

How to Prepare for the H-1B Lottery in 2015

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Who are we talking about?

- A job that normally requires a specific college degree or the equivalent in experience
- The employee is currently working on OPT that expires after April 1, 2015, or the prospective employee needs work status to work on or after October 1, 2015

Why are we talking about the H-1B classification now?

- The United States Citizenship and Immigration Services (USCIS) can only approve 65,000 H-1B petitions for work to begin on October 1, 2015 for jobs that require a bachelor's degree and 20,000 petitions for jobs that require a U.S. master's degree
- The first day that H-1B petitions can be filed is April 1, 2015

Why are we talking about the H-1B classification now?

- For the past three years, there were enough petitions filed in the first few days of April to exhaust the numbers available (In 2014, approximately 172,000)
- If the petition is filed and accepted before the employee's OPT expires after April 1, 2015, then the employee can continue to work on OPT until the petition is approved or denied

Who is exempt from having to file?

- Employees who have been granted an H-1B within the last six years and have not used up the entire six years
- Employees of a U.S. institution of higher education or a related or affiliated nonprofit entity
- Certain employees of health care providers

Registering with Department of Labor

Department of Labor (DOL) must obtain documentation from the employer clearly showing the FEIN and the name of the employer associated with the unique identification number.

- Documentation from IRS noting assignment of FEIN
- Federal or State tax return (only acceptable with a pre-printed label) or a pre-printed 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 registration documents
- Official and/or government documents
- Other documentation showing the FEIN and name of the employer

Why the Labor Condition Application (LCA) is Required

- USCIS and DOL require that employers complete an LCA to ensure that employment of H-1B visa holders does not adversely affect the wages and working conditions of U.S. workers.
- The employer affirms that:
 - employment of the noncitizen will not adversely affect the wages and working conditions of workers similarly employed in the area of intended employment.
 - the employer will pay the noncitizen the higher of the actual wage or the prevailing wage for the occupational classification in the area of intended employment.
 - the employer will notify employees that an LCA is being filed.
 - at the time the application is signed, there is no strike, lockout, or work stoppage related to a labor dispute in the occupation.

When to Submit the LCA

- The LCA will not be accepted by the DOL more than 6 months before the beginning date of employment.
- LCA with DOL through online iCert portal.
 - Attorney needs: Signatory, job description, job location (offsite?), wage offered to start
 - The employer must post such notice within one working day of submission of the LCA in at least two conspicuous locations at the worksite and the notice must remain posted for at least 10 days.
- Prevailing Wage versus Actual Wage: The DOL has determined that the required wage rate is the higher of the actual wage or the prevailing wage. If the employer's wage is below the required wage, the DOL will not certify the LCA.

Public Access File: Creation and Access

The Public Access File (PAF) is the file that an employer must create and maintain for each H-1B employee. This file must be created within one working day of the LCA filing. It must be available for public inspection, as well as inspection by the DOL, either at the employer's principal place of business or the actual location of employment.

Contents of the Public Access File

The PAF must contain a copy of the certified LCA and the related cover pages. For LCAs that were electronically submitted (as is standard practice), the printout must be signed by the employer and employee should receive a copy.

Wages

In order to document that the worker will be paid the higher of either the prevailing wage or the actual wage by the employer, the PAF must contain a clear explanation of the system that the employer used to set the actual wage (memo or summary).

Benefits

Since it is necessary to provide benefits to foreign workers covered by LCAs at the same level as those provided to U.S. workers, the PAF must include a summary of the benefits offered to U.S. workers in the same occupational classification as the nonimmigrant worker.

Proof of Notification

The absence of appropriate posting of notification at the location of intended employment is a common LCA violation that can have serious consequences in the event of a DOL investigation.

- Have HR or authorized rep sign and date posting, list exactly where posted.

Other Legal Requirements

There are additional legal requirements for employers who are either H-1B dependent or who have been found to be willful violators of the LCA requirements. The PAFs of these employers must contain specific proof of their efforts to recruit U.S. workers, if required.

An employer is considered H-1B-dependent if it has:

- 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or
- 26 - 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or
- 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers.

Retention Requirements

- All current employees should have a PAF.
- Keep the PAF for a period of one year beyond the date of employment under the LCA.
- If no foreign national was employed under the LCA, the PAF must be kept for one year from the expiration of the LCA, or for one year from the withdrawal of the LCA.

