LCA to the bargaining representative (representing the workers of the employer in the same job classification and area of intended employment as the nonimmigrant worker), or where there is no bargaining representative, providing electronic notice of the filing of the LCA or by posting notice of the LCA in at least two conspicuous locations in the employer's place(s) of business in the area of intended employment. The notice must contain specific information about the nonimmigrant workers sought and the process for submitting allegations of misrepresentation or non-compliance related to the LCA. Since the ETA Form 9035/9035E contains this information, employers may choose to comply with the notice requirement by providing or posting a copy of the ETA Form 9035/9035E.

  In addition, the employer must provide the nonimmigrant worker(s) with a copy of the certified ETA Form 9035/9035E no later than the first day on which the foreign worker begins to work for the employer.

An employer who is H-1B dependent or a willful violator must also attest that it has met or will meet the following requirements:

- *Displacement*: Non-displacement of the U.S. workers in the employer's workforce;
- *Secondary Displacement*: Non-displacement of the U.S. workers in another employer's workforce; and
- *Recruitment and Hiring*: Recruitment of U.S. workers and hiring of U.S. workers applicant(s) who are equally or better qualified than the H-1B non-immigrant(s).

H-1B1

Question: Under the Department's regulations, what are the employer's obligations with respect to hiring a national of Chile or Singapore?

Answer: For the most part, the obligations of an employer filing an LCA with the Department where the beneficiary is either a national of Chile or a national of Singapore in the H-1B1 visa category are virtually the same as those applicable to employers hiring H-1B workers.

However, there are some differences in the H-1B1 visa category. The employer filing an LCA to hire a national of Chile or Singapore in the H-1B1 visa category must make

one of the following appropriate notations on its ETA 9035: “H-1B1-Chile” or “H-1B1-Singapore”.

In addition, Section 20 CFR 655.700(d) of the Department’s regulations provides a list of regulatory provisions that do not apply to the H-1B1 visa category, including: numerical visa cap provisions (note: the H-1B1 visa category is subject to a separate cap of 6,800 (1,400 for Chile and 5,400 for Singapore) initial visas annually); the provisions regarding the North American Free Trade Agreement; certain provisions for filing complaints; certain provisions regarding the H-1B dependent employers or willful violators; provisions regarding changes in the employer’s corporate structure or identity; provisions regarding short-term placement of H-1B foreign workers outside the area of intended employment; the provision defining H-1B dependent employers and willful violators; provisions regarding exempt H-1B workers; certain non-displacement provisions applicable to H-1B dependent employers and willful violators; provisions regarding recruitment of U.S. workers applicable to H-1B dependent employers and willful violators; and certain public examination of records requirements. This section also includes specific filing procedures for employers applying to hire foreign workers in the H-1B1 visa category with paragraphs (5) and (6) of the section applying to Chile and Singapore, respectively.

E-3

Question: Under the Department’s regulations, what are the employer’s obligations with respect to hiring an Australian national?

Answer: For the most part, the obligations of an employer filing an LCA with the Department where the beneficiary is an Australian national in the E-3 visa category are virtually the same as those applicable to employers hiring H-1B foreign workers.

However, there are some differences for the E-3 visa category. The employer filing an LCA to hire an Australian national in the E-3 visa category must make the following notation on its ETA Form 9035/9035E - “E-3 Australia”.

In addition, Section 20 CFR 655.700(d) of the Department’s regulations provides a list of regulatory provisions that do not apply to the E-3 visa category including: numerical visa cap provisions (note: the E-3 visa category is subject to a separate cap of 10,500 initial visas annually); the provisions regarding the North American Free Trade Agreement; certain provisions for filing complaints; certain provisions regarding the H-1B dependent employers or willful violators; provisions regarding changes in the employer’s corporate structure or identity; provisions regarding short-term placement of H-1B foreign workers outside the area of intended employment; the provision defining H-1B dependent employers and willful violators; provisions regarding exempt H-1B workers; certain non-displacement provisions applicable to H-1B dependent employers and willful violators; provisions regarding recruitment of U.S. workers applicable to H-1B dependent employers and willful violators; and certain public examination of records requirements. This section also includes specific filing procedures for employers applying to hire foreign workers in the E-3 visa category.

WAGES

Question: What is the required wage for purposes of the LCA program?

