

**Office of Foreign labor Certification
Questions and Answers Regarding:
Delays Issuing Prevailing Wage Determinations and
H-1B Labor Condition Applications
September 12, 2011**

Question: Due to the National Prevailing Wage Center's (NPWC) focus on issuing H-2B prevailing wage redeterminations, what should an employer do if it is unable to receive a prevailing wage determination from the NPWC in a timely fashion so as to file its H-1B application?

Answer: The Office of Foreign Labor Certification (OFLC) has reallocated significant staff resources within its organization to focus on completing the 3,500 H-2B wage redeterminations at the NPWC as expeditiously as possible. At the same time, OFLC has implemented plans to minimize delays in processing pending employer requests for H-1B and PERM prevailing wages. Despite the focus on H-2B prevailing wage redeterminations at the NPWC, employers continue to file H-1B applications for processing with the OFLC Chicago National Processing Center (NPC). Since July 1, 2011, the Chicago NPC has consistently received more than 7,600 new H-1B applications each week for processing, an average nearly identical to the same period last year.

In the H-1B program an employer is not required to obtain a prevailing wage from the NPWC. The Department's regulations provide the employer with the following alternative sources for obtaining a prevailing wage in support of an H-1B application:

- A wage rate set forth in a collective bargaining agreement (CBA);
- A wage rate for the occupation and area of intended employment under either the Davis-Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA), which are available at <http://www.wdol.gov>;
- A wage rate produced by a survey conducted by an independent authoritative source that meets the requirements set forth in Departmental regulations at 20 CFR sec. 655.731; or
- A wage rate produced by another legitimate source of information, including the Bureau of Labor Statistics Occupational Employment Statistics Survey (OES) data, which is available at <http://www.flcdatcenter.com>

Question: What are the consequences to a foreign worker when his or her H-1B employer is not able to receive a prevailing wage determination from the National Prevailing Wage Center in a timely fashion so as to file an H-1B Labor Condition Application?

Answer: As stated in the previous response, an employer is not required to obtain a PWD from the NPWC in order to file an H-1B application. As long as the employer provides a prevailing wage in support of its H-1B application, whether through obtaining a PWD from the NPWC or through the other sources listed in the previous response, there should not be any consequences to the foreign worker on whose behalf the H-1B application was filed. However, should an employer choose to not use a wage from an alternative source, the issue of the foreign worker's immigration status becomes a matter between the worker, their counsel if represented, and the U.S. Department of Homeland Security.

Question: What happens to the Labor Condition Application if an H-1B employer who does not receive a PWD from the NPWC selects an incorrect wage?

Answer: If the H-1B employer selects an incorrect prevailing wage, then the employer is responsible for that wage attestation in the event of an investigation or enforcement action. The Department's regulations at 20 CFR sec. 655.731(a)(2)(ii)(A)(3) state that when an employer obtains a prevailing wage determination from the National Prevailing Wage Center, the Department of Labor will accept that wage as correct and will not question its validity, i.e. the employer is granted "safe harbor".

However, the Department can not grant this same "safe harbor" to employers who obtain their own prevailing wages under the regulations. Other legitimate wage sources need to meet the criteria set forth in the H-1B regulations, and the Department's regulations at 20 CFR sec. 655.731(a)(2)(ii)(C) which state that "the employer will be required to demonstrate the legitimacy of the wage in the event of an investigation".