

The Employment of Non-Immigrants on H-1B Visas

Presented by the
U.S. Department of Labor
Wage and Hour Division



U.S. Department of Labor



Immigration and Nationality Act (INA) of 1952

- **Amended by:**
 - H-1B Reform Act of 2004
 - American Competitiveness and Workforce Improvement Act of 1998 (ACWIA)
- **Regulations**
 - Title 20 CFR Part 655, Subparts H & I



H-1B Program

- Establishes an annual ceiling on the number of workers issued H-1B visas
- Defines the scope of eligible occupations
- Specifies the qualifications for H-1B status



H-1B Program

- Requires an employer to file a Labor Condition Application (LCA) which establishes conditions of employment
- Establishes an enforcement system to determine compliance with LCA requirements



Agencies

- The Employment and Training Administration (ETA) of the USDOL approves the LCA
- The U.S. Citizenship and Immigration Services (USCIS) approves H-1B visa classification (status)
- The Department of State issues the visa
- The Wage and Hour Division (WHD) of USDOL enforces the employer's LCA obligations



Petition Fees

- A training and processing fee (\$1,000) charged to employers that was discontinued on October 1, 2003, is reinstated and restructured as of December 8, 2004:
 - 25 or fewer employees - \$750
 - more than 25 employees - \$1,500
- Anti-Fraud Fee – all employers pay an additional \$500



Labor Condition Application (LCA)



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Labor Condition Application (LCA)

The employer must accurately specify:

- Employer information (firm name, employer identification number (EIN), address, phone)
- Rate of pay (amount, salary/hourly, full/part-time)
- Period of intended employment (beginning and ending dates)



Labor Condition Application (LCA)

The employer must also accurately specify:

- Occupation information (number of H-1Bs sought, occupation code, and job titles)
- Work locations (initial and additional or subsequent work locations)
- Prevailing wage (amount, source) for all work locations listed



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Labor Condition Application (LCA)

The employer must agree to abide by (or “comply with”) the following Labor Condition Statements:

- **Wages:** The employer will pay the higher of the actual or prevailing wage rate, pay for nonproductive time, *and* offer benefits on the same basis as offered to U.S. workers
- **Working Conditions:** The employer will provide working conditions (including hours, shifts, vacations, seniority based benefits) which will not adversely affect similarly employed U.S. workers



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Labor Condition Application (LCA)

The employer must agree to abide by (or “comply with”) the following Labor Condition Statements:

- Strike, Lockout or Work Stoppage: There is no strike or lockout in the same occupational classification on the LCA
 - ETA will be notified if a strike/lockout occurs
 - No H-1B will be placed at a site with a strike/lockout



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Labor Condition Application (LCA)

The employer must agree to abide by (or “comply with”) the following Labor Condition Statements:

- Notification: The employer will notify the union or workers of the LCA filing
 - A copy will be posted for 10 days at two conspicuous locations, or
 - A copy will be posted electronically, and
 - A copy will be provided to the H-1B worker



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Labor Condition Application (LCA)

Additional Labor Condition Statements for H-1B Dependent and/or Willful Violator Employers

- The “ACWIA” amendments to the INA of 1998 established additional requirements for “H-1B Dependent” and/or “Willful Violator” employers on or after January 19, 2001. These additional requirements include recruitment provisions and prohibitions on displacement of U.S. workers



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Labor Condition Application (LCA)

These provisions sunset on September 30, 2003, and were not included on LCAs filed after that period until...

- The H-1B Reform Act of 2004 reinstated these provisions;
- Effective March 8, 2005, the additional provisions are part of all LCAs filed on or after that date



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Labor Condition Application (LCA)

H-1B Dependent Employer defined:

- 25 or fewer full-time equivalent (FTE) employees, including 8 or more H-1Bs
- 26-50 FTE employees, including 13 or more H-1Bs
- 51 or more FTE employees, including at least 15% H-1Bs



Labor Condition Application (LCA)

Willful Violator Employer defined:

- An employer who (in a final agency action) was determined to have committed a willful failure or a willful misrepresentation after October 21, 1998, and within five years of the filing of the LCA



Labor Condition Application (LCA)

