Employment of Non-Immigrants on H-1B Visas

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

dol.gov/whd
1-866-4US-WAGE

Disclaimer

This presentation is intended as general information only and does not carry the force of legal opinion. The Department of Labor is providing this information as a public service. This information and related materials are presented to give the public access to information on Department of Labor programs. You should be aware that, while we try to keep the information timely and accurate, there will often be a delay between official publications of the materials and the modifications of these pages. Therefore, we make no express or implied guarantees. The *Federal Register* and the *Code of Federal Regulations* remain the official source for regulatory information published by the Department of Labor. We will make every effort to keep this information current and to correct errors brought to our attention.

What is the H-1B Program?

Immigration and Nationality Act (INA) of 1952

Amended by:

- Immigration Act of 1990 (IMMACT)
- American Competitiveness and Workforce Improvement Act of 1998 (ACWIA)
- H-1B Reform Act of 2004

Regulations:

- Title 20 CFR Part 655, Subparts H & I

H-1B Program Foundation

- 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.
- The visa is good for 3 years and can be renewed once.

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.

E-3 and H-1B1 Visa Programs

- The H-1B regulations are generally applicable to E-3 and H-1B1 workers.
- The E-3 visa classification applies to foreign nationals in specialty occupations from Australia.
- The H-1B1 visa classification applies to foreign nationals in specialty occupations from Chile and Singapore.
- The term “H-1B” includes “E-3” and “H-1B1” except as otherwise excluded in the regulations.

E-3 Visa Program

- Limited to 10,500 nationals of Australia.
- Limited to a 2-year period of employment.
- Requires an employer to file a Labor Condition Application (LCA) which establishes the conditions of employment.
- Extension beyond the 2-year period of employment requires the filing of a new LCA.

H-1B1 Visa Program

- Limited to 1,400 nationals from Chile and 5,400 nationals of Singapore.
- Limited to a 1-year period of employment.
- Requires an employer to file a Labor Condition Application (LCA) which establishes conditions of employment.
- Extensions are permitted in 1-year increments up to 2 extensions.

Agencies

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

Petition Fees

I-129 Petition Fee	Petition Fee (ACWIA)	Fraud Detection and Prevention Fee	Asylum Program Fee
$730 plus additional fees $460 plus additional fee	$750 for 1-25 employees $1,500 for 25 or more employees	$500	$300 for 1-25 employees $600 for 25 or more employees

Labor Condition Application (LCA)

LCA Requirements

LCA Requirements:

- Specification Requirement on LCA
- Required Wage
- Working Conditions
- No Strike/Lockout/Work Stoppage
- Notice of intent to hire H-1B workers
- Additional Attestations
- Public Disclosure Information

LCA Specifications

The employer must accurately specify:

- Number of workers sought
- Occupational classification
- Wage rate
- Conditions of employment

LCA Statements

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

Wages	Working Conditions
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.	The employer will provide working conditions (including hours, shifts, vacations, seniority-based benefits) which will not adversely affect similarly employed U.S. workers.

LCA Labor Conditions

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

- No 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 worker will be placed at a site with a strike/lockout

LCA Notice

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

- Provide notice of the filing of the LCA to workers employed in the occupational classification at the place of employment. The notice requirement can be accomplished by:
  - Bargaining representative
  - Physical posting in two conspicuous locations at each place of employment of H-1B workers
  - Electronic notification

LCA Additional Statements

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

- Additional requirements apply for “H-1B Dependent” and/or “Willful Violator” employers. These additional requirements include recruitment and hiring provisions and prohibitions on displacement of U.S. workers.

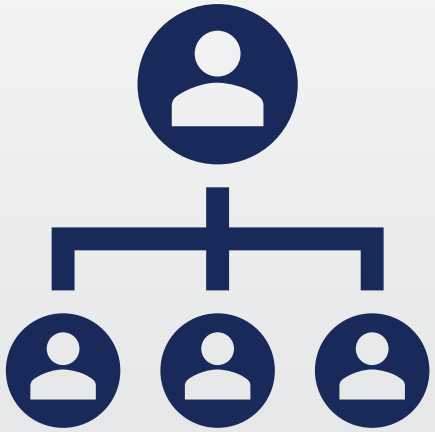
H-1B Dependent Employer

H-1B Dependent Employer defined

Willful Violator Employer

Willful Violator Employer defined:

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



Displacement

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 employed by the employer within 90 days before or after an H-1B visa petition is filed.

Secondary Displacement

- Employer must inquire of a secondary employer whether an H-1B worker will displace a similarly employed U.S. worker 90 days before and 90 days after the placement.