Answer: The required wage is the wage the employer must pay to its foreign workers in the H-1B, H-1B1 and E-3 visa categories for the entire period of authorized employment, as approved by the Department. The required wage rate must be the higher of the actual wage rate (the rate the employer pays to all other individuals with similar experience and qualifications who are performing the same job), or the prevailing wage (a wage that is predominantly paid to workers in the same occupational classification in the area of intended employment at the time the application is filed). In addition, an employer is not permitted to pay a wage that is lower than a wage required under any other applicable Federal, State or local law.

Question: How does an employer determine the prevailing wage for purposes of the LCA program?

Answer: Although the Department's regulations governing the LCA process do not require an employer to use any specific wage methodology to determine the prevailing wage, they do require that the prevailing wage be based on the best information available at the time the employer files an application. An employer filing an LCA may, but is not required to, request a prevailing wage determination (PWD) from the OFLC's National Prevailing Wage Center (NPWC) by U.S. mail or through the iCERT Portal System. In the absence of a PWD issued by the NPWC, the employer may consider the following wage sources in determining the prevailing wage:

a. A wage rate set forth in a collective bargaining agreement (CBA), or

b. If the job opportunity is in an occupation which is not covered by a CBA:

   i. A wage rate for the occupation and area of intended employment under the Davis-Bacon Act (DBA);

   ii. A wage rate for the occupation and area of intended employment issued under the McNamara-O'Hara Service Contract Act (SCA);

   iii. A wage rate produced by a survey conducted by an independent authoritative source that meets the requirements set forth in 20 CFR 655.731; or

   iv. A wage rate produced by another legitimate source of information, including the Bureau of Labor Statistics Occupational Employment Statistics Survey (OES) data available through the iCERT Portal System and the FLC Data Center.

Under the American Competitiveness and Workforce Improvement Act (ACWIA), as implemented by the Department's regulations, the prevailing wage for employees of an institution of higher education, an affiliated or related nonprofit entity, a nonprofit research organization, or a governmental research organization must be based only on

the wages of similarly employed employees of such institutions in the area of intended employment. The ACWIA wages may be accessed through the iCERT Portal System and the FLC Data Center.

For more information on the process of obtaining a PWD from the NPWC, please consult the Prevailing Wage Determination Policy Guidance and the Prevailing Wage FAQs on the OFLC Web site.

Question: Why might an employer want to obtain a PWD from the National Prevailing Wage Center (NPWC)?

Answer: Under the Department's regulations, the Department will deem the PWD from the NPWC as correct as to the amount of the wage in the event of an investigation by the Wage and Hour Division. However, this "safe harbor" does not protect an employer who has failed to pay the higher of the actual wage or the prevailing wage, and/or who has paid a wage that is lower than a wage required under any other applicable Federal, State or local law.

Question: If an employer requests a PWD from the National Prevailing Wage Center (NPWC), does it have to obtain a determination from the NPWC before filing the LCA?

Answer: No. The employer does not need to obtain the PWD from the NPWC prior to filing the LCA. However, if the employer requests a PWD, but does not wait to obtain the PWD before submitting the LCA, the employer must consider the following:

- The employer may list the PWD from the NPWC as its prevailing wage source in Section G of the ETA Form 9035/9035E only if it has a PWD issued and valid on the day it submits the LCA. If the employer intends to file an LCA listing the NPWC-issued PWD as the source of the prevailing wage, it must wait until the NPWC actually issues the final PWD before submitting the LCA. The employer may not use iCERT tracking numbers and wage rates requested on the ETA 9141, in lieu of an actual final NPWC prevailing wage determination. Listing an NPWC–issued prevailing wage on an LCA operates as an endorsement of that wage and forecloses the employer's ability to appeal the PWD after filing the LCA.
- If the employer wishes to qualify for the "safe harbor" discussed in the previous FAQ, the employer must request a PWD from the NPWC and file an LCA during the prevailing wage validity period specified on the ETA Form 9141. If the employer cannot wait for the NPWC to issue the PWD before filing its LCA, the employer may instead rely on another legitimate source of available wages so long as the employer retroactively compensates the H-1B, H-1B1 or E-3 nonimmigrant for the difference between the wage the employer paid in reliance on the other legitimate wage source and the prevailing wage, if higher. Please see 20 CFR 655.731(a)(2)(ii)(A)(2).

Question: If an employer has received a prevailing wage determination from the NPWC how should the employer enter the prevailing wage determination on the LCA?