Additional Labor Condition Statements for H-1B Dependent and/or Willful Violator Employers:

- Non-Displacement: Employer will not displace a similarly employed U.S. worker within 90 days before or after an H-1B visa petition is filed
- Secondary Inquiry: Employer must inquire of a secondary employer whether an H-1B will displace a similarly employed U.S. worker



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Labor Condition Application (LCA)

Additional Labor Condition Statements for H-1B Dependent and/or Willful Violator Employers (cont'd):

- Recruitment: Employer will make good faith efforts to recruit U.S. workers
- Employer will offer the job to an equally or better qualified U.S. applicant (enforced by Department of Justice)



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Labor Condition Application (LCA)

Public Disclosure Information:

The employer must also maintain a public disclosure file that will be kept at the:

- Employer's principal place of business or
- The place of employment



Compliance



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Compliance

A Material Fact is a significant item of information:

- The H-1B worker's occupation
- Number of H-1B workers sought
- Rate of pay
- Period of employment
- Work location, prevailing wage rate, and source
- H-1B dependent and/or willful violator employer status



Compliance

Misrepresentation of a Material Fact:

- Failure to exercise reasonable care and diligence
- False statement at the time of filing
- More than inadvertent error

If the employer knowingly or recklessly provides incorrect information on the LCA, the employer has committed a willful misrepresentation



Compliance

Wages:

Employer must pay no less than the Required Wage Rate

- Required Wage Rate is the higher of the actual wage paid or the prevailing wage for the occupation in which the H-1B worker is employed in the geographic area of intended employment



Compliance

Prevailing Wage:

Weighted average (mathematical mean) of wages paid:

- To all individuals in the same occupational class
- Within the area of intended employment *and...*
- Represents the most recent and accurate information available
- The prevailing wage rate must be no less than the minimum wage required by Federal, State, or local law



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Compliance

Prevailing Wage Sources:

- Collective Bargaining Agreement (CBA)
- State Workforce Agency (SWA) (formerly State Employment Security Agency (SESA))
- Occupational Employment Statistics (OES)
- Independent authoritative source or other legitimate source
- Service Contract Act (SCA) wage determination



Compliance

Prevailing Wage – Occupational Employment Statistics (OES):

- The USDOL provides prevailing wage rates on its website: www.flcdatacenter.com
- Starting March 8, 2005, a four level wage structure replaced the previous two levels



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Compliance

Actual Wage:

- Employer's own scale or system
- Must be documented
- May include variable rates

EMPLOYER MUST PAY THE HIGHER OF THE ACTUAL WAGE OR PREVAILING WAGE RATE



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Compliance

Obligation to Pay - The employer's obligation commences on the date which:

- The H-1B worker first makes self available for work or otherwise comes under control of the employer
And
 - If the H-1B worker does not reside in the U.S., not later than 30 days after that worker is admitted to the U.S.; OR
 - If the H-1B worker already resides in the U.S., not later than 60 days after that worker becomes eligible to work



Compliance

Obligation to Pay – Nonproductive Time:

The employer must pay the required wage rate for all nonproductive time caused by:

- conditions related to employment
- lack of work
- lack of permit
- studying for licensing exam
- employer required training

Failure to pay will result in the employee's being "benched." Benched time must be compensated.



Compliance

Obligation to Pay – Nonproductive Time (cont'd):

Payment is not required if reasons unrelated to employment exist, such as:

- Voluntary absence for pleasure
- Voluntary absence due to illness
- Absence must be truly voluntary



Compliance

Obligation to Pay – Nonproductive Time (cont'd):

- Full-time workers must be paid the full amount of the required wage rate
- Part-time workers must be paid for the number of hours indicated on the I-129 and referenced on the LCA



Compliance

Obligation to Pay:

The employer's obligation ceases only after a bona fide termination of employment, as indicated by:

- Notification to the H-1B worker that employment relationship has been terminated
- Notification to USCIS that the employment relationship is canceled
- Payment and/or offer to pay transportation home if required by USCIS regulation

An H-1B worker may not be terminated and then rehired under the same petition



Compliance

The required wage rate must be paid, cash in hand, free and clear, when due.