Recruitment and Hiring

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

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

Disclosure

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

WHD Enforcement Authority

WHD Enforcement Authority: H-1B

Enforcement authorities in an H-1B Investigation:

- Aggrieved party complaints
- Credible source information
- Secretary-certified investigations
- Random investigations of willful violators

Aggrieved Party

Aggrieved party complaints:

- A person or entity whose operations or interests are adversely affected by the employer's alleged noncompliance with the H-1B program.
- Alleged violation must have occurred within the previous 12 months of the filing of the complaint.

Credible Source

Information from a credible source:

A “Credible Source” is a person likely to have knowledge of the H-1B employer’s practices or employment conditions.

Alleged violations must be:

- Willful
- Pattern or practice; or
- Substantial affecting multiple employees

Alleged violation must have occurred within previous 12 months of the Secretary’s receipt of information from the source.

Secretary-Certified Investigations

- The statute authorizes the Secretary of Labor to certify an investigation under this authority.
- The Secretary of Labor (or Acting Secretary) must have reasonable cause to believe the employer is not in compliance with its LCA requirements.
- The Secretary must personally certify that reasonable cause exists and approve the investigation.
- The statute does not specify an investigatory window under this authority.

Random Investigations

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” .
- WHD may conduct random investigations of willful violator employers up to 5 years from the employer is determined to be a willful violator.
- DOL maintains a list of willful violator employers.

Compliance

Misrepresentation of Material Fact

A Material Fact is a significant item of information on the LCA:

- 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

Misrepresentation of a Material Fact, continued

- 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.

Required Wage

Wages:

- Employer must pay no less than the Required Wage Rate.

Required Wage Rate is the higher of -

(1) the actual wage paid to similar employees in the employer's own workforce or

(2) the prevailing wage for the occupation in which the H-1B worker is employed in the geographic area of intended employment

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.

Prevailing Wage

- Intended to reflect typical/average wages paid:
  - To all individuals in the same occupational class
  - Within the area of intended employment
- Variety of permissible sources/methodologies
- Should represent the most recent and accurate information available
- Must be no less than the minimum wage required by Federal, State, or local law

Prevailing Wage Sources

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

Prevailing Wage Resource

Occupational Employment and Wage Statistics (OEWS):

- The USDOL provides prevailing wage rates on its website: www.flag.dol.gov/wage-data/wage-search

Obligation to Pay Wages

The employer's obligation to pay the required wage commences on:

- The date when the H-1B worker first makes self available for work or otherwise comes under control of the employer.

But in any event cannot be later than:

- If the H-1B worker does not reside in the U.S., 30 days after that worker is admitted to the U.S.; **OR**
- If the H-1B worker already resides in the U.S., 60 days after that worker becomes eligible to work

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
- any condition caused by the employer
- any other condition **except** as specified in regulations

Failure to pay for nonproductive time is known informally as “benching.” Benching time must be compensated.

Nonproductive Time Payment

- 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.

Nonproductive Time - No Payment Required

Payment for nonproductive time is not required if the nonproductive status is due to conditions unrelated to employment that:

- Takes an employee away from work at his/her voluntary request or convenience; or
- Renders the employee unable to work.

Examples:

Voluntary absence for vacation

Caring for ill relative

Non-work-related car accident

Bona fide Termination

The employer's obligation to pay ceases only after a bona fide termination of employment, as indicated by **(ALL THREE REQUIRED):**

- Notification to the H-1B worker the employment relationship has been terminated;
- Notification to USCIS the employment relationship is canceled; AND
- 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.

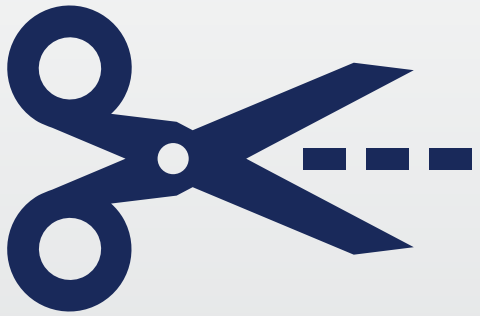
Wages Defined

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.

Authorized Deductions



Authorized Deductions from the required wage:

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

Other Deductions

Other authorized deductions from the required wage must meet ALL of the following criteria:

- Voluntarily authorized in writing by the employee, but not as a condition of employment
- Principally for the benefit of the employee
- Not a recoupment of employer's business expense
- 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 under the Consumer Credit Protection Act (CCPA)

Prohibited Deductions

Deductions from the required wage <u>may not</u> be taken:

- To recoup an employer's business expense
- As a penalty for early cessation of employment
- To recover any of the USCIS filing fees
- To cover the costs incurred in the petition process
- To recover the $500 Anti-Fraud Fee

Short-Term Placement

Short-Term Placement:

Employers may temporarily place an existing H-1B worker at a worksite without a new 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

Short-Term Placement Limitations

There can be no strike/lockout at placement site

There can be no LCA for that geographic area of employment

H-1B worker does not exceed 30 workdays within a one-year period

Plus, an additional 30 workdays if certain criteria are met.

