ABCs OF H-1Bs (THIS IS PART III OF AN VIII PART SERIES): WHAT H-1B EMPLOYERS NEED TO KNOW ABOUT THE LCA TO AVOID POTENTIAL DOL COMPLIANCE PITFALLS.

By: Michael Phulwani, Esq., David H. Nachman, Esq. and Ludka Zimovcak, Esq., Immigration Lawyers at the Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. - VISASERVE (NJ, NY, Indiana, Canada, and India).

The H-1B visa program permits a United States employer ("employer") to temporarily employ nonimmigrants to fill specialized jobs in the United States. The Immigration and Nationality Act (the "INA" or the "Act") requires that an employer pay an H-1B worker the higher of the actual wage or the local prevailing wage, in order to protect U.S. workers and their wages. Under the Act, an employer seeking to hire a foreign national in a specialty occupation on an H-1B visa must receive permission from the Department of Labor ("DOL") before the foreign national may obtain an H-1B visa. The Act defines a "specialty occupation" as an occupation requiring the application of highly-specialized knowledge and the attainment of a bachelor's degree or higher. The Act requires an employer seeking permission to employ an H-1B worker to submit and receive an approved Labor Condition Application ("LCA") from the DOL.

The employer should be extremely cautious in making attestations on the LCA and complying with the regulations governing it. Knowingly and willingly furnishing any false information in the preparation of the LCA and any supporting documentation, OR even aiding, abetting, or counseling another to do so is a federal offense, punishable by fine or imprisonment up to five (5) years or both. Other penalties may also apply to the fraud or misuse of the LCA and to the perjury with respect to the ETA 9035.

Where and When Should Employers Post Notice of the LCA?

The notice requirement of an LCA mandates that employers post notice of their intent to hire nonimmigrant workers. An H-1B employer must provide notice[i] of the filing of an LCA. When there is a collective bargaining representative for the occupation in which the H-1B worker will be employed, the employer must provide such notice to that collective bargaining representative by way of a copy of the LCA or other document which contains all the required information.

When there is no bargaining representative, the employer must provide such notice in one of the two following manners. A hard copy notice of the filing of the LCA must be posted in two conspicuous locations at *each* place of employment where any H-1B nonimmigrant will be employed (*whether such place of employment is owned or operated by the employer or by some other person or entity*). Alternatively, the electronic notice of the filing of the LCA may be posted by providing electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which H-1B nonimmigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed. Further, the H-1B employer is required to post notice on or within 30 days before the date the labor condition application is filed and should remain posted for a total of 10 days.

In situations involving H-1B workers working at end-site users (third party placements), it is the duty of an H-1B employers to post the notice of filing of the LCA at the secondary sites. Even if the H-1B employer makes good faith attempt to post notice but the end-site user refuses to post notice at its worksite, the H-1B employer will be found to have substantially and willfully violated the law. The end-site users have no obligation under the Act to post the notice.

Additionally, the posting requirement mandates that employers note and retain the dates when, and locations where, the notice was posted and to retain a copy of the posted notice.

Additional Obligations for H-1B Dependent Employers and Willful Violators.

An employer is considered H-1B-dependent if it has: 25 or fewer full-time equivalent employees and at least eight (8) H-1B nonimmigrant workers; or 26 - 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or 51 or more full-time equivalent employees of whom15 percent or more are H-1B nonimmigrant workers.

An employer whose dependency is not readily apparent or is on the borderline may use the "*snap-shot*" test. The *snap-shot* test requires a comparison of the total number of all H-1B workers to the number of the total workforce (including H-1B workers). If a small employer's *snap-shot* calculation shows that the employer is dependent, the employer must then fully calculate its dependency status. If a large employer's calculation exceeds 15 percent of its workforce, that employer must fully calculate its dependency status.

The employer is a willful violator if the employer has been found at any time during the past five (5) years preceding the date of the application (and after October 20, 1998) to have committed a willful violation[ii] or a misrepresentation of a material fact (two of the Labor Condition Application (LCA) attestations). A willful violator employer must comply with additional attestations under any LCA it files within five (5) years of the finding of a willful violation. The only exception is when an LCA is filed for and used exclusively for exempt H-1B workers.

H-1B-dependent employers and/or willful violators must attest that they have not displaced a U.S. worker[iii] at the time of filing an H-1B visa petition. Additionally, H-1B dependent employers and/or willful violators are required to make displacement inquiries. Displacement inquiry is an obligation of the H-1B dependent employers and/or willful violators when they desire to place an H-1B[iv] nonimmigrant with another/secondary employer where there are indicia of an employment relationship. Further, such employers must attest that they have taken good faith steps to recruit U.S. workers, and that the employer offered the job to any equally or better qualified U.S. worker who applied for the job for which the H-1B worker is sought.