Answer: ETA Form 9035/9035E instructions for Item G.7 require the employer to identify either the State, district or territory where the prevailing wage was issued or the agency which issued the prevailing wage. However, as of January 1, 2010, prevailing wage determinations are only provided by the NPWC. Accordingly, an employer who has received a prevailing wage determination from the NPWC by mail or through the iCERT Portal System must enter under item G.7 either "District of Columbia" (for the State/district/territory) or "NPWC" (for the National Prevailing Wage Center) or both. An employer who has received a PWD from the NPWC must also enter the prevailing wage tracking number under Item G.7a.

Question: When should an employer mark the box for "Other" in Item G.11 (prevailing wage source) of the ETA Form 9035/9035E?

Answer: Item G.11 of the ETA Form 9035/9035E specifically lists four prevailing wage sources: Occupational Employment Statistics (OES), Collective Bargaining Agreement (CBA), Davis-Bacon Act (DBA), and McNamara-O'Hara Service Contract Act (SCA). When an employer uses one of these sources, it must mark the box next to the prevailing wage source it used. When the employer uses a prevailing wage source not specifically listed in Item G.11, it must mark the box for "Other," and list the specific prevailing wage source used in item G.11b.

Important note: Pursuant to the instructions accompanying the ETA Form 9035/9035E, if an employer obtained a prevailing wage using OES data from the Foreign Labor Certification Data Center Online Wage Library at http://www.flcdatacenter.com (not the National Prevailing Wage Center), then the employer must specify "OFLC Online Data Center" in item G.11b of the ETA Form 9035/9035E. Additionally, if the employer obtained a prevailing wage using the same OES data available from the iCERT Portal System, the employer should likewise specify "OFLC Online Data Center" in item G.11b of the ETA Form 9035/9035E.

Question: What wage sources qualify as "independent authoritative sources" for purposes of determining the prevailing wage in the LCA program?

Answer: The term "independent authoritative source" (defined in 20 CFR 655.715) refers to any professional, business, trade, educational or governmental association, organization, or other similar entity, which is not owned or controlled by the employer and which has recognized expertise in a particular occupational field. As explained above, for purposes of prevailing wage determinations, an employer may use or request

the consideration (by the NPWC) of a published survey of wages produced by an independent authoritative source. The independent authoritative source survey must meet three main requirements:

1. It must reflect the average wage (i.e. the weighted average or, if the survey provides a median rather than a weighted average, the median) paid to U.S. workers who are similarly employed in the area of intended employment;
2. It must be based on recently collected data, e.g. data that was collected during the 24-month period before the date on which the survey was published; and
3. The survey must be the most recent survey published by that independent authoritative source for the occupation in the area of intended employment.

Please see 20 CFR 655.715. The Department published a non-comprehensive sample list of generally acceptable wage surveys applicable to LCA program on its Web site in the form of the ETA Form 9035CP – General Instructions for 9035 & 9035E; Appendix II: Sample of Acceptable Wage Survey Sources. Employers should note that the acceptability of a particular wage source is a determination that is made on a case-by-case basis.

Question: How should an employer identify a prevailing wage survey on the Labor Condition Application (LCA)?

Answer: An employer using an independent authoritative source survey or another legitimate source of wages (a prevailing wage survey) must mark "Other" in Item G.11 and specifically identify the prevailing wage source in Item G.11b of the ETA Form 9035/9035E. Where the employer is relying on a private survey as the source of the prevailing wage, the employer must enter both the company name and the survey title in Item G.11b. If the complete survey company name and the complete survey title do not fit into the available space in Item G.11b, the employer should enter as much information as possible to clearly identify the survey company name and the survey title.

While an employer may abbreviate words contained in the survey company name and title where necessary to fit into the space provided in item G.11b, the information provided by the employer must be sufficient to ensure that both the survey company name and the survey title are obviously identifiable. If the title of a survey includes the year the survey was conducted, the employer should not include the year in the survey title entry in Item G.11.b but should only enter the year in Item G.11.a.

