



U.S. Citizenship
and Immigration
Services

NOV 05 2009

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld 
Acting Associate Director, Domestic Operations

SUBJECT: Temporary Acceptance of H-1B Petitions Without Department of Labor (DOL)-
Certified Labor Condition Applications (LCAs)

Purpose

The recent implementation of DOL's iCERT system has resulted in increased processing times for certain LCA certifications. There have been instances in which employers and beneficiaries have reported being negatively impacted by the increased processing times as it can delay their ability to file initial, extension of stay and change of status H-1B petitions.

USCIS has received requests from the public to accept the filing of H-1B petitions that include LCAs that have been filed with DOL, but that DOL has not yet certified.

This memorandum provides guidance regarding the temporary acceptance of Form I-129, *Petition for a Nonimmigrant Worker*, for H-1B specialty occupations that have been filed with a Labor Condition Application (LCA), ETA Form 9035, that has not yet been certified by the Department of Labor (DOL).¹ This guidance applies to all H-1B petitions, including initial petitions, extension of stay petitions and change of status petitions.

This memorandum does not permit the acceptance of H-1B specialty occupation petitions that do not include evidence that an LCA has been filed with DOL. Furthermore, it does not permit the approval of *any* H-1B specialty occupation petition where DOL has not yet certified the LCA or where certification of the LCA has been denied.

¹ In this case, evidence of filing with an uncertified LCA requires a copy of DOL's email giving notice of receipt of the LCA.

Background

The Immigration and Nationality Act (INA) provides that a worker will qualify as an H-1B nonimmigrant if the worker is coming temporarily to the United States to perform certain services, meets certain requirements of the occupation (or is of distinguished merit and ability in the case of a fashion model), and “with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security that the intending employer has filed with the Secretary [of Labor] an application under section 1182(n)(1) [INA § 212(n)(1) of this title.”² In turn, “[n]o alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor [an LCA].”³ Further, the INA requires that, unless the Secretary of Labor finds that the LCA is incomplete or obviously inaccurate, the Secretary must provide certification within 7 days of the date of filing of the LCA.⁴

With respect to H-1B petitions involving specialty occupations, USCIS regulations make obtaining a certified LCA part of the petitioning process. Specifically, the regulations provide that the petitioner must: (1) obtain the DOL certification of LCA filing before filing the H-1B petition and (2) submit the certification of LCA filing with the H-1B petition.⁵ DOL regulations also provide, in relevant part: “After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (DHS Form I-129), together with the certified LCA, to DHS, requesting H-1B classification for the foreign worker. . . .”⁶ Meanwhile, the instructions to Form I-129 currently call for submission of “[e]vidence that a labor certification application has been filed with the U.S. Department of Labor.”⁷

In 1992, the legacy Immigration and Naturalization Service (INS) responded to LCA processing problems by accepting H-1B filings accompanied by evidence of an LCA filing.⁸ This approach permitted petitioners to meet filing requirements, preserve legal status, and avoid employment disruptions until DOL was able to address its underlying LCA processing problems.

Guidance for Temporarily Accepting H-1B Specialty Occupation Petitions Without Certified LCA

After review, USCIS can reasonably institute a policy to provide flexibility in the normal filing procedures for H-1B petitions. The special, temporary filing processes have been determined necessary as a public accommodation given the current delays in DOL’s issuance of certified LCAs. USCIS will allow the acceptance of H-1B specialty occupation petitions that are filed with a copy of DOL’s email giving notice of receipt of the LCA through March 4, 2010.

² See INA § 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b).

³ See INA § 212(n)(1), 8 U.S.C. 1182(n)(1).

⁴ See INA § 212(n)(1)(G)(ii), 8 U.S.C. 1182(n)(1)(G)(ii).

⁵ See 8 CFR 214.2(h)(4)(i)(B)(1) and 8 CFR 214.2(h)(4)(iii)(B)(1).

⁶ See 20 CFR 655.700(b)(2).

⁷ See page 3 of the instructions for Form I-129.

⁸ See Memo, Weinig, Asst. Comm., Adjudications, CO 214h-P (Mar. 5, 1992), reprinted in 69 No. 12 Interpreter Releases 378, 390 (Mar. 30, 1992).