Wages are:

- Payments reported on the employer's payroll as earnings
- Reported as earnings to the IRS
- Reported as earnings to all other appropriate Federal, State, and local governments under appropriate law



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Compliance

Authorized Deductions from Wages:

- Deductions required by law (taxes)
- Reasonable/customary deductions (insurance, savings, retirement)
- Authorized by a collective bargaining agreement



Compliance

Permissible Deductions:

- Voluntarily authorized in writing by the employee, but not as a condition of employment
- Principally for the benefit of the employee
- Do not exceed the fair market value or actual cost of a provided benefit (lodging, transportation, goods, for example)
- Do not exceed the garnishment limits



Compliance

Deductions may not be taken:

- To recoup an employer's business expense
- As a penalty for early cessation of employment
- To recover the \$750/\$1,000/\$1,500 USCIS filing fee
- To cover the costs incurred in the petition process
- To recover the \$500 Anti-Fraud Fee



Compliance

Short-Term Placement:

Employers may temporarily place an H-1B worker at a worksite without an LCA if they:

- Pay the required wage rate of the home-based LCA
- Pay the actual cost of lodging
- Pay the actual cost of travel, meals, and incidental or miscellaneous expenses



Compliance

Short-Term Placement Limitations:

- There can be no strike/lockout at placement site
- There can be no LCA for that geographic area of employment
- The H-1B worker does not exceed 30 workdays within a one-year period
 - Plus an additional 30 workdays if certain criteria are met



Compliance

A penalty assessed on an H-1B worker who ceases employment before the contract ends is prohibited:

- Bona fide liquidated damages are permitted
- Liquidated damages may include business expenses, but **NOT** USCIS filing fee
- State law determines whether an assessment is a penalty or liquidated damages



Compliance

**Last paycheck may not be withheld
by the employer to recover liquidated
damages**



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Compliance

Labor Condition Statements – Notification:

On or within 30 days prior to the filing of the LCA

- A copy is to be provided to a collective bargaining representative, *or*
- A copy is to be posted at all worksites for 10 days at two conspicuous locations, *or*
- A copy is to be posted electronically



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Compliance

Displacement of U.S. Workers:

Super Penalty Violation

- A three year debarment and Civil Money Penalty (CMP) for each violation may be assessed where an employer (in a final determination) was found to have a willful violation, in the course of which a U.S. worker in an essentially equivalent job was laid off within 90 days before or after the filing of the H-1B petition. For current maximum penalty amounts, see <https://www.dol.gov/whd/immigration/h1b.htm#cmp>



Compliance

Displacement of U.S. Workers (cont'd):

Super Penalty Violation

- Applies to all H-1B employers, not just H-1B dependent and/or willful violator employers
- Applies only where the displaced U.S. worker is employed by the violating H-1B employer
- This displacement ban **did not** sunset



Compliance

Additional Labor Condition Statements for H-1B Dependent and/or Willful Violator Employers – Displacement:

Direct Displacement

- Bans layoff of a U.S. worker in an equivalent position 90 days before and after the filing of the H-1B petition
- Applies only where the displaced U.S. worker is employed by the violating H-1B employer



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Compliance

Displacement (cont'd):

Secondary Displacement

- Requires an H-1B dependent and/or willful violator employer placing an H-1B worker with a secondary employer to ask whether the secondary employer has laid off, or intends to lay off, a U.S. worker from an essentially equivalent job, 90 days before or after the placement of the H-1B worker



Compliance

H-1B Dependent and/or Willful Violator Employer - Recruitment:

- Must take good faith steps to recruit U.S. workers before the LCA or petition is filed
- Must recruit using “industry wide” standards (normal, common, prevailing in the industry)



Compliance

Recruitment:

- External or Internal Solicitation, and
- Active (direct communication with potential employees), and
- Passive (indirect communication through advertising, internet, etc.)



