

Labor Condition Application for H-1B and E-3 Nonimmigrants

Purpose

This document describes the procedures operating locations need to follow to complete and submit the Labor Condition Application (LCA).

Background

The H-1B visa is used for the temporary employment of noncitizens in specialty occupations. The E-3 visa is used for nationals of Australia coming to the United States (U.S.) to perform services in a specialty occupation.

A prospective employer must submit a labor condition application to the Department of Labor (DOL) and then petition the United States Citizenship and Immigration Services (USCIS) to classify the person as a temporary worker in either an H-1B or E-3 visa category.

For more information on the H-1B and E-3 visas, refer to the procedures, "H-1B Visa Holder Employment (https://www.rfsuny.org/media/RFSUNY/Procedures/per_h1b-visa-holder-employment_pro.htm)" and "E-3 Visa Holder Employment."

What the LCA is Used For

The LCA must be completed by employers who want to:

- petition the United States Citizenship and Immigration Services for the classification of a prospective noncitizen employee as eligible for an H-1B/E-3 visa, or
- extend the stay of a currently employed H-1B/E-3 visa holder.

Why the LCA is Required

The United States Citizenship and Immigration Services and the Department of Labor (DOL) require that employers complete an LCA to ensure that the employment of H-1B/E-3 visa holders does not adversely affect the wages and working conditions of U.S. workers, as required by the Immigration Act of 1990.

By signing and submitting a completed LCA, the employer affirms that:

- employment of the noncitizen will not adversely affect the wages and working conditions of workers similarly employed in the area of intended employment.
- the employer will pay the noncitizen the higher of the actual wage or the prevailing wage for the occupational classification in the area of intended employment.

- the employer will notify employees that an LCA is being filed.
- at the time the application is signed, there is no strike, lockout, or work stoppage related to a labor dispute in the occupation.

When to Submit the LCA

The LCA will not be accepted by the Department of Labor (DOL) more than 6 months before the beginning date of employment.

If the employer obtains a prevailing wage determination from the State Employment Security Agency, the employer must submit the LCA within 90 days. Refer to the "Determining the Prevailing Wage" section later of this document for more information.

How to Complete and Submit an LCA

The steps operating locations must take to complete and submit an LCA are listed in the following table.

Instructions can be found using the following link: [Form 9035 Instructions](#)

Step	Action
1	Determine the required wage, which is, for a given position, the higher of <ul style="list-style-type: none"> • the actual wage or • the prevailing wage. Refer to the "Required Wage" section later in this document.
2	Gather information for the LCA. Examples of the information required are: <ul style="list-style-type: none"> • the job's three-digit occupational group code available from the DOL's LCA Instructions (ETA 9035CP), • the employer's own title for the job, • the number of workers sought in that classification, • the gross wage rate of pay, • the period of employment of up to 6 years, and • the place(s) of intended employment. For a complete list of information required, see instructions .
3	Complete and submit LCA through the online iCERT portal: https://icert.doleta.gov .
4	Upon receipt of the certification of the LCA, print and sign the form. The LCA must be signed by the operations manager or designee. Note: A project director may not sign as the responsible officer for the Research Foundation (RF) on an LCA.
5	Notify employees that the LCA has been submitted. The employer must post such notice within one working day of submission of the LCA in at least two conspicuous locations at the worksite and the notice must remain posted for at least 10 days.
6	If the LCA is certified by the DOL, proceed with the next step of the petition process. For more information, refer to the procedures "H-1B Visa Holder Employment (,

	https://www.rfsuny.org/media/RFSUNY/Procedures/per_h1b-visa-holder-employment_pro.htm)" or " E-3 Visa Holder Employment ." If the LCA is not certified, revise it to address problems noted by the DOL and resubmit.
7	Retain necessary records. Refer to the document " Recordkeeping Requirements for Labor Condition Applications ."

Required Wage

The DOL has determined that the required wage rate is the higher of the actual wage or the prevailing wage. If the employer's wage is below the required wage, the DOL will not certify the LCA.

Determining the Required Wage

In order to determine the required wage, the operating location must:

- classify the position,
- determine the actual wage for the position, and
- determine the prevailing wage for the position.

For more information, refer to the "Classifying the Position, Determining the Actual Wage" and "Determining the Prevailing Wage" sections below.

Required Wage for Extensions of Stay

If a new LCA is submitted and certified to extend the stay of a currently employed visa holder, the wage figures must be updated and the employee must receive no less than the greater of the actual or updated prevailing wage for the occupation for the remaining period of intended employment.

Penalties

Failure to pay the required wage will result in penalties imposed by the DOL, including the liability for back pay and a \$1,000 fine per violation. If the failure is found to be willful, the DOL will notify USCIS and the employer may be barred from filing H petitions for at least one year.

Documentation

According to DOL regulations, the operating location must develop and retain documentation on how it determined the prevailing and actual wage for each LCA and may have the burden of proving the validity of such determinations in the event a complaint is filed. The regulations also require that documentation to support the prevailing wage rate be updated every time a new LCA is filed (every three years, or sooner depending on employment dates).

