

Advanced Issues in H-1B Processing

Elaine Kimbrell
Attorney-at-Law
Ware | Gasparian
elaine@david-ware.com
1-800-537-0179



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Advanced Issues in H-1B Processing

- What is an H-1B?
- Prevailing Wages, Public Access Files and Labor Condition Applications
- H-1Bs for physicians, coaches and RFE trends
- Deemed Exports
- I-9 issues
- Hot Topics- Government shutdown and site visits

What is an H1B?

- H1B is the principal immigration status available for persons temporarily working in professional level jobs (“specialty occupations”) in the US.
- It generally requires that the employee have at least a four year degree or equivalent *AND that the position require a minimum of a bachelor’s degree.*



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How do you prepare and file an H-1B?

- Review job description and identify an SOC
- Prepare PWD or indentify wage source and PW
- Prepare postings, LCA and file LCA
- Prepare Public Access File
- Prepare I-129 and H supplements to submit to CIS with certified LCA



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Prevailing Wages

- 1st attestation on the LCA – employer must pay the higher of the prevailing wage or actual wage = required wage *See* 20 CFR §§750(a)(3);
- What's the actual wage – wage paid to other workers who have substantially the same experience and qualifications – may establish a wage range. [20 CFR §655.731\(a\)\(1\)](#).
- Only 1 worker in the position, wage = actual wage



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Prevailing Wages

- Should you obtain a PWD from the National Prevailing Wage and Helpdesk Center (NPWHC)?
 - Creates a presumption that the employer complied with the PW requirement. [20 CFR §655.731\(a\)\(2\)\(ii\)\(A\)\(3\)](#).
 - If no survey provided, NPWHC uses OES
- Combination of occupations?
 - NPWHC uses O*NET to identify skills normally associated with an occupation, if duties atypical, a point will be added
 - Look to see if skill set crosses disciplines
 - Special skills – travel, combination of occupations, foreign language skills, licenses and certifications if not normal
 - http://www.nafsa.org/Find_Resources/Supporting_International_Students_And_Scholars/ISS_Issues/Issues/DOL_FAQs_On_Prevailing_Wage_Determinations_For_Combinations_Of_Occupations/



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Prevailing Wages – Using OES

- What if there is no ACWIA wage?
- The NPWC must issue an ACWIA wage for all institutions covered by ACWIA. When a SOC is assigned to an occupation that does not have an ACWIA wage, the NPWC will use wages for the closest occupation where an ACWIA Higher Education wage is available. The NPWC will enter an explanation of the assigned wage into the Additional Notes section of the PWD

See

<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#wage5>



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Postdoctoral Fellows

- Are all postdoc positions considered entry level? No. The NPWC considers a Postdoctoral Fellow position as entry level unless the position requires significant experience. If the employer requires significant experience and/or training for a Postdoctoral Fellow position, the NPWC may issue a wage higher than a level one. Additionally, if the position requires supervising other postdoctoral fellows or has other significant special requirements or duties, the wage issued may be higher than a level one.
- <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#pwds4>



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R&D vs. non R&D

- **In order to issue a Prevailing Wage Determination (PWD), how does the NPWC decide between Research & Development (R&D) and non-R&D occupations under the American Competitiveness and Workforce Improvement Act (ACWIA)?**

R&D positions directly conduct or support a research effort. Non-R&D positions support administrative functions such as finance and technical facilities support. Employers should provide clear job duties that explain if the position supports R&D or non-R&D.

When the position combines elements from both R&D and non-R&D occupations, the NPWC will select the occupation with the highest wage in the same manner as other combinations of occupations. The PWD will only show the occupation with the highest wage.

- <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#pwds4>



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Prevailing Wages – Timing

- NPWHC takes approximately 60 days to get PWD
- Should you file a PWD as a safeguard even though you have a certified LCA and already filed the H-1B?
- When does an ER have to start paying the required wage?
 - Within 30 days of entry if overseas; or
 - Within 60 days of employee's change of status if in the US.



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Employer must pay the costs

- Regulations require the employer to pay the ACWIA fee but higher ed is exempt
- So, can the employee pay the rest?
- The employee cannot pay legal or filing fees if:
 - Paying any or all of the fees would push the employee below the “required” wage.
- Recent case law and DOL guidance indicate that an employer must pay all legal and filing fees as it results in an impermissible wage reduction.
- What about the premium processing fee?