Compliance

H-1B Dependent and/or Willful Violator Employer - Qualified U.S. Worker:

- The employer must offer the LCA job to a better or equally qualified U.S. worker - this is enforced by the Department of Justice, not by the Wage and Hour Division



Compliance

H-1B Dependent and/or Willful Violator Employer - “Exempt” H-1B Workers:

Additional Labor Condition Statements do not apply to LCAs listing only “exempt” H-1B workers

An “exempt” H-1B worker is one who:

- Earns at least \$60,000 a year; **or**
- Has the equivalent of a master’s degree or higher



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Compliance

Whistleblower Protection:

- The employer may not retaliate against any current, former, or prospective employee for asserting H-1B rights or cooperating in H-1B enforcement



Records



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Records

Public Access File:

- The employer must make the LCA and supporting documentation available to the public within one working day of the filing



Records

Public Access File includes:

- LCA and cover pages
- Wage rate documentation
- Actual wage system
- Prevailing wage documentation
- Summary of benefits



Records

Public Access File includes (cont'd):

- Notification documentation
- Change in corporate structure statement
- "Single Employer" entities
- List of "exempt" H-1Bs
- Summary and time frame of recruitment efforts



Records

The employer must also maintain the following records:

- Complete petition package
- Payroll and basic records
- Name, address, social security number, occupation of workers
- Benefit plans
- Record of dependency determination



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Enforcement



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Enforcement

The Wage and Hour Division investigations are based upon:

- The existence of a valid LCA
- A complaint from an aggrieved party
 - a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the LCA
- An alleged violation of the H-1B program which occurred within 12 months of the complaint



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Enforcement

Wage and Hour may conduct random investigations of “Willful Violators”

- Any employer that has been determined in a final agency action to have committed a willful failure or a willful misrepresentation after October 21, 1998, is a “willful violator”
- The authority to conduct the investigation expires five years after the final agency action



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Enforcement

The H-1B Reform Act of 2004:

- Authorizes Wage and Hour to conduct an investigation when the Secretary of Labor personally certifies that there is reasonable cause to do so; such authority is retroactive to October 1, 2003



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Enforcement

The H-1B Reform Act of 2004 (cont'd):

- Authorizes Wage and Hour to conduct an investigation if it receives information from a known “credible source” likely to have Knowledge of an employer’s practices or labor conditions within 12 months of the alleged violations



Determination of Findings



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Determination of Findings

When the investigation is complete, Wage and Hour issues a determination letter offering the employer and interested parties an opportunity to appeal the findings.



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Determination of Findings

Violation Categories:

- Wages
- Benefits
- Misrepresentation of a material fact
- Working conditions
- Strike/Lockout
- Notification
- Specificity
- Displacement – Direct and Secondary



Determination of Findings

Violation Categories (cont'd):

- Recruitment
- Petition fees
- Early cessation penalty
- Discrimination for protected conduct
- Failure to make available public access documents
- Failure to maintain documentation
- Failure to cooperate in Wage Hour investigation
- Failure to comply with the regulations



Determination of Findings

Levels of Violation:

- Nonwillful Failure
- Substantial Failure
- Willful Failure
- Willful and Substantial Failure



Determination of Findings

Good Faith Defense:

- Under the H-1B Reform Act of 2004, no violation will be cited for a “technical” or “procedural” failure, if there was a good faith attempt to comply; **and**
- The employer corrects the failure within 10 business days after USDOL or another enforcement agency has explained the failure; **and**
- There is no pattern or practice of willful violations



Determination of Findings

The H-1B Reform Act of 2004 also provides that in employer found to have violated the prevailing wage requirements during the course of an investigation will not be assessed fines or penalties if the employer can establish that the manner in which the wage was calculated was consistent with industry standards and practices.



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Determination of Findings

Remedies:

- Back Wages
- Fringe Benefit Reimbursements
- Civil Money Penalties (CMPs)
- Prohibition from obtaining any new non-immigrant or permanent program foreign workers for one to three years (Debarment)
- Compliance



For More Information

- Other resources concerning H-1B are available at <http://www.wagehour.dol.gov>
 - Regulations
 - H-1B complaint form (Form WH-4)
 - Wage and Hour office locations
- The Foreign Labor Certification Data Center is available at <http://www.flcdatcenter.com>
 - LCA filing information
 - Prevailing wage rates
- Hotline: 1-866-4US-WAGE (1-866-487-9243)



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