

## § 655.721

(3) ETA will review the submitted justification, and may require the employer to submit supporting documentation. In the case of employers asserting a lack of Internet access, supporting documentation could, for example, consist of documentation that the Internet cannot be accessed from the employer's worksite or physical location (for example because no Internet service provider serves the site), and there is no publicly available Internet access, at public libraries or elsewhere, within a reasonable distance of the employer. In the case of employers with physical disabilities supporting documentation could, for example, consist of physicians' statements or invoices for medical devices or aids relevant to the employer's disability.

(4) ETA may approve or deny employers' requests to submit LCAs by U.S. Mail. Approvals shall be valid for 1 year from the date of approval.

(d) *U.S. Mail.* If an employer has a valid approval to file by U.S. Mail in accordance with paragraph (c) of this section, the employer may use Form ETA 9035 and send it by U.S. Mail to ETA. ETA shall publish a Notice in the FEDERAL REGISTER identifying the address, and any future address changes, to which paper LCAs must be mailed, and shall also post these addresses on the DOL Internet Web site at <http://www.lca.doleta.gov>. When Form ETA 9035 is submitted by U.S. Mail, the form must bear the original signature of the employer (or that of the employer's authorized agent or representative) at the time it is submitted to ETA.

(e) The ETA National Office is responsible for policy questions and other issues regarding LCAs. Prevailing wage challenges are handled in accordance with the procedures identified in § 655.731(a)(2).

[70 FR 72561, Dec. 5, 2005, as amended at 73 FR 19949, Apr. 11, 2008]

## § 655.721 [Reserved]

### § 655.730 What is the process for filing a labor condition application?

This section applies to the filing of labor condition applications for H-1B, H-1B1, and E-3 nonimmigrants. The term H-1B is meant to apply to all

## 20 CFR Ch. V (4-1-16 Edition)

three categories unless exceptions are specifically noted.

(a) *Who must submit labor condition applications?* An employer, or the employer's authorized agent or representative, which meets the definition of "employer" set forth in § 655.715 and intends to employ an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall submit an LCA to the Department.

(b) *Where and when is an LCA to be submitted?* An LCA shall be submitted by the employer to ETA in accordance with the procedure prescribed in § 655.720 no earlier than six months before the beginning date of the period of intended employment shown on the LCA. It is the employer's responsibility to ensure ETA receives a complete and accurate LCA. Incomplete or obviously inaccurate LCAs will not be certified by ETA. ETA will process all LCAs sequentially and will usually make a determination to certify or not certify an LCA within seven working days of the date ETA receives the LCA. LCAs filed by U.S. Mail may not be processed as quickly as those filed electronically.

(c) *What is to be submitted and what are its contents?* Form ETA 9035 or ETA 9035E.

(1) *General.* The employer (or the employer's authorized agent or representative) must submit to ETA one completed and dated LCA as prescribed in § 655.720. The electronic LCA, Form ETA 9035E, is found on the DOL Web site where the electronic submission is made, at <http://www.lca.doleta.gov>. Copies of the paper form, Form ETA 9035, and cover pages Form ETA 9035CP are available on the DOL Web site at <http://www.ows.doleta.gov> and from the ETA National Office, and may be used by employers with approval under § 655.720 to file by U.S. Mail during the approval's validity period.

(2) *Undertaking of the Employer.* In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements

(attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP. The labor condition statements (attestations) are described in detail in §§ 655.731 through 655.734, and the additional attestations for LCAs filed by certain H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements are described in §§ 655.736 through 655.739.

(3) *Signed Originals, Public Access, and Use of Certified LCAs.* In accordance with § 655.760(a) and (a)(1), the employer must maintain in its files and make available for public examination the LCA as submitted to ETA and as certified by ETA. When Form ETA 9035E is submitted electronically, a signed original is created by the employer (or by the employer's authorized agent or representative) printing out and signing the form immediately upon certification by ETA. When Form ETA 9035 is submitted by U.S. Mail as permitted by § 655.720(a), the form must bear the original signature of the employer (or of the employer's authorized agent or representative) when submitted to ETA. For H-1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

(4) *Contents of LCA.* Each LCA shall identify the occupational classification for which the LCA is being submitted and shall state:

(i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;

(ii) The number of nonimmigrants sought;

(iii) The gross wage rate to be paid to each nonimmigrant, expressed on an hourly, weekly, biweekly, monthly, or annual basis;

(iv) The starting and ending dates of the nonimmigrants' employment;

(v) The place(s) of intended employment;

(vi) The prevailing wage for the occupation in the area of intended employment and the specific source (e.g., name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, now known as a State Workforce Agency (SWA), the appropriate box must be checked and the wage must be stated; the source for a wage obtained from a source other than a SWA must be identified along with the wage; and

(vii) For applications filed regarding H-1B nonimmigrants only (and not applications regarding H-1B1 and E-3 nonimmigrants), the employer's status as to whether or not the employer is H-1B-dependent and/or a willful violator, and, if the employer is H-1B-dependent and/or a willful violator, whether the employer will use the application only in support of petitions for exempt H-1B nonimmigrants.