Classifying the Position

To classify the position, operating locations must obtain a detailed job description from the project director and review the occupational classification from the Department of Labor's Dictionary of Occupational Titles (DOT). DOT classifications are available from the LCA instructions within [ETA 9035CP](#).

The job description and DOT classification should be used to determine the correct Research Foundation position classification. The Office of Human Resources is also available to assist with position classifications.

Determining the Actual Wage

The actual wage is the wage rate paid by the employer to all individuals with experience and qualifications similar to the visa holder's for the specific employment in question at the place of employment.

The actual wage is not the average of the wage rates paid to all workers employed in the occupation.

To determine the actual wage, the employer must first identify all other employees who are performing the actual set of duties and who have the same responsibilities the visa holder will have. Consideration should be given to the following factors:

- length and type of work experience of other employees in the position to be occupied by the noncitizen, compared to the experience of the noncitizen,
- the similarity of job qualifications, educational background, and class rank,
- job responsibilities and actual duties, and (4) specialized knowledge in a specific area within the field.

Other "legitimate business factors" justifying different compensation levels for the same job, such as professional distinction or international acclaim, are also acceptable considerations.

A statement should be prepared and retained detailing the basis used to establish the actual wage and how it relates to the wage set for the visa holder. Refer to the document, "[Guidance for Determination of the 'Actual Wage.'](#)"

Determining the Prevailing Wage

The prevailing wage is generally considered to be the average, within five percent, of the wages paid to workers similarly employed in the area of intended employment. USCIS and DOL regulations require that the determination be based on the best information available.

Information Sources

Information may be obtained from:

- the Department of Labor's State Employment Security Agency (SESA). To obtain a prevailing wage determination from SESA go to icert.doleta.gov and complete the prevailing wage on the front page. **Note:** The DOL considers a SESA determination a "best available" source. If the employer obtains its prevailing wage determination from SESA, the DOL will accept that determination as correct and will not question its validity provided that the employer maintains a copy. Employers may challenge SESA prevailing wage determinations only through the Employment Service complaint process, and only prior to filing an LCA using the SESA determination.
- an independent, authoritative source survey that has been published within the last 24 months. The survey can be a professional, business, educational, or organizational salary survey that has recognized standing in an occupational field, such as Compensation in Research & Development published by Abbott, Langer & Associates. It must cover the occupational classification for which the visa is sought. Preferably, it should be region-specific and sort the participating businesses it covers by size and type. DOL-approved survey information may be obtained from central office.
- another legitimate source. An example of a legitimate alternative source is a salary survey done by the employer. Such a survey should include written, well-detailed statements regarding the position, requirements, and salary level for at least ten or more like employers in the area where the noncitizen will work. The employer will have to be prepared to demonstrate the legitimacy of the survey in the event of an investigation.

Approval Process

DOL Regional offices will review LCAs for completeness within seven working days of their receipt and return one copy to the employer. Upon completion of the review, the DOL will return the LCA.

H-1B Visas

If the DOL certifies the LCA, the employer must submit it with Form I-129 and other supporting documentation to the INS for H-1B adjudication. Refer to the document, "[H-1B Petition for a Nonimmigrant Worker](#)" for more information.

E-3 Visas

A copy should be sent to the noncitizen. They may then directly apply for the visa. Refer to the document, "E-3 Visa Holder Employment."

DOL Rejections

If the DOL does not certify the LCA, the employer can revise it to address problems noted by the DOL and resubmit it.

How Long LCA is Valid

The labor condition application (LCA) is valid for the period of employment up to a maximum of three years.

Forms

- Noncitizen Employment Forms are available in the Forms area of Employees: Personnel Administration business area.
- "Labor Condition Application for H-1B Nonimmigrants" ([Form ETA 9035](#)) and instructions are available in the iCERT portal: icert.doleta.gov
- "[Prevailing Wage Request Form for H1B Professionals](#)" is available in PDF format from the Forms resource area in the Employees: Personnel Administration business area. No fee required.

Further Information

[20 CFR Part 655 Subpart H](#) — Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas In Specialty Occupations and as Fashion Models

[Guidance for Determination of the "Actual Wage"](#)

Wage Information from the DOL Web site.

Change History

- **July 1, 2009** - Updated to include information on iCERT
- **July 24, 2006** - Updated Immigration and Naturalization Service (INS) to United States Citizenship and Immigration Services (USCIS).
- **November 21, 2005** - Updated so instructions apply to both H-1B and E-3 visas.
- **February 2, 2001** - Changes to H-1B Filing and new form ETA 9035 effective January 19, 2001
- **February 27, 2001** - "Occupational Codes and Classifications for use with Labor Condition Applications" included with ETA 9035CP instructions.
- **March 19, 2002** - Updated DOL links to forms.

Feedback

Was this document clear and easy to follow? Please send your feedback to webfeedback@rfsuny.org.