Labor Condition Applications and Prevailing Wage Determinations

Certain non-immigrant visas for specialty occupations, including the H-1B visas, H-1B1, and E-3 visas, require the employer to submit a Labor Condition Application (Form ETA 9035/9035E) in which the employer sets out the standards to which it will adhere for the position it is seeking to fill with a foreign worker. The LCA must be certified by the Department of Labor and included as part of the visa applications for the specialty occupations.

In addition to providing the details regarding the proposed employment, the LCA has four primary attestations which must be made by the employer:

(1) Wages: The employer shall pay nonimmigrant workers at least the prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. The employer shall offer nonimmigrant workers benefits and eligibility for benefits provided as compensation for services on the same basis as the employer offers to U.S. workers. The employer shall not make deductions to recoup a business expense(s) of the employer including attorney fees and other costs connected to the performance of H-1B, H-1B1, or E-3 program functions which are required to be performed by the employer. This includes expenses related to the preparation and filing of this LCA and related visa petition information. 20 CFR 655.731;

(2) Working Conditions: The employer shall provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed. The employer's obligation regarding working conditions shall extend for the duration of the validity period of the certified LCA or the period during which the worker(s) working pursuant to this LCA is employed by the employer, whichever is longer. 20 CFR 655.732;

(3) Strike, Lockout, or Work Stoppage: At the time of filing this LCA, the employer is not involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area(s) of intended employment. The employer will notify the Department of Labor within 3 days of the occurrence of a strike or lockout in the occupation, and in that event the LCA will not be used to support a petition filing with the U.S. Citizenship and Immigration Services (USCIS) until the DOL Employment and Training Administration (ETA) determines that the strike or lockout has ended. 20 CFR 655.733; and

(4) Notice: Notice of the LCA filing was provided no more than 30 days before the filing of this LCA or will be provided on the day this LCA is filed to the bargaining representative in the occupation and area of intended employment, or if there is no bargaining representative, to workers in the occupation at the place(s) of employment either by electronic or physical posting. This notice was or will be posted for a total period of 10 days, except that if employees are provided individual direct notice by e-mail, notification need only be given once. A copy of the notice documentation will be maintained in the employer's public access file. A copy of this LCA will be provided to each nonimmigrant worker employed pursuant to the LCA. The employer shall, no later than the date the worker(s) report to work at the place(s) of employment, provide a signed copy of the certified LCA to the worker(s) working pursuant to this LCA. 20 CFR 655.734.

With respect to the prevailing wage, the required wage rate must be the higher of (a) the **actual wage rate** (the rate the employer pays to all other individuals with similar experience and qualifications who are performing the same job), or (b) the **prevailing wage** (a wage that is predominantly paid to workers in the same occupational classification in the area of intended employment at the time the application is filed). In addition, an employer is not permitted to pay a wage that is lower than a wage required under any other applicable Federal, State or local law. Employers are encouraged, but not required, to obtain a prevailing wage from the National Prevailing Wage Center (NPWC).

The actual wage is "either the amount paid to other employees or the actual wage paid to the H-1B employee if no other employees exist in that position at the place of employment." *Kurzban Immigration Law Sourcebook, 14th Ed.*, Ch. 5, Section VII(C)(3)(c)(1); 20 C.F.R. Section 655.731(a)(1). The "prevailing wage" is determined by the NPWC through the iCert portal on a national basis.

There are essentially three ways to prove the prevailing wage:

1) The employer can request the wage rate from the NPWC. Wage rates obtained from NPWC are the most likely to be approved and not questioned further. The employer files Form 9141 through the iCERT system to the NPWC. The DOL will determine the prevailing wage based on a collective bargaining agreement if one exists; if not, the DOL shall establish the prevailing wage based on "the best information available that is the arithmetic mean of the wages of workers similarly employed in the area of the intended employment." *Kurzban Immigration Law Sourcebook, 14th Ed.*, Ch. 5, Section VII(C)(3)(d). Wages are available for each occupation through O*NET's occupation classification system at four levels (entry, qualified, experienced and fully competent.)

2) If the employer has a Collective Bargaining Agreement, Davis-Bacon Act wage, or McNamara O'Hara Service Contract Act wage for the LCA, this can be entered as the prevailing wage.

3) Alternatively, the employer may attempt to prove the prevailing wage based on a survey that is "the median wage of workers similarly employed in the area of intended employment conducted by an 'independent authoritative source.'" *Kurzban Immigration Law Sourcebook, 14th Ed.*, Ch. 5, Section VII(C)(3)(d)(7)(a). Such an "independent authoritative source" can mean a survey of wages published in a "book, newspaper, periodical, loose-leaf service, newsletter, or other similar medium. It must be the last published survey of the source, conducted within the past 24 months. If another legitimate source is used, the employer must demonstrate the legitimacy of the wage if an investivgation is conducted." *Kurzban Immigration Law Sourcebook, 14th Ed.*, Ch. 5, Section VII(C)(3)(d)(7)(a); 20 CFR Section 655.731(a)(2)(ii)(C).

   If the employer does present such an alternate survey, it must contain a large volume of supporting information, including:
   - The name of the published survey;
   - The publication schedule for the survey;
   - When the data was collected;
   - A description of the job duties or activities used in the survey;
   - The methodology used in the survey, including how the universe is defined, how the sample size was determined, how the participants were selected including the number of employers surveyed for the occupation in the area and the number of wage value responses, a list of employer participats or an explanation of how the cross industry nature of the survey was maintained, how the presented wage was determined and if it was a mean or medium;
   - Any other appropriate methodological information and
   - The area covered by the survey.

Kurzban Immigration Law Sourcebook, 14th Ed., Ch. 5, Section VII(C)(3)(d)(7)(b).

There are a number of additional considerations and requirements in submitting the prevailing wage determination. The NPWC is not the *only* way to prove the prevailing wage, but it is the safest!

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