Effective immediately, Service Centers are to begin accepting certain H-1B specialty occupation petitions with a copy of DOL's email giving notice of receipt of the LCA.⁹ USCIS will only accept such petitions if the petitioner includes evidence that the LCA was filed with DOL at least seven calendar days prior to USCIS receiving the H-1B petition. A statement by the petitioner or the petitioner's representative or a copy of the LCA without evidence that it was in fact filed with DOL will not be considered sufficient evidence. All H-1B filings without a DOL certified LCA must be forwarded to the Service Center's Case Resolution Unit (CRU) to be reviewed for evidence of LCA filing prior to being accepted during this 120-day period. The H-1B petition will be rejected if CRU determines that less than seven calendar days lapsed between the filing of the LCA with DOL and USCIS receiving the H-1B petition.

Any H-1B specialty occupation petitions filed after March 4, 2010 that do not include a DOL-certified LCA will be rejected per the current practice.

Guidance for Adjudicating Petitions Filed Under the Temporary Removal of the Requirement to Have a Certified LCA at Time of Filing

Adjudicators should follow the below guidance when reviewing an H-1B petition filed between November 5, 2009 and March 4, 2010 that includes a copy of DOL's email giving notice of receipt of the LCA.

The adjudicator will review the petition and accompanying evidence in its entirety. If the petition is approvable and the only missing evidence is the certified LCA, the adjudicator will send out a Request for Evidence (RFE) providing the petitioner with 30 days to submit the same LCA certified by DOL.¹⁰

An RFE for the DOL-certified LCA may be combined with a request that the petitioner address any other deficiencies in the H-1B petition noted by the adjudicator. The petitioner will be provided with the currently prescribed response time for the evidence being requested in the RFE.¹¹

If the time frame provided by USCIS in the RFE has lapsed without response by the petitioner, the petition will be considered abandoned and denied. The petition will also be denied if the petitioner submits the following in response to the RFE:

- Evidence the LCA in question was denied by DOL; or

⁹ This does not preclude the petition from being rejected for other reasons, such as lack of a proper signature, filing fees, or H-1B cap-subject petitions filed after the fiscal year cap has been met.

¹⁰ Notwithstanding the lack of a certified LCA, an adjudicator does not need to issue an RFE for the certified LCA if there is a separate basis upon which to deny the petition.

¹¹ See Memorandum From Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS "Removal of Standardized Request for Evidence Processing Timeframe Final Rule, 8 CFR 103.2(b); Significant Revision to *Adjudicator's Field Manual* (AFM) Chapters 10.5(a), (b); New Appendix 10-9 (AFM Update AD07-05)," HQ 70/11, 70/12 (June 1, 2007).

- Evidence that an LCA was approved but the LCA is different than the one originally filed in support of the H-1B petition.¹²

The H-1B petition will not be reopened if the petitioner submits the DOL-certified LCA after USCIS issues a notice denying the petition. The petitioner may choose to file a new H-1B petition and submit the DOL-certified LCA at that time.

If petitioner submits the DOL-certified LCA within the time period provided by USCIS on the RFE, the petition may be approved as long as the petition satisfies all other H-1B petition requirements.

Guidance for Adjudicating Untimely Extension of Stay (EOS) or Change of Status (COS) H-1B Specialty Occupation Petition

Adjudicators should follow the below guidance when reviewing an untimely filed H-1B specialty occupation petition where the petitioner submits evidence that the late filing was due to DOL processing delays of LCAs. This guidance applies regardless of whether the petition was filed before or after the 120-day acceptance period.

If the petitioner submits evidence to establish that the sole reason for the failure to timely file an EOS or COS H-1B petition was due to a delay in DOL certification of the LCA, the adjudicator should review the totality of the circumstances to determine whether USCIS can exercise discretion and excuse the late filing under 8 CFR 214.1(c)(4) or 8 CFR 248.1(b)(1).

Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudication of H-1B specialty occupation petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instructions and guidance in this memorandum are in no way intended to and do not prohibit enforcement of the immigration laws of the United States.

Questions regarding this guidance should be directed through appropriate supervisory channels to the Business Employment Services Team in the Office of Service Center Operations.

¹² The petition may still be approvable if the different LCA was certified by DOL prior to the filing of the H-1B petition. The adjudicator should review the totality of the circumstances to determine the reason(s) why the certified LCA was not submitted at the time of filing.