> **Example:** In 2009, Watson Wyatt published a survey entitled *Survey Report on Top Management Compensation, May 29, 2009.* The survey should have appeared in Section G under Items 11, 11.a and 11.b as follows:
>
> *Item 11. Prevailing wage source (Choose only one): **Other**
> *Item 11a. Year source published: **2009**

§Item 11b. If "OES" and SWA did not issue prevailing wage OR "Other" in question 11, specify source: **Watson Wyatt: Survey Report on Top Management Compensation**[1,2]

[1] (*) indicates the field response is required
[2] (§) indicates the field response is conditionally based on a response provided in a required field

For additional information about prevailing wage survey entries, please refer to the ETA Form 9035CP – General Instructions for 9035 & 9035E; Appendix II: Sample of Acceptable Wage Survey Sources.

Question: What should the employer list as the prevailing wage if its elected wage source provides a wage that is lower than the applicable Federal, State or local minimum wage?

Answer: The Department's regulations require that the employer pay the H-1B nonimmigrant the greater of the actual wage (rate of pay) or the prevailing wage and prohibit an employer from paying less than a wage required by any applicable Federal, State or local law. Where the employer's elected wage source provides a wage that is lower than the applicable Federal, State or local minimum wage, the employer must list the highest applicable minimum wage in Section G of the ETA Form 9035/9035E as the prevailing wage. Please refer to the example below (based on the current Federal minimum wage):

Example:
*Item 9. Prevailing wage: **$7.25**
*Item 11. Prevailing wage source (Choose only one): **Other**
*Item 11.a Year source published: **2009**
§Item 11b. If "OES", and SWA/NPC did not issue prevailing wage **OR** "Other" in question 11, specify source: **Federal Minimum Wage**[1,2]

[1] (*) indicates the field response is required
[2] (§) indicates the field response is conditionally based on a response provided in a required field

Important note: Employers may only list the most recent source of minimum wage information. In addition, an employer must retain documentation of the applicable minimum wage source consistent with the Department's regulations.

Question: May an employer list the prevailing wage on the LCA in the form of an annual salary?

Answer: Yes. An employer may list the prevailing wage on the LCA in the form in which the employer intends to pay the wage, except where the job opportunity is for part-time employment, in which case the employer must list the prevailing wage as an hourly rate.

Question: How should the employer list wage rates on the ETA 9035/9035E if the nonimmigrant is employed in a part-time capacity?

Answer: Since the number of work hours for part-time employment may vary, the employer should enter the wage rates in both Item F.1 (Rate of Pay) and Item G.9 (Prevailing Wage) on the ETA 9035/9035E in the form of an hourly wage. The employer may use the example below as a model for converting annual wage rates into hourly wage rates. Employers may also use prevailing wage sources which provide hourly prevailing wage rates.

> **Example**: If the Rate of Pay minimum wage rate for a worker to be paid is $50,000 annually at 40 hours per week, the calculation is as follows:
>
> 52 weeks x 40 hours per week= 2080 hours per year
> $50,000 per year/ 2080 hours per year= $24.04 per hour
>
> If the Rate of Pay minimum wage rate for a worker to be paid is $50,000 annually at 30 hours per week, the calculation is as follows:
>
> 52 weeks x 30 hours per week= 1560 hours per year
> $50,000 per year/ 1560 hours per year = $32.05 per hour

Question: What are an H-1B employer's pay obligations with respect to a nonimmigrant worker in nonproductive status?

Answer: An H-1B employer is required to pay a nonimmigrant H-1B worker who is not working and is in nonproductive (not producing income for the employer) status as follows:

- As to full-time salaried nonimmigrant workers, the employer must pay that worker the full pro-rata amount due.
- As to full-time hourly wage nonimmigrant workers, the employer must pay that worker for a full-time workweek (40 hours, unless the employer can demonstrate that a different number of hours constitutes full-time employment).
- Part-time nonimmigrant workers must be paid for at least the number of hours indicated on the USCIS petition, and where that number is represented by a range, the employer is required to pay for at least the average number of hours within the range normally worked by the nonimmigrant worker. The employer may not pay the nonimmigrant worker less than the amount corresponding to the minimum number of hours in the range.
- An employer is not required to pay a nonimmigrant work for nonproductive status if it is based on a decision by the nonimmigrant worker to make him/herself unavailable to work (provided the worker's unavailability is due to conditions

unrelated to employment which take the worker away from his/her duties at that worker's voluntary request or convenience or render the nonimmigrant unable to work in accordance with 20 CFR 655.731(c)(7)(ii), and the time is not subject to payment under the employer's benefit plan or other statutes).

NOTICE

Question: What must an employer do to comply with the notice requirement when there is no bargaining representative?