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The Public Access File (PAF)

- ER is required to create a PAF and make it available for inspection within one working day after LCA is filed. [20 CFR §655.760](#)
- PAF must contain
 - Certified LCA w/original signature and cover
 - Wage rate to be paid to H-1B worker
 - Actual wage docs and periodic raise info
 - PW docs
 - Posting and notification docs
 - Summary of benefits offered to US workers in same classification
 - Should you include anything else?



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PAF

- Must provide copy of the certified LCA to the employee before they begin H-1B employment
- Must post notice of filing on or w/in 30 days before filing
- Retained for one year beyond the last date of which any H-1B employee is employed under the LCA



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H-1B Physicians

- There are three types of employment that encompass the positions that most IMGs tend to fill:
 - 1) Research and/or teaching positions, *e.g.*, positions with academic institutions.
 - 2) Clinical positions as practicing medical doctors.
 - 3) Positions intended to fulfill graduate medical training, *e.g.*, residencies or fellowships.



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Research and/or Teaching Physicians

- May only fulfill clinical responsibilities that are incidental to their teaching responsibilities. 8 CFR §214.2(h)(4)(viii)(B)(1).
- What is incidental patient care? Not defined.
 - If they have the credentials, include them.
 - If not, emphasize minimum patient care only necessary to teach



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Clinical Positions

- Credentialing and Licensure
 - Graduated from accredited medical school in US or equivalent
 - Most states consider graduate medical education in Canada = US medical degree
 - Passed USMLE (if older FLEX/NBME) – may still need degree evaluation
 - English competency
 - If evidence of work authorization is required to get license, USCIS will issue a 1 year H, *see* USCIS Memorandum, D. Neufeld, “Adjudicators Field Manual Update: Chapter 31:



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J-2 Change of status to H-1B after J-1 Waiver Approval

- DOS takes the position that both J-1 and J-2 are independently subject
- USCIS has recently denied some COS to H-1B for IMG J-2 dependents, stating only H-4 available until J-1 fulfills 3 year requirements
- Solutions
 - Consular process H-1B for J-2
 - File for COS to H-4 than COS to H-1B



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H-1B vs. LCA SOC

- INA s. 212(n)(1) – LCA must be filed in occupational classification “based on best information available.” SOC on I-129 and LCA must match.
- ISSUE - Assistant Professors of Medicine – on I-129 use same SOC as LCA/PWD but SOC doesn’t include clinical responsibilities
 - Original Answer: CIS looks to a nexus between the offered position duties and the SOC O*NET Code, CIS may deny if it believes the code is incorrect and encourages petition to address the issue with the DOL. AILA/SCOPS – August 14, 2013
 - CIS is addressing issue with DOL and CIS Counsel – AILA/SCOPS – Sept. 24, 2013



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H-1B for Coaches

- Is it a specialty occupation?
 - An occupation that requires the theoretical and practical application of a body of highly specialized knowledge, and 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 United States.
INA §214(i)



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H-1Bs for Coaches

8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4) list four criteria and require that a specialty occupation position meet only one of the four criteria. These four criteria are as follows:

- A baccalaureate or higher degree or its equivalent *in the specific specialty* is normally the minimum requirement for entry into the particular position;
- The degree requirement *in the specific specialty* is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree *in the specific specialty*;
- The employer normally requires a degree or its equivalent *in the specific specialty* for the position; or
- The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree *in the specific specialty*.



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H-1Bs for Coaches

- USCIS takes the position that a coaching position does not require a degree in a specific specialty and is not a specialty occupation
- USCIS cites the OOH – “no specific education requirement” BUT “college coaches must usually have a bachelor’s degree. Degree programs specifically related to coaching include exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine.”



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H-1B RFEs for Coaches

- How to successfully respond to an H-1B RFE
 - Anticipate the RFE and advertise for specific degree
 - Challenge reliance on OOH – “the *Handbook* provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. The *Handbook*, therefore, is not intended, and should never be used, for any legal purpose.”

<http://www.bls.gov/ooh/about/acknowledgements-and-important-note.htm>



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H-1B RFEs for Coaches

- Get an evaluation to say experience = BA in Coaching
- What can you do with the degree information?
- Letters/coach profiles from other similar schools
- Find similar job postings
- Combine with instructor position
- Use AAO cases
- <http://www.careerinfonet.org/>



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H-1B when COS Pending

- USCIS routinely approved H-1Bs when another bridge petition was pending (i.e., COS to H-4 or F-1)
- Recent trend in RFE's requesting adjudication of "bridge petition" before H-1B approved
- Solution premium process pending application, if available, or consular process



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Export Control

- Added question on I-129 for H-1B, H-1B1, L-1 or O-1
- Petitioner certifies that they have reviewed International Traffic in Arms Regulations (ITAR) and Export Admin. Regulations (EAR), made a license determination and, will prevent access to controlled technology or data until an export license is obtained



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Export Controls – Who are you dealing with?