An Employer's Duty to Keep Records of Wages Paid to H-1B Employees.

The Act also provides that the LCA, filed by the employer with the DOL, must include a statement to the effect that the employer is offering to an alien status as an H-1B nonimmigrant, that wages for H-1B visa holders are at least equal to the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is *higher*, based on the best information available at the time of filing the application.

Decades back while addressing a claim brought under the Fair Labor Standards Act, the United States Supreme Court in a landmark decision[v] held that once an employee shows that he has performed work and was not properly paid for it, and he produces sufficient evidence of the amount and extent of work as a matter of just and reasonable inference, the burden shifts to the employer to produce evidence of the precise amount of work that was performed or evidence to negate the inference created by the employee's evidence. The Court explained that it is the employer's duty to keep precise records and that such a burden should not fall on the employee and bar the employee from recovery when such records cannot be produced.

Thus, acting on the sufficient evidence produced by the employee, if the Administrator of the Wage and Hour Division (WHD[vi]) establishes that the employer has failed to properly compensate the H-1B nonimmigrant worker then the employer bears the burden of establishing the existence of circumstances that warrant the wages not being paid or benefits not being offered, by a preponderance of the evidence. Failure to do so would result in the employer being held liable for the payment of back wages and other financial remedies.

Back Pay Liability Not Subject to One-Year Statute of Limitation.

DOL accepts complaints by aggrieved persons or organizations or through its own initiated investigation relating to misrepresentation or failure of the employer to meet the conditions stated in the LCA. An aggrieved employee has 12 months after the latest date on which the alleged violations were committed to file a complaint; however, this Statute of Limitations does not apply to an employer's back pay liability.

If the employer fails to pay an H-1B worker the "required wage," it can be ordered to pay back pay or make-up the deficiency. The regulations require the WHD Administrator to determine whether an employer has the proper documentation to support its wage attestation. The Administrator *may* contact the Employment and Training Administration (ETA)[vii], a part of DOL, to get the prevailing wage. The regulation is permissive, and the ETA's determination is merely an option that the Administrator can use in its investigation. 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 I-129 Forms submitted to the United States and Citizenship Services[viii] (USCIS) for the approval of H-1B petition in determining whether the employee was appropriately classified at the specific wage level.

Civil Money Penalties for H-1B Violations and Debarment for Non-Compliance.

The WHD Administrator may assess Civil Money Penalties (CMPs) not to exceed $5,000 per violation for a willful violation pertaining to wages. The Administrator may also assess a penalty not to exceed $1,000 per violation for displacement of U.S. workers, a substantial violation pertaining to notification, labor condition application specificity, recruitment of U.S. workers, or a misrepresentation of any material fact on the LCA.

The regulations require the Administrator to consider seven factors for the assessment of CMPs: (1) Previous history of violation, or violations, by the employer; (2) The number of workers affected by the violation or violations; (3) The gravity of the violation or violations; (4) Efforts made by the employer in good faith to comply with the provisions of the law and regulations; (5) The employer's explanation of the violation or violations; (6) The employer's commitment to future compliance; and (7) The extent to which the employer achieved a financial gain due to the violation, or the

potential financial loss, potential injury or adverse effect with respect to other parties.

Moreover, the regulations state that an employer that willfully fails to pay wages shall be debarred for a period of at least 2 years. Further, a substantial failure to provide notice may result in a one year debarment. Additionally, an H-1B dependent employer's failure to make displacement inquiry may result in one-year debarment. Last but not the least, an H-1B employer's ignorance of the INA's requirements or contention that non-compliance was due to an attorney or an employee will not excuse non-compliance.

The prospect for debarment for an H-1B employer is scary. Debarment is a very strong deterrent from non-compliance since debarment strikes at the very heart of an H-1B employer's livelihood. H-1B employees are necessary to generate the income that allows "body shops" to exist.

---

[i] This notice must include: The number of H-1B nonimmigrants the employer is seeking to employ; The occupational classifications in which the H-1B nonimmigrants will be employed; The wages offered; The period of employment; The locations at which the H-1B nonimmigrants will be employed; and The following statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

[ii] A finding of violation by the employer is entered in either of the following two types of enforcement proceeding: A Department of Labor proceeding under the Immigration and Nationality Act (INA) § 212(n)(2); (8 U.S.C. § 1182(n)(2)(C); OR A Department of Justice proceeding under INA § 212(n)(5); (8 U.S.C.§ 1182(n)(5).)

[iii] during the period beginning 90 days before and extending to 90 days after the placement of the H-1B worker.

[iv] excluding H-1B1 or E-3.

[v] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

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

[vii] The Employment and Training Administration (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.

[viii] USCIS is an agency within the Department of Homeland Security that oversees lawful immigration to the United States.