ABC's OF H-1Bs (THIS IS PART 2 OF AN 8 PART SERIES). HOW MUCH DO PROSPECTIVE H-1B EMPLOYERS NEED TO PAY TO H-1B EMPLOYEES AND WHY THE FEDERALLY MANDATED PREVAILING WAGE IS SO IMPORTANT.

By: David H. Nachman, Esq., Michael Phulwani, Esq. and Ludka Zimovcak, Esq.

Employers who seek to hire an H-1B nonimmigrant in a specialty occupation must first make a filing with the Department of Labor (DOL) and obtain a Labor Condition Application (LCA). The LCA, among other things, must specify the number of workers sought, the occupational classification in which the H-1B will be employed, and the wage rate and conditions under which the proposed H-1B nonimmigrant will be employed. Additionally, the employer must attest that it is offering, and will continue to offer, during the period of H-1B employment, the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment position in question; OR (2) the prevailing wage level for the occupational classification in the intended area of employment.

If required to pay the prevailing wage, the wage must be 100% of the prevailing wage. The prevailing wage is determined for the occupational classification in the area of intended employment and must be determined as of the time of the filing of the LCA[i]. The regulations require that the prevailing wage be based upon the best information available. An employer that fails to pay wages as required is liable for back wages equal to the difference between the amount that should have been paid and the amount that was actually paid.

The prevailing wage could be determined by a Collective Bargaining Agreement (CBA) if one exists that pertains to the occupation at the place of intended employment. If the job offer is for an occupation not covered by a CBA and the employer does not choose to provide a survey or request the use of a current wage determination in the area, the wage component of the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey[ii] should be used to determine the prevailing wage rate for the prevailing wage in connection with an employer's job offer.

Although employers are not required to keep and maintain position descriptions, the regulations do require an employer to keep and maintain a copy of the documentation the employer used to establish the 'prevailing wage' for the occupation for which the H-1B nonimmigrant is sought or the underlying individual wage data relied upon to determine the prevailing wage. This information may have to be made available to the public (if requested) or it may have to be made available to the DOL upon request or in connection with an enforcement action.

The Federal regulations governing the H-1B nonimmigrant visa require the Administrator, Wage and Hour Division (WHD)[iii], to determine whether an employer has the proper documentation to support its wage attestation. Where the documentation is nonexistent or insufficient to determine the prevailing wage, or where the employer has been unable to demonstrate that the prevailing wage determined by an alternate wage source is in accordance with the regulatory criteria, the Administrator may contact the Employment and Training Administration (ETA)[iv], a part of DOL, to get the prevailing wage.

Once the ETA provides the prevailing wage, the Administrator is bound to use this determination as the basis for determining violations and for computing back wages, if such wages are found to be owed by an H-1B employer. It is important to highlight that the regulation is permissive, and the ETA's determination is merely an option that the Administrator can use in its investigation(s). This option is rarely used by Administrators during investigations. If the employer fails to support, through proper documentation, how it arrived at the prevailing wage level, the Administrator can use the employer's Letter of Support and Form I-129 submitted to the United States and Citizenship Services (USCIS) in connection with the H-1B petition to determine whether the employee was appropriately classified at the specific wage level. Thus, the alternative of not keeping documents used in the determination of appropriate wage level is to maintain the compatibility between the LCA and H-1B petition.

The nature of the job offer, the area of intended employment, and job duties for workers that are similarly employed are the relevant factors that are to be used in determining a prevailing wage rate. In determining the nature of the job offer, the first thing to consider is the requirements of the employer's job offer. “Area of intended employment” means the area within normal commuting distance of the place (address) of intended employment. The regulations define “similarly employed” as substantially comparable jobs in the occupational category in the area of intended employment[v]. The required work and education and/or experience for a job impact the determination of the prevailing wage level.

ETA provides guidance for determining the proper wage level for a position. Level I wage rates are assigned to job offers for beginning or entry-level employees who have only a basic level of understanding of the occupation. Level I employees perform routine tasks that often require limited exercise of judgment. The guidance states that Level II wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment.

Level III wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), or 'head' (head nurse) would be indicators that a Level III wage should be considered. The Level IV wage level applies to highly-competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Level IV employees generally hold management and/or supervisory roles and responsibilities.

To better understand how the wage levels apply, consider an example of a job position that requires either two years or more of experience or a Masters' degree or higher. Taking into consideration the above-mentioned guidelines, the employer should use either a Level II or higher prevailing wage rate. It is important to mention that if an entry level job has additional requirements or duties beyond that of those ordinarily required; the employer should refrain from using a Level I prevailing wage.

To summarize, an employer hiring an H-1B worker is required to pay the higher of the actual wage or the prevailing wage. If paying the prevailing wage, the wage must be 100% of the prevailing wage. Further, the determination of the prevailing wage depends upon whether the occupation is covered by CBA or not. If the job offer is for an occupation not covered by a CBA and the employer does not choose to provide a survey or request use of a current wage determination in the area, the wage component of the OES survey should be used to determine the prevailing wage.

The employer is required to keep a copy of the documents used to determine the appropriate wage level. If the employer fails to provide such documents, the WHD Administrator may either contact the ETA to get the prevailing wage for the offered position OR refer to the Letter of Support and/or I-129 Forms submitted to the USCIS with the H-1B petition to make a determination. Thus, the alternative of not keeping documents used in the determination of appropriate wage level is to maintain the compatibility between the LCA and the H-1B petition.

In July 2018, the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services issued Requests For Evidence (RFE) for cases chosen in the 2017 - 2018 Cap Lottery. RFEs were issued at an astounding rate of approximately 40%. Many of the RFEs queried why the H-1B Employer decided upon a Level I wage when the position was clearly designated as a "specialty occupation". In other words, the immigration authorities threw a curveball to H-1B petitioners requesting that they justify why, if the position is such a "specialty" position, a Level I wage was appropriate as opposed to a wage more commensurate with one that tracks someone with "special" skills. In the 2018-2019 H-1B Season it is anticipated that we will see more of the same types of RFEs.

In conclusion, a prospective H-1B employer should exercise caution in offering a wage to prospective H-1B employee that should be the greater of either the actual or prevailing wage. If paying prevailing wage, the employer should take into consideration the nature of the job offer, the area of intended employment, and jobs duties for the proffered position in selecting the appropriate OES wage level, or else they may find themselves facing WHD challenges with regard to paying back wages.

For more information about the H-1B nonimmigrant work visa process or to consider H-1B nonimmigrant work visa options, the immigration and nationality lawyers and attorneys at the Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. invite you to visit them on the web at www.visaserve.com or to email them at info@visaserve.com or to call the firm at 201.670.0006 (x107).

---

[i] To compute the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of: an institution of higher education; an affiliated or related nonprofit entity; a nonprofit research organization; or a governmental research organization; the prevailing wage level should take into account the wage levels of employees only at such institutions and organizations found in the area of intended employment.

[ii] The OES survey is a semi-annual survey of approximately 200,000 non-farm business establishments conducted by the Bureau of Labor Statistics (BLS), headquartered in Washington, DC with six regional offices and one office in each State.

[iii] The WHD, an agency within the DOL, enforces Federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act.

[iv] The ETA administers federal government job training and worker dislocation programs, federal grants to States for public employment service programs, and unemployment insurance benefits. These services are primarily provided through State and Local workforce development systems.

[v] If no such workers are employed by employers other than the employer applicant in the area of intended employment, it means: jobs requiring a substantially similar level of skill within the area of intended employment; <u>OR</u> substantially comparable jobs in the occupational category as employers outside of the area of intended employment if there are no substantially comparable jobs in the area of intended employment.