- DOC's Bureau of Industry and Security (BIS) – EAR governs
- DOS' Directorate of Defense Trade Controls (DDTC) – ITAR governs



Key Concepts

- Foreign Person
 - ITAR – person who is not a USC, lawful permanent resident - look at country of birth and citizenship
 - EAR – person who is not a USC, LPR – look at country of citizenship only
- Technology (EAR) - as specific information necessary for the development, production, or use of a product. This includes, in general, blueprints, drawings, photographs, plans, instructions and documentation related to commercial and some dual-use items.
- Technical Data (ITAR) - information required for the design, development, production, manufacture, assembly, operation, repair testing, maintenance, or modification of defense articles. This includes, in general, blueprints, drawings, photographs, plans, instructions, and documentation related to a defense and some dual-use articles and services.



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What's Not Technical Data/Technology?

- Under ITAR, technical data are not:
 - Information in the public domain;
 - Information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities; or
 - Basic marketing information on function or purpose or general system descriptions of defense articles.
- As per Part 734 of EAR, “technology” is not subject to BIS’s control if it is:
 - Already published or will be published;
 - Arising during or resulting from fundamental research;
 - Educational; or
 - Included in certain patent applications.



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Fundamental vs. Proprietary Research

- Fundamental Research is exempt - is basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community.
- Proprietary research (controlled development tech) may be subject – look at research and the contract terms for release of the results

How to deal with deemed exports?

- Establish an export compliance program:
 - Organization structure
 - Corporate commitment and policy
 - Identification, receipt and tracking of ITAR/EAR controlled items/technical data and technology
 - Restricted/prohibited exports and transfers
 - Recordkeeping
 - Internal monitoring
 - Training
 - Violations and penalties



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Why care about deemed exports?

- Penalties are hefty!
- ITAR penalties include, but are not limited to:
 - Up to \$1 million fine per criminal violation, or imprisonment of up to 10 years or both;
 - Up to \$500,000 fine per civil violation (note: there can be multiple violations), and possibly also:
 - Seizure and forfeiture of goods;
 - Prohibited from engaging export activity;
 - Interim suspension with direct or indirect prohibition of exporting goods;
 - Debarment from federal government contracts.
- Penalties for violating EAR include, but are not limited to:
 - Up to 20 years imprisonment and \$1 million per criminal violation;
 - Up to \$250,000 per civil violation or twice the value of the export (whichever is greater);
 - Prohibition from engaging in export activity.



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Terminating an H-1B Employee

- Must take follow 20 CFR §655.731(c)(7)(iii):
 - (1) the employee must be notified of the termination;
 - (2) U.S. Citizenship and Immigration Services (USCIS) must be notified that the employment relationship has terminated so that the Form I-129, Petition for a Nonimmigrant Worker, is cancelled;
 - (3) Must withdraw the LCA from the DOL; and
 - (4) Must *offer* to pay for reasonable costs of return transportation to the home country.
- Status terminates on day employment ends not severance



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Wage changes & Furloughs

- Across the board pay cut
 - Make sure still meet required wage and update actual wage information in PAF
- Furlough – Employer must pay during nonproductive time at the discretion of the employer
- Nonproductive time at request of employee is permitted – FMLA/Maternity leave
- Be sure to document any changes in the PAF



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Does your employee work offsite?

- Must list all work locations on the LCA
- Can work at unanticipated work locations as long as they are within the area of intended employment – commuting distance but must post first
- Incidental travel does not count
- Regular and continuous travel to a location to perform duties as an instructor require additional steps
- Best practice - if filing a new LCA need to file amended H



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What about short-term placement?

- What is short-term placement? Sent to a new site not covered by the LCA up to 60 days per year, if:
 - (1) the H-1B holder continues to maintain an office or work station at the permanent worksite;
 - (2) the H-1B holder continues to spend a substantial amount of time at the permanent worksite in a one-year period; and
 - (3) the H-1B holder's U.S. residence or place of abode is located in the area of the permanent worksite.