Answer: Where there is no bargaining representative, the employer must post a notice meeting the requirements of 20 CFR 655.734. A copy of the completed ETA Form 9035 /9035E can serve as the notice, but is not required to be posted as long as all of the required information set forth at 20 CFR 655.734(a)(1)(ii) is in fact posted. The notice must be posted on or within 30 days before the filing date. Each notice must remain posted for a total of 10 days.

Posting may occur through one of two methods: hard copy notice or electronic notice. The hard copy notice must be posted in at least two conspicuous locations in each employment location where an H-1B, H-1B1, or E-3 nonimmigrant worker will be employed. Appropriate locations for posting notice include, but are not limited to, near Wage and Hour Division notices or Occupational Safety and Health Administration notices. If the employer is providing electronic notice, it must notify employees in the occupational classification for which the H-1B nonimmigrant is sought (including both the direct employees of the H-1B employer and employees of a secondary/downstream employer where the H-1B worker will actually be placed). Electronic notification may be provided by whatever means the H-1B employer and/or secondary employer normally uses to communicate with its workers including electronic postings (e.g., e-mail, bulletin board, and home web page). The same time frames that apply to electronic notice apply to hard copy notice.

WORKING CONDITIONS

Question: Is an employer required to offer a certain minimum number of hours to an H-1B, H-1B1 or E-3 nonimmigrant worker?

Answer: The employer must offer the nonimmigrant worker the number of hours specified in the USCIS petition (incorporating the LCA) and which constitute either full-time or part-time employment.

POST APPROVAL CHANGES

Question: Is an employer who has already filed an LCA required to submit a new LCA if it changes its permanent business location, but remains within the same Metropolitan Statistical Area (MSA), i.e. within the same area of intended employment?

Answer: If the new permanent business location is a place of employment within the meaning of 20 CFR 655.715 that was not contemplated at the time of filing, and the employer permanently relocates its nonimmigrant worker(s) to the new business location, the employer must post electronic or hard-copy notice(s) at those worksites on or before the date the H-1B nonimmigrant begins work. In addition, the employer may file a new LCA to reflect the new place of employment.

Question: What are the employer's obligations when the employer transfers and/or assigns a nonimmigrant worker to a worksite listed on an approved LCA within the area of intended employment?

Answer: The employer must ensure that there is no strike or lockout in the course of a labor dispute in the new place of employment in the same job classification before transferring the nonimmigrant worker to the new worksite that was previously identified on the approved LCA.

Important note: H-1B-dependent employers and willful violators placing a non-exempt H-1B nonimmigrant worker(s) at a new place of employment also have an obligation to ensure that they are not displacing any U.S. worker(s) directly (in their own workforce) or secondarily (in the workforce of another employer at the place of employment). H-1B dependent employers and willful violators are defined in 20 CFR 655.736. Exempt H-1B nonimmigrants are defined in 20 CFR 655.737. Non-displacement obligations are described in 20 CFR 655.738.

Question: May an employer who previously filed an LCA file a subsequent LCA for the same beneficiary(ies) if the new LCA reflects a different period of employment than that listed on the initial application?

Answer: Yes. In addition, under the Department's regulations, employers who do not wish to be bound by the terms and conditions of an obsolete LCA may withdraw that LCA at any time before the expiration of its validity so long as the nonimmigrants covered by that LCA are not employed at the place of employment pursuant to that LCA, and the Department's Wage and Hour Division has not commenced an investigation of that particular LCA.

Question: What are the employer's obligations with respect to its nonimmigrant workers when there is a change in the employer's corporate structure or identity?

Answer: If an employing entity receives nonimmigrant workers under a valid and certified LCA from a previous employer as a result of a change in corporate structure or identity, the new employing entity is not required to file a new LCA (in order to continue to employ the nonimmigrant worker(s)), regardless of whether the new entity has the same Federal Employer Identification Number (FEIN), so long as the new employing entity:

- Maintains a list of transferred nonimmigrant workers in its public access file(s); and
- Maintains in a public access file a document containing all of the following:
  - The number of each affected LCA and date of certification;
  - A description of the new employing entity's actual wage system applicable to the transferred nonimmigrant workers;
  - The FEIN of the new employing entity (even if it is the same as the previous employer's);
  - A sworn Statement by the new employer or its authorized representative in which the new employing entity explicitly accepts all obligations and responsibilities inherent in the attestations of all affected (and valid) LCAs with respect to the transferred nonimmigrant workers. This statement must also include the new employing entity's acknowledgement of assuming all obligations, liabilities, and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity.