(5) *Multiple positions and/or places of employment.* The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more nonimmigrants, but the LCA may cover more than one intended position (employment opportunity) within that occupation. All intended places of employment shall be identified on the LCA; the employer may file one or more additional LCAs to identify additional places of employment. Separate LCAs must be filed for H-1B, H-1B1, and E-3 nonimmigrants.

(6) *Full-time and part-time jobs.* The position(s) covered by the LCA may be either full-time or part-time; full-time and part-time positions can not be combined on a single LCA.

(d) *What attestations does the LCA contain?* An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and § 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary an application stating that:

(1) The employer is offering and will offer during the period of authorized employment to H-1B nonimmigrants no less than the greater of the following wages (such offer to include

**§ 655.730**

**20 CFR Ch. V (4-1-16 Edition)**

benefits and eligibility for benefits provided as compensation for services, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers):

(i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or

(ii) The prevailing wage level for the occupational classification in the area of intended employment;

(2) The employer will provide working conditions for such nonimmigrants that will not adversely affect the working conditions of workers similarly employed (including benefits in the nature of working conditions, which are to be offered to the nonimmigrants on the same basis and in accordance with the same criteria as the employer offers such benefits to U.S. workers);

(3) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;

(4) The employer has provided and will provide notice of the filing of the labor condition application to:

(i)(A) The bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the H-1B nonimmigrants are sought, in the manner described in § 655.734(a)(1)(i); or

(B) If there is no such bargaining representative, affected workers by providing electronic notice of the filing of the LCA or by posting notice in conspicuous locations at the place(s) of employment, in the manner described in § 655.734(a)(1)(ii); and

(ii) H-1B nonimmigrants by providing a copy of the LCA to each H-1B nonimmigrant at the time that such nonimmigrant actually reports to work, in the manner described in § 655.734(a)(2).

(5) For applications filed regarding H-1B nonimmigrants only (and not applications regarding H-1B1 or E-3 nonimmigrants), the employer has determined its status concerning H-1B-dependency and/or willful violator (as described in § 655.736), has indicated such status, and if either such status is applicable to the employer, has indicated

whether the LCA will be used only for exempt H-1B nonimmigrant(s), as described in § 655.737.

(6) The employer has provided the information about the occupation required in paragraph (c) of this section.

(e) *Change in employer's corporate structure or identity.* (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Federal Employer Identification Number (FEIN)), *provided that* the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see § 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;

(ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s) who become employees of the new employing entity;

(iii) The Federal Employer Identification Number (FEIN) of the new employing entity (whether or not different from that of the predecessor entity); and

(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H-1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see § 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H-1B petition(s) when it hires any new H-1B nonimmigrant(s) or seeks extension(s) of H-1B status for existing H-1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H-1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H-1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H-1B nonimmigrant employees. However, the new employing entity shall comply with § 655.736 concerning H-1B-dependency and/or willful-violator status and § 655.737 concerning exempt H-1B nonimmigrants, in the event that such entity seeks to hire new H-1B nonimmigrant(s) or to extend the H-1B status of existing H-1B nonimmigrants. (See § 655.736(d)(6).)

[65 FR 80212, Dec. 20, 2000, as amended at 66 FR 63301, Dec. 5, 2001; 69 FR 68228, Nov. 23, 2004; 70 FR 72562, Dec. 5, 2005; 71 FR 35521, June 21, 2006; 73 FR 19949, Apr. 11, 2008]

**§ 655.731 What is the first LCA requirement, regarding wages?**

An employer seeking to employ H-1B nonimmigrants in a specialty occupation or as a fashion model of distinguished merit and ability shall state on Form ETA 9035 or 9035E that it will pay the H-1B nonimmigrant the required wage rate. For the purposes of this section, "H-1B" includes "E-3 and H-1B1" as well.

(a) *Establishing the wage requirement.* The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 or 9035E attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B nonimmigrant(s); that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the

prevailing wage (as specified in paragraph (a)(2) of this section). The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The *actual wage* is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. "Legitimate business factors," for purposes of this section, means those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards. Where there are other employees with substantially similar experience and qualifications in the specific employment in question—*i.e.*, they have substantially the same duties and responsibilities as the H-1B nonimmigrant—the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer. Where the employer's pay system or scale provides for adjustments during the period of the LCA—*e.g.*, cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage).

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an