



Office of the
Citizenship and Immigration Services Ombudsman

U.S. Department of Homeland Security
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Homeland
Security

TEMPORARY ACCEPTANCE OF FILED LABOR CONDITION APPLICATIONS (LCAs) FOR CERTAIN H-1B FILINGS

October 23, 2009

The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with the U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

EXECUTIVE SUMMARY

In August and September 2009, the Ombudsman received complaints concerning H-1B cases with incorrectly denied Labor Condition Applications (LCA/ETA-9035) filed with the U.S. Department of Labor (DOL). LCA processing delays and errors at DOL, when coupled with USCIS' current H-1B petition initial filing requirements, are prejudicing employers and individuals who are unable to timely file original or extension H-1B visa petitions. Untimely H-1B petition filings lead to problems, including: (1) the potential loss of employees' legal status; (2) business operation disruptions due to the loss of continuity in the employment of key employees; and (3) economic loss to employees in the form of lost wages and costs of travel overseas due to loss of status. USCIS has the authority to mitigate the impact upon these customers.

To mitigate the impact of LCA processing difficulties, the Ombudsman recommends that USCIS:

- (1) **Reinstate USCIS' previous practice of temporarily accepting an H-1B petition (Form I-129) supported by proof of timely filing of an LCA application with DOL, and issue a Request for Evidence (RFE) whereby the H-1B petitioner later provides the certified LCA; and**
- (2) **Establish a temporary policy under which USCIS would excuse late H-1B filings where the petitioner has documented an LCA submission to DOL that was improperly rejected.**

BACKGROUND

Pursuant to the Immigration and Nationality Act (INA) § 212(n)(1), USCIS may not approve an H-1B petition without a supporting certified LCA. However, the INA does not prohibit acceptance of the petition filing without the certified LCA. The applicable regulation,

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8 C.F.R. § 214.2(h)(4)(i)(B) (2008), states that “[b]efore filing a petition for H-1B classification ..., the petitioner shall obtain a certification from the Department of Labor that it has filed a [L]abor [C]ondition [A]pplication ...” [emphasis added]. Further, the June 12, 2009, revision to the “Instructions for Form I-129” state, in relevant part (*see* p. 3), that “[t]he petition must be filed by the U.S. employer and must be filed with: 1. Evidence that a [L]abor [C]ondition [A]pplication has been filed with the U.S. Department of Labor ...” [emphasis added]. However, USCIS currently requires that petitioners include a certified LCA with their H-1B petition.

Stakeholders have detailed to the Ombudsman errors stemming from the new DOL LCA certification process, iCERT, launched on April 15, 2009.¹ For example, DOL is denying LCAs based on false FEIN (Federal Employer Identification Number) mismatches with DOL’s database. Both DOL and USCIS indicated to the Ombudsman that cases involving LCA certification problems represent up to seven percent of total iCERT filings from April 15, 2009 through the beginning of August 2009 (approximately 2,900 denials out of approximately 41,700 LCAs submitted). The Ombudsman understands that neither DOL nor USCIS can specify the exact number of incorrect LCA denials.

In 1992,² the legacy Immigration and Naturalization Service (INS) responded to LCA processing problems occurring at DOL at that time by accepting H-1B filings accompanied by evidence of an LCA filing, and subsequently issuing an RFE to obtain the later-approved LCA. This approach permitted customers to meet filing requirements, preserve legal status, and avoid employment disruptions until DOL was able to address its underlying LCA processing problems.

ANALYSIS

Despite DOL’s jurisdictional ownership of H-1B-related LCA processing problems, these difficulties extend to USCIS through the agency’s requirement that petition filings include certified LCAs. Any costs to USCIS such as issuing RFEs or temporarily lowering production levels, are outweighed by the burden that incorrect denials have on employers and individuals. USCIS currently has the capacity to make what amounts to a minor processing modification to address a temporary situation.

Given that Form I-129 instructions say a petitioner must provide evidence that an LCA has been filed with DOL, and that USCIS has previously accommodated petitioners in nearly the same circumstances, implementing these recommendations as a temporary solution is warranted.

¹ Under 20 C.F.R. § 655.740(a)(1) (2009), DOL allows itself up to seven working days to certify LCAs.

² A March 5, 1992, memo from INS Assistant Commissioner Lawrence Weinig stated “petitions for H-1B nonimmigrants do not have to be accompanied by an approved [L]abor [C]ondition [A]pplication. Instead, petitions for H-1B nonimmigrants must now be accompanied by a certification from the Secretary of Labor that the petitioner has filed a [L]abor [C]ondition [A]pplication with the Department of Labor The certification will be a copy of the original ETA 9035 filed by the petitioner with the Department of Labor with the Department of Labor’s stamp affixed to the form.” The Ombudsman understands that USCIS reaffirmed this approach as recently as 2001.