No employing entity may use a transferred LCA to either hire new nonimmigrant workers or extend the status of any nonimmigrant worker. Instead, the new employing entity must initiate a new LCA process.

Question: What is required with respect to a sworn statement when there is a change in an employer's corporate structure or identity?

Answer: Any sworn statement made to the Department in connection with an approved LCA must be signed by the employer and, as listed on the LCA instructions (ETA Form 9035CP), should indicate that the employer is making such statement under penalty of perjury and understands that knowingly and willingly furnishing any false information, or aiding, abetting, or counseling another to do so is committing a federal offense, punishable by fine or imprisonment up to five years or both. The employer must maintain the sworn statement in its public access file.

Question: How do I withdraw a certified LCA (ETA 9035/9035E) after receiving certification from the Department of Labor through the iCERT Portal System

Answer: An employer who received a certified LCA filed through the iCERT Portal System may withdraw a certified labor condition application (LCA) electronically through the iCERT Portal System, via email or written notice. A certified labor condition application (LCA) may be withdrawn at any time, provided the employee benefiting from the LCA is not currently working for the employer and the Administrator has not commenced an investigation. If an investigation has commenced, the LCA will remain pending until the investigation is complete.

To withdraw a certified LCA using the iCERT Portal System, a Master account holder (Attorney/Employer) or Associate account holder (a subaccount user granted permission by the Master account holder) must login to the iCERT Portal System, select the certified LCA he or she wishes to withdraw and click the withdraw button. The user is required to select a withdrawal reason from a dropdown list and enter a case note explaining the reason for withdrawal. The system will ask the user to verify the request to withdraw the selected certified LCA. The user must click the verification button. Once the verification is made, the employer contact and the attorney contact, as listed on the LCA, will receive an email indicating the withdrawal was successful. If the user does not have the authority to withdraw the certified LCA, either because of LCA status or account status, the iCERT Portal System will not allow completion of the withdrawal. Withdrawing an LCA through the iCERT Portal System is the only option that guarantees confirmation once the withdrawal is complete.

To withdraw a certified LCA via email, the employer must send the request to the LCA Help Center at: LCA.Chicago@dol.gov. The email subject line must include: Certified LCA Withdrawal Request. Please scan the certified LCA and attach it to the body of the email.

In the body of the email, please provide: the employer's name and Federal Employer Identification Number (FEIN) if available, the LCA number, an explanation for why you are withdrawing the certified LCA, and provide a statement that no employee is working on the LCA pursuant to it being withdrawn. The user must access the iCERT Portal System to verify if the certified LCA was successfully withdrawn.

To withdraw a certified LCA through written notice, the employer must send the written request to:
Attn: LCA Withdrawal
U.S. Department of Labor ETA
Chicago National Processing Center
11 West Quincy Court
Chicago, IL 60604-2105

Written notice must include: the employer's name and FEIN if available, the LCA case number, an explanation for why you are withdrawing the LCA, and verification that no

employee is working on the LCA pursuant to it being withdrawn. The user must access the iCERT Portal System to verify if the certified LCA was successfully withdrawn.

Please reference 20 Code of Federal Regulations § 655.750(b) for further explanation of the requirements for withdrawing a certified LCA with the Department of Labor ETA.

TERMINATION OF EMPLOYMENT

Question: What are an H-1B employer's obligations with respect to a nonimmigrant worker whose employment ends (e.g. termination, resignation, or move to another employer) prior to the end of the LCA validity period?

Answer: Under the Department's regulations, the employer is prohibited from charging a nonimmigrant worker a penalty fee outright or in the form of a deduction for ceasing employment early. However, in some circumstances, the employer may contract with the worker to receive liquidated damages in the event of a premature termination on the part of the worker. Employers should refer to DHS regulations for additional obligations.

Additionally, an H-1B employer is relieved of the responsibility to continue paying the required wage to the nonimmigrant worker throughout the authorized employment period specified on the LCA only if a bona fide termination is effected. A bona fide termination requires that the H-1B employer notify both the nonimmigrant worker and DHS of the termination of employment. Additionally, where the employer has terminated a nonimmigrant worker, the employer must pay for the nonimmigrant's cost of return transportation. Once these conditions are met, the employer will be relieved of that wage payment obligation.