

Guidance for Determination of the Actual Wage

The following Department of Labor guideline appeared as an appendix in the December 20, 1994 Federal Register, "Labor Condition Applications and Requirements for Employers Using Nonimmigrant on H-1B Visas in Specialty Occupations and as Fashion Models; Final Rules."

Appendix A to Subpart H

Guidance for Determination of the "Actual Wage"

In determining the required wage rate, in addition to obtaining the prevailing wage, the employer must establish the actual wage for the occupation in which the H-1B nonimmigrant is employed by the employer. For purposes of establishing its compensation system for workers in an occupational category, an employer may take into consideration objective standards relating to experience, qualifications, education, specific job responsibility and function, specialized knowledge, and other legitimate business factors.

The use of any or all these factors is at the discretion of the employer. The employer must have and document an objective system used to determine the wages of non-H-1B workers, and apply that system to H-1B nonimmigrants as well. It is not sufficient for the employer simply to calculate an average wage of all non-H-1B employees in an occupation; the actual wage is not an "average wage."

The documents explaining the system must be maintained in the public disclosure file. The explanation of the compensation system must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H-1B nonimmigrant. The computation of the H-1B nonimmigrant's individual actual wage rate must be documented in the H-1B nonimmigrant's personnel file.

Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer gives its employees a raise at year's end or if the system provides for other adjustments in wages, H-1B nonimmigrants must also be given the raise (consistent with legitimate employer-established criteria such as level of performance, attendance, etc.). This is consistent with Congressional intent that H-1B nonimmigrants and similarly employed U.S. workers be provided the same wages.

Where the employer's pay system or scale provides adjustments during the validity period of the LCA--e.g., cost-of-living increase or other annual adjustments, increase in the entry-level rate for the occupation due to market forces, or the employee moves into a more advanced level in the same occupation--the employer shall retain documentation explaining the changes and clearly showing that, after such adjustments, the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment. The following examples illustrate these principles:

1. Worker A is paid \$10.00 per hour and supervises two employees. Worker B, who is similarly qualified and performs substantially the same job duties except for supervising other employees, is paid \$8.00 per hour because he/she has no supervisory responsibility.

The compensation differential is acceptable because it is based upon a relevant distinction in job duties, responsibilities, and functions: The difference in the supervisory responsibilities of the two employees. The actual wage in this occupation at the worksite for workers with supervisory responsibility is \$10.00 per hour; the actual wage in this occupation at the worksite for workers without supervisory responsibility is \$8.00 per hour.

2. Systems Analyst A has experience with a particular software which the employer is interested in purchasing, of which none of the employer's current employees have knowledge. The employer buys the software and hires Systems Analyst A on an H-1B visa to train the other employees in its application. The employer pays Systems Analyst A more than its other Systems Analysts who are otherwise similarly qualified.

The compensation differential is acceptable because of the distinction in the specialized knowledge and the job duties of the employees. Systems Analyst A, in addition to the qualifications and duties normally associated with this occupation at the employer's worksite, is also specially knowledgeable and responsible for training the employer's other Systems Analysts in a new software package. As a result, Systems Analyst A commands a higher actual wage. However, if the employer employs other similarly qualified systems analysts who also have unique knowledge and perform similar duties in training other analysts in their area of expertise, the actual wage for Systems Analyst A would have to be at least equivalent to the actual wage paid to such similarly employed analysts.

3. An employer seeks a scientist to conduct AIDS research in the employer's laboratory. Research Assistants A (a U.S. worker) and B (an H-1B nonimmigrant) both hold Ph.D.'s in the requisite field(s) of study and have the same number of years of experience in AIDS research. However, Research Assistant A's experience is on the cutting edge of a breakthrough in the field and his/her work history is distinguished by frequent praise and recognition in writing and through awards. Research Assistant B (the nonimmigrant) has a respectable work history but has not conducted research which has been internationally recognized.

Employer pays Research Assistant A \$10,000 per year more than Research Assistant B in recognition of his/her unparalleled expertise and accomplishments. The employer now wants to hire a third Research Assistant on an H-1B visa to participate in the work.

The differential between the salary paid Research Assistant A (the U.S. worker) and Research Assistant B (an H-1B nonimmigrant) is acceptable because it is based upon the specialized knowledge, expertise and experience of Research Assistant A, demonstrated in writing. The employer is not required to pay Research Assistant B the same wage rate as that paid Research Assistant A, even though they may have the same job titles. The actual wage required for the third Research Assistant, to be hired on an H-1B visa, would be the wage paid to Research Assistant B unless he/she has internationally recognized expertise similar to that of Research Assistant A. As set out in Sec. _____731(1)(A) the employer must have and document the system used in determining the actual wage of H-1B nonimmigrants. The explanation of the system must be such that a third party may use the system to arrive at the actual wage paid the H-1B nonimmigrant.

4. Employer located in City X seeks experienced mechanical engineers. In City X, the prevailing wage for such engineers is \$49,500 annually. In setting the salaries of U.S. workers, employer pays its nonsupervisory mechanical engineers with 5 to 10 years of experience between \$50,000 and \$75,000 per year, using defined pay scale "steps" tied to experience. Employer hires engineers A, B, and C, who each have five years of experience and similar qualifications and will perform substantially the same nonsupervisory job duties. Engineer A is from Japan, where he/she earns the equivalent of \$80,000 per year. Engineer B is from France and had been earning the equivalent of \$50,000 per year. Engineer C is from India and had been earning the equivalent of \$20,000 per year. Employer pays Engineer A \$80,000 per year, Engineer B \$50,000, and Engineer C \$20,000 as the employer has had a long-established system of maintaining the home-country pay levels of temporary foreign workers.

The INA [Immigration and Naturalization Act] requires that the employer pay the H-1B nonimmigrant at least the actual wage or the prevailing wage, whichever is greater, but there is no prohibition against paying an H-1B nonimmigrant a greater wage. Therefore, Engineer A may lawfully be paid the \$80,000 per year. Engineer B's salary of \$50,000 is acceptable, since this is the employer's actual wage for an engineer with Engineer B's experience and duties. Engineer C's salary, however, at a rate of \$20,000 per year, is unacceptable under the law, even given the employer's "long-established 'home country' system," since \$20,000 would be below both the actual wage and the prevailing wage. The latter situation is an example of an illegitimate business factor, i.e., a system to maintain salary parity with peers in the country of origin, which yields a wage below the required wage levels.