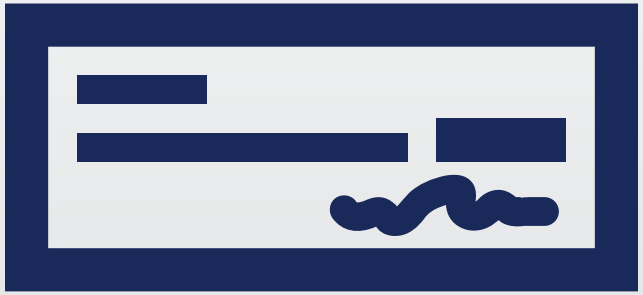
Penalties and Liquidated Damages

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

- 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

Last Paycheck

Last paychecks may not be withheld by the employer to recover liquidated damages.



LCA Notice Requirements

As explained earlier in the presentation, 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.

Direct Displacement

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 was employed by the violating H-1B employer

Secondary Displacement

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

Recruitment

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

- 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).

Job Offer

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 who applies.
- Enforced by the Department of Justice, not by the Wage and Hour Division.

Exempt H-1B Workers

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

Whistleblower Protection

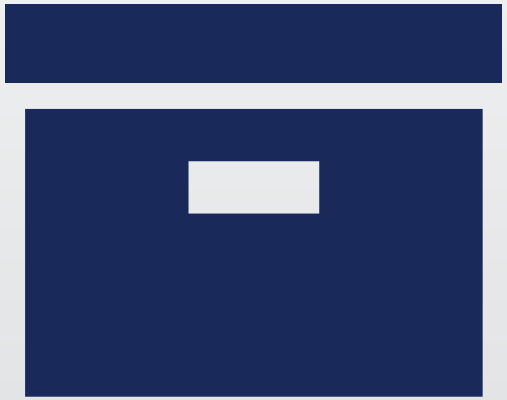
The employer may not retaliate against any current, former, or prospective employee for asserting H-1B rights or cooperating in H-1B enforcement.

Records

Employer Records

Public Access File:

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



Public Access

Public Access File Includes:

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

Files

Public Access File includes, continued:

- Notification documentation
- Change in corporate structure statement
- “Single Employer” entities
- List of “exempt” H-1B workers
- Summary and time frame of recruitment efforts

Maintenance

The employer must also maintain the following records:

- Complete Petition Package
- Payroll and basic records
- Worker name, address, social security number, occupation
- Benefit Plans
- Record of dependency determination

Determination of Findings

Determination Letters

When the investigation is complete, the Wage and Hour Division issues a determination letter listing any violations found and remedies offering the employer and interested parties an opportunity to appeal the findings.

Violation Categories

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

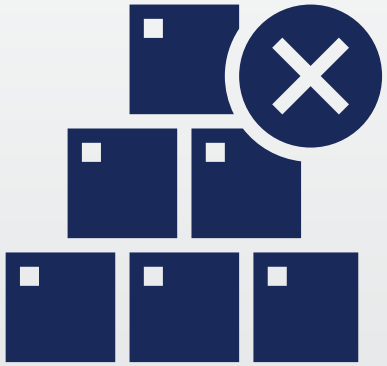
Violation Categories, continued

- Recruitment
- Petition Fees
- Early cessation penalty
- Discrimination of protected conduct
- Failure to make available public access documents
- Failure to maintain documentation
- Failure to cooperate in a Wage and Hour Division investigation
- Failure to comply with the regulations

Levels

Levels of Violation:

- Non-willful Failure
- Substantial Failure
- Willful Failure
- Willful and Substantial Failure



Good Faith Defense

- 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

No Fines or Penalties

An employer found during an investigation to have violated the prevailing wage requirements will not be assessed fines or penalties if the employer can establish that the way the prevailing wage was calculated was consistent with industry standards and practices.

Remedies

Back Wages

Fringe Benefit Reimbursements

Civil Money Penalties (CMPs)

Debarment for 1-3 years

Compliance

Displacement of U.S. Workers

- "Super Penalty" Violation
  - A three-year debarment and Civil Money Penalty (CMP) per violation may be assessed where an employer (in a final determination) was found to have a willful violation, during 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.

Displacement of U.S. Workers , continued

- "Super Penalty" Violation, continued
  - Applies to all H-1B employers, not just H-1B dependent and/or willful violator employers.
  - Applies only where the displaced U.S. worker was employed by the violating H-1B employer.

For More Information

Online H-1B resources:

- H-1B complaint form (Form WH-4)
- Wage and Hour Division office locations
- H-1B Program- U.S. Department of Labor
- The Foreign Labor Certification Data Center
    - LCA filing information
    - Prevailing wage rates

Have questions later?

Please call us at 1-866-4US-WAGE
Or go to our website: dol.gov/whd

Follow us on social media: