

H-1 Bs
LACBA
10/19/2002

- I. Request hypothetical positions from the audience
- II. Approach of a case: three issues are most important in initial analysis
 - A. What is the salary?
Relates to LCA
 - B. What is the position, job duties?
 - C. What are the alien's qualifications?
 - D. Ancillary issues (esp. corp structure & travel issues)
- III. What constitutes a Labor Condition Application (LCA)?
 - 1. Prerequisite to filing an H-1 petition, filed w/ DOL; H petition cannot be approved by INS until certified
 - 2. certified LCA – checked for obvious inaccuracies and completeness
 - 3. purpose – in area of intended employment :to protect US workers & to protect aliens – wages, benefits
 - 4. enforcement as to substance – through DOL audits
- B. LCA form ETA-9035 (9035E) – See form and cover pages at 65 Fed Reg 90240-90251 (12/20/2000), or forms software on internet available
 - 1. Basic information about job: rate of pay, period of employment and work location and attestations
 - 2. Filed with DOL – by mail to Phila (PO Box 13640, Phila, PA 19101), fax (800 397-0478), internet – see handout
 - 3. Regs require response in 7 days; glitches in system led to E filing – instantaneous
- C. Attestations by the employer promising to:
 - 1. Employer is and will continue to pay the greater of the prevailing wage or actual wage
 - a. prevailing wage – wages paid to other workers in the position offered in the intended area of employment – best information available (SCA & union contracts control)
 - I. safe harbor is obtained from SWA (State Workforce Agency/EDD in CA) 916 262-2482
 - II. DOL On-Line Wage Library – see handout
 - Level 1 – entry level, or those involving routine, highly supervised, little discretion
 - Level 2 – fully competent, works independently, usu. 2 yrs. Exp.

- III. Published surveys that meet GAL 2-98 requirements – BLS, Watson-Wyatt, Employer's Group
- IV. Other legitimate source of wage data
- V. GAL 2-98 seven criteria

1. The data must have been collected within twenty-four months.
2. If it is a published survey, it must have been published within twenty-four months.
3. The survey must reflect the area of intended employment.
4. The employer job description must adequately match the survey job description.
5. The survey must include industries that employ workers in the occupation.
6. The wage determination must be based on an arithmetic mean.
7. The survey must identify a statistically valid methodology that was used to collect the data.

VI. Hathaway decision (regulated at 20CFR 655.731 – applies separate, lower wage scale for

- A. institutions of higher education
- B. affiliated or related nonprofits
- C. nonprofit research organization
- D. governmental research organizations
- E. these factors in I-129W form and they don't compete with private industry wages

- b. actual wage – wages paid to other of the employer's workers with similar backgrounds in the same position
 1. 1 employee, ie, alien – actual wage is wage offered to alien
 2. more than 1 employee – differences in wages are acceptable so long as legitimate business reason exists for the difference in wages eg., education, experience, special knowledge, tenure, etc.

c. Payment of attorney fee by employer required when if paid by employee, rate of pay is brought below prevailing wage

2. Other attestations – not detailed

Working conditions for H-1B employee that will not adversely affect working conditions of workers similarly employed in the area of employment
3. There is no strike, lockout or work stoppage in the course of a labor dispute at the place of employment when LCA is filed
4. Employer has provided notice of filing the LCA at place of employment (including other worksites where the employee will be employed not mentioned in the LCA):
 - a. posted notice – 2 conspicuous places for 10 working days
 - I. requires certain statements in notice: easiest to use the form itself, & item E on instructions

- II. plus statement: Complaints regarding the LCA may be made to Wage & Hour Division of DOL
- III. Notice must be posted w/I 30 days prior to & up to filing the LCA
- IV. Electronic notice – one time
 - b. bargaining representative for union positions

5. Added attestations from ACWIA, as of 10/21/1998 – protects against displacement of US workers by H-1B dependent employers, and stiffens penalties for LCA violations. Regulations on ACWIA went into affect 1/19/2001.

Additional attestations for H-1B dependent employers and willful violators – documentation required for public access file

c. no displacement of protected US workers

d. prior recruitment

A. a. Dependent employer if:

- 1. 1-25 full-time (or equivalent) employees and more than seven H-1b nonimmigrants;
- 2. 26-50 full-time (or equivalent) employees and more than 12 H-1b nonimmigrants; or
- 3. more than 50 full-time (or equivalent) employees at least 15 percent of whom are H-1b nonimmigrants then you are an H-1b dependent employer.
- 4. Note part-timers affect these calculations (may have twice as many half time employees)

B. A willful violator is an employer who has been found to have committed a willful failure or misrepresentation with respect to the H-1B requirements.

- D. Keep evidence of compliance with LCA requirements in public access file – Create a folder just for the LCA separate from employee files.
 - Copy of signed LCA (where mailed); original when filed by fax/e-filed, & cover pages
 - Prevailing Wage documentation
 - Actual Wage Memo – explanation of system that's understandable to the person viewing the memo; DYNAMIC actual wage-record in Public Access File
 - Wage Rate to be paid to the alien
 - Summary of benefits of H—1 aliens on par with US workers, with copy of benefits plan, and choices made, if any. Multinationals who provide home country benefits include statement of benefits
 - Acknowledgement of receipt of copy of LCA by alien
 - Two notices, including dates posted and taken down, and signed by employer to show compliance with 10 day working period---or union representative notification

Summary of recruitment for dependent employers

Calculation as to dependency, when not obvious (list of exempt employees & where single employer for related entities under IRC, list of the entities)

Change in corporate structure – to avoid filing amended H-1 petitions by new employing entity, sworn statement that it accepts all obligations under the LCA filed by predecessor employer (plus list of all LCAs), new EIN, new actual wage memo & list of affected LCAs

SKIP THIS

E. Public Access File additional requirements for special situations (infrequent for me)

1. Where the snapshot test of dependent or non-dependent employer exists, no evidence of calculation need be in the file, otherwise the employer needs to evidence that the calculation (eg, parttime workers)
2. Exempt employees (masters degreed or salaries \$60,000 and above. Exempt H-1 employees must be taken into account when making the calculation regarding H-1 employer dependency, but there's no additional attestations required for exempt employees, but a dependent employer must keep a list of exempt H-1B employees in the public access file.
3. Determining the number of H-1 employees, and employer H-1 dependency depends on the definition of employer under sec. 414 of the Internal Revenue Code. Where a group of companies is treated as a single employer under the IRC, then the calculation of the number of H-1s is done under one umbrella. A list of the related entities must be added to the public access file.
4. H-1 dependent employers & willful violators: summary of recruitment methods

START HERE

F. Complaints, challenge & Sanctions

Complaint procedure exists for challenging the conditions in LCAs or of making misrepresentations.

Awards of back pay, civil fines, disqualification from INS approval of immigrant and nonimmigrant employment petitions

- E. One LCA may be used for multiple aliens in one occupation, or one LCA per alien- matter of style & # of workers in the area of intended employment

IV. What are the job duties? Are they H-1B caliber? – call for hypos again

A. INA 214(i)(1), 8 USC 1184(I)(1) defines “specialty occupation” (former professionals)– to be:

1. Theoretical and practical application of a body of highly specialized knowledge and
2. 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 US.
3. Use of DOT vs. SOC

B.8 CFR 214.2(h)(94)(iii)(A) further specifies that this is done in one of four ways:

1. Bachelors or higher degree or equivalent is normally the minimum entry requirement for the position
2. degree requirement is common to the industry, OR the position is so complex or unique that it can be performed only by a person w/a degree
3. Employer normally requires a degree or equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelors or higher degree.

C. Degree must be in the specialty

1. general degrees not acceptable; they must be focus majors
 - a. liberal arts
 - b. general business, but specific business degrees (finance, accounting, marketing, OK)
 - I. Management duties are not H-1 caliber, but when coupled with a specialty, eg. AGRONOMY to become AGRICULTURAL PRODUCTION MANAGER, then OK.
2. Examples of H-1 jobs
 - I. typical – professions – elementary or higher teacher, architect, lawyer, physician, engineers etc.
 - II. Atypical – Exercise physiologist (vs. personal trainer), WINE SPECIALTY CONSULTANT (vs. sales and customer service rep), study viticulture/enology—emerging degree. YOGA INSTRUCTOR (vs. guru), do as TEACHER vs. religious leader, problematic – computer science or electrical engineer for software engineer
 - Exercise Physiologist – degree in physiology or kinesiology
 - IV. In transition – purchasing manager, computer programmer, programmer/analysts (creating custom designs, modifying or problem solving w/software, and not just code entry or computer

operation) graphic designer (don't confuse with web design that a HS kid can do), industrial designer, medical technologist

D. Must be at correct level

1. Positions that require a Masters or Doctorat/MD Degree are not specialty level where the job requires a bachelors degree – eg., psychologist (but cultural counselor with multi-cultural psychology may be OK)
2. License – if the job doesn't require a license, it may still be H-1 caliber where the requirements for licensure are not part of the job. EG pharmacy dispensing drugs – job requires a license; laboratory pharmacist – doesn't require license.

V. What is the alien's background? 4 ways to be a specialist:

A. Does alien have a degree in correct specialty and at correct level?

1. major or concentration in 1 or related areas (eg., software engineer may have degree in electrical engineering, electronics engineering, computer science, mathematics)
2. number of credits required—depends on the university – at least 30
3. completion of course work without having the degree
4. having a higher degree in specialty than that required for the position
5. cross-over areas – management plus specialty—degree in the specialty best. If degree in management, then experience in lieu of education, see below

B. If not the US degree, does alien have the equivalent? Equivalent education – foreign degree that is evaluated by a reliable evaluator, or by INS as being equivalent

C. License – one is at specialty occupation w/unrestricted State license, registration or certification which authorizes fully to practice in the specialty occupation and be immediately engaged in that specialty in the state of intended employment. Doesn't mention education, but must presume it OR

D. Experience in lieu of education – may have equivalent to degree through experience alone – 3 years experience for each year of education missing

a. Regulation at 8 CFR 214.2(h)(4)(iii)©

- I. caliber of experience must be in “progressively more responsible positions in positions related to the specialty”
- II. alien must have “recognition of expertise”

b. Equivalence to completion of college degree

I. evaluation done by an official with authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program in the field

II. Passage of college-level equivalency exam or special credit program (CLEP, College Level Examination Program, or PONSII, Program on Noncollegiate Sponsored Instruction)

III.using a reliable credential evaluator specialized in evaluating foreign EDUCATIONAL credentials
IV.certification or registration from a nationally recognized professional assn for the specialty known to grant certification or registration to persons who have reached certain competency level

V. INS determination that equivalency is based on combination of education, specialized training and/or work experience related to the field, and achievementment of recognition.

A. 3 for 1 rule – 3 years of experience for every one year missing in education, eg. person with 12 years experience may have equivalent to a US bachelors degree

B. for equivalence to a Masters, the alien must have the actual bachelors education first, then 5 years of progressive experience to equate to masters.

C. If job requires doctorate, the alien must possess an actual doctorate degree –US or foreign degree equivalent.

D.theoretical and practical application of body of specialized knowledge while working with others who hold the degree or equivalent to the degree:

- 1.peers
2. supervisors
3. subordinates

E. Recognition in field

VI. recognition by 2 recognized authorities

VII. membership in recognized foreign or US assn. or society in specialty

VIII. published material by or about the alien in professional media

IX. license or registration in the foreign country or

X. achievements that a recognized authority determines to be significant contributions to the field. (Sounds like EB-1 & O-1)

VI.Other H-1 requirements

A. Employer liability for return transportation – in the event alien is terminated (ratherthan quits) – to place of last residence

B. Employer liable to pay required wage when alien terminated, until it withdraws H-1 petition

C. Benching – wage must be paid anyway----range in wage---must pay at least the midpoint of wage.

VII. Timing issues

- A. normal processing times – ilw.com, CSC has processing times on line – in materials for URL
H-1s are INS's lowest priority now
COS/CN – 5 mos
EOS – 6 mos
IBIS checks – for all applications – done every 60 days, so may be done 2-3 times per H petition, slowing down process.
- B. Premium processing – 15 working days from filing
If RFE issued, then 15 days starts again from time they receive it
- C. Consular processing – more involvement as there's new OF-156 Supplement; State Dept. checks take at least 30 days for citizens of countries on the Dept's. list of 26 countries, and must get clearances back negative before visa will be issued
- D. Section 306 of the Enhanced Border Security and Visa Reform Act of 2002 (EBSVRA) pertains to the issuance of visas to aliens from state sponsors of terrorism.

Seven countries are now designated as state sponsors of terrorism. They are North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya.

Special Visa Processing Procedures:

All applicants from state sponsors of terrorism age 16 and over, irrespective of gender, must without exception complete form DS-157, in addition to form DS-156, and must appear for an interview with a consular officer.

An exception to the requirement for an interview may be made at the discretion of the consular officer in cases of A and G visa applicants (except for A-3 and G-5 applicants, who must be interviewed).

- D. Note registration on entry, exit, yearly for Iran, Iraq, Libya, Sudan & Syria – takes time at airport
- E. Note: no more TCN at Ciudad Juarez

Annual cap: Currently 195,000 visas available;
will revert to 65,000 fiscal year starting 10/1/03

Really interested in H-1B statistics, see
Report on Characteristics of Specialty Occupation
Workers, Fiscal Year 2001 released by INS 7/02
(mandated by ACWIA)