[20 CFR §655.735\(c\)](#)



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Short term placement for Conrad Physicians

- Must work 40 hours per week in certain area or areas within the state
- Must consult with state's Conrad 30 coordinator before moving to a new location
- Usually will need to provide proof that new location is in a HPSA and serves indigent population



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H-1Bs and I-9 issues

- How do you document a timely filed H-1B extension on the I-9?
 - Write “240- Day Ext ” and enter the date you submitted Form I-129 to USCIS in the margin of Form I-9 next to Section 2
 - Reverify the employee’s employment authorization in Section 3 once you receive a decision on the H-1B petition or by the end of the 240-day period, whichever comes first.
 - <http://www.uscis.gov/files/form/m-274.pdf>



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H-1Bs and I-9 Issues

- How do you document the I-9 to reflect H-1B portability?
 - Write “AC-21” and enter the date you submitted Form I-129 to USCIS in the margin of Form I-9 next to Section 2
 - Reverify when petition approved and enter relevant information



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H-1Bs and Government Shutdown

- October 18, 2013 announcement
- USCIS will consider the government shutdown as an extraordinary circumstance and excuse late filing if an H-1B petitioner submits evidence establishing that the primary reason for failing to timely file an extension of stay or change of status request was due to the government shutdown.
- Under 8 CFR 214.2(c)(4), CIS has discretion to excuse late filings
- See <http://www.foreignlaborcert.doleta.gov/>



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Preparing for residence

- When should you start?
 - Must have I-140/Labor cert filed before the end of the 5th year to extend beyond normal 6 years of H-1B
 - Start early!
 - For faculty/staff with teaching responsibilities remember 18 month cut off
- If labor cert. application or immigrant petition is filed more than 365 days before 6th year of H-1B expires, H-1B and H-4s can be extended beyond 6 years (start LPR process early!)
- If I-140 is approved but backlog prevents filing AOS, H-1B/H-4 status can be extended beyond 6 years
- Once AOS application is filed, applicant can get work card and travel document and/or continue to maintain H-1B status
 - *Usually a good idea to maintain H-1B status until green card arrives*
- After AOS application has been pending 180 days, employee can move to a new employer, similar employment, and not “cancel” application, but complicated and risky so get legal advice



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Preparing for residence

- 1 year vs. 3 year H-1B extension
 - 1 year extension available if Labor Cert/I-140 filed at least 365 days prior to the end of the 6 years or approved I-140 and current priority date
 - 3 year extension with approved I-140 and PD not current
- If PERM or I-140 denied, may need to appeal to get further extensions.



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H-1B site visits

- Started in earnest in 2008
- Funded through the H-1B “fraud fee”
- CIS say it is random
- 17,307 conducted in FY 2011
- In FY 2011, 13,484 of petitions were “Verified.”
- Purpose is to verify the company exists and that the H-1B worker is appropriately employed
- Visits are post-adjudication of the H-1B petition (?)
- Unannounced
- FDNS has indicated that it does not need a subpoena in order to complete the site visit because USCIS regulations governing the filing of immigration petitions allow the government to take testimony and conduct broad investigations relating to the petitions.



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H-1B Site Visits

- Generally are conducted by contractors who have been equipped with a set of specific questions, primarily reaching the issues of:
 - whether there's really an employer there,
 - whether the employer knows it filed the petition,
 - and whether the beneficiary is doing the work and receiving the wage indicated on the petition.
- Visits may occur at the H-1B employer's principal place of business and/or at the H-1B nonimmigrant's work location
- Inaccurate information, even if innocently provided, can cause complications for employer and employee



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H-1B Site Visits

- Questions usually are about a specific petition, not all petitions but may ask about counsel, previous petitions, etc.
- Typical Questions:
 - Start date of employee
 - Geographic location/ physical address where employee works
 - Job duties/Job title
 - Specific information about the company, including, but not limited to, the employer's business, locations, and number of employees
 - May ask what legal fees were paid, who paid them, who paid the filing fees
- May request to review a copy of the company's tax returns, quarterly wage reports, and/or other company documentation to evidence that it is a bona fide business; May request a copy of the most recent pay stub or W-2
- Confirm signature is legitimate
- CIS states that the site inspector is provided the names of the petitioner and beneficiary, the address of the worksite, hours of operation (if included in the file), number of employees (if included in the file), and the beneficiary's occupation, salary, and description of duties; Labor Condition Application (LCA); and the employment letter.
- Follow up by phone or email from CIS



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