Additional Information Needed

- Current audited financials or U.S. income tax returns that have enough income to pay the employee's salary.
- Alternatively, a copy of the employee's two most current pay stubs if working for you or, if the company has over 100 employees, a letter from the chief financial officer confirming the ability to pay.
- General information on the company. What information is on the web?

Additional Information Needed

- Prospective employee's current resume
- Prospective employee's degree certificates and transcripts, licenses and certificates, along with translations
- Third party evaluation of any foreign degree and equivalent experience

Additional Information Needed

- Organization chart which shows the proposed job and the name, job title and degree held by those employees who have similar positions, the immediate supervisor and for any employees that will be reporting to the employee
- Determine the proper NAICS and LCA codes

Common Oversights

- Is a change of status in the U.S. possible and is it requested on the Form I-129?
- Proof that the person has been in legal status since arriving in the U.S.
- Copy of all previous Forms I-797 approval notices
- Copy of the prospective employee's entire passport

Common Oversights

- What U.S. consulate and port of entry will the prospective employee use to obtain any necessary visa and entry into the U.S.?
- Does the employer need to comply with the deemed import-export control laws?
- Is the employer's information current with Dun and Bradstreet (VIBE)?

Common Oversights

- Are the dates of employment correct?
- Do the dates in the labor condition application correspond to those dates?
- The LCA start date cannot be more than six months from the date the LCA is filed with the DOL.

Common Oversights

If the prospective employee is a student, is she/he aware of the difference in tax treatment between F-1 and H-1B holders? Does she/he want to have a later start date?

Common Oversights

Are there any dependents of the prospective employee who need to have their status changed and/or extended?

Offsite Employment

In order to establish what third-party placement arrangements are legal under H-1B criteria, the USCIS first clearly defines the components of an employer-employee relationship. In short, the employer must have the “right to control over when, where, and how the beneficiary performs the job” they were brought to the United States to do.

11 Point Questionnaire

- USCIS considers a combination of these different factors (with no one factor being decisive) when making its determination:
 - Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
 - If the supervision is off-site, how does the petitioner maintain such supervision?
 - For example, weekly calls, periodic reporting back to the main office, site visits by petitioner?
 - Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
 - Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
 - Does the petitioner hire, pay, and have the ability to fire the beneficiary?
 - Does the petitioner evaluate the work-product of the beneficiary, such as through progress or performance reviews?
 - Does the petitioner claim the beneficiary for tax purposes?
 - Does the petitioner provide the beneficiary any type of employee benefits?
 - Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
 - Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
 - Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

What else can you submit?

- An itinerary of services or engagements with the names and addresses of the actual employers and the names and addresses of the locations where the services will be performed for the period of time requested
- A copy of the signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment.
- A copy of an employment offer letter that clearly describes the relationship and the services to be performed by the beneficiary.
- A copy of relevant portions of valid contracts between the petitioner and the client in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and/or letters between the petitioner and the authorized officials of the third-party companies.
- A copy of the position description or any such documentation that describes the skills required to perform the job, instruments and tools needed to perform the job, the product or service to be provided, the location where the employee will perform the duties.
- A description of the performance review process; and/or A copy of the petitioner's organizational chart, demonstrating the beneficiary's supervisory chain.

Procedural Concerns

- Checks to issued by employer or law firm for \$325, \$500 and \$1,500 (or \$750) as well as \$1,225 for expedited processing
- Use the Form I-129 and H supplement dated 02/27/14
- Use the Form I-907 for expedited processing dated 10/19/11

Procedural Concerns

- Two signed originals of the support letter, Forms I-129 and H supplement and I-907
- All five pages of the original labor conditional application which has been signed
- Addressed and sent to the correct service center based on job location

What if not selected?

- Extend OPT, STEM 17 month extension (E-verify)
- Other non-immigrant options—where are they from?
 - NAFTA
 - Australian E-3
 - Student
- What is spouse's status
 - L-2s/E dependents can work.
- From Chile (1400)/Singapore (5400)?
 - one-year period renewable indefinitely
- Do they work for a company abroad that has related entity here?
 - L-1A, L-1B
- Are they a U.S. citizen?



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Thank you!

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