Chapter 71

ENFORCEMENT OF H-1B LABOR CONDITION APPLICATION (LCA)

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71a INTRODUCTION

71a00 Background/statutory standards

Division of responsibilities

(a) The H-1B program allows an ER to hire a nonimmigrant in a "specialty occupation" or as a fashion model of distinguished merit and ability. A "nonimmigrant" is an INA term for an individual from another country who is authorized by the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) (formerly the INS) to enter the U.S. for a limited period of time for specific purposes. This is the opposite of an "immigrant," who is an individual authorized by the USCIS to remain permanently in the U.S. The nonimmigrant in this program is the individual certified by USCIS as eligible for H-1B status or TN status. (See 20 C.F.R. § 655.700(c)(2) for more information on TN status.)

(b) The H-1B process begins with the ER's filing of an LCA Form ETA 9035 and/or Form ETA 9035E with the Employment and Training Administration (ETA). (*20 C.F.R.§ 655.700(b)(1)* and FOH 71a00(b).)

(c) WH enforces all elements of the LCA, which include the material facts and labor condition statements. The regulations for this program are in 20 C.F.R. § 655 subparts H and I. (See 20 C.F.R. § 655.700(b) for other agencies' responsibilities under the H-1B program.)

71a01 Labor Condition Application (LCA)

(a) *Function and purpose of LCA.*

(1) The LCA is the document that a prospective H-1B ER files to initiate employment of an H-1B worker. (20 C.F.R.§ 655.700(b).) The LCA is *not* "employee specific"; it does not identify a particular foreign worker who is to be employed. (*INA Sec. 212(n)(1)(D)* and 20 C.F.R. § 655.730(c)(2).) The visa petition (Form I-129/I-129W) (filed by the ER with the USCIS) is "employee specific"; it identifies the foreign workers and sets their qualifications for CIS adjudication.

(2) The LCA is the basis for WH's enforcement of the ER's H-1B obligations. The ER's submission of, and signature on, the LCA make enforceable "promises," "statements," or "attestations." (20 C.F.R. § 655.730(d).) LCA obligations are in effect/enforceable for the entire validity period of the LCA, as follows:

(A) The validity period of the LCA *begins and ends* on the dates specified by the ETA official who certifies the LCA. If the H-1B worker begins employment with a "new" H-1B ER prior to the ETA certification date (pursuant to the "portability" option, (FOH 71a00(b)), the beginning date of the LCA's validity period is the date on which the H-1B worker began employment.

(B) The LCA validity period *ends* on the date specified by the ETA official who certifies the LCA, *except that* the LCA remains in effect and enforceable for as long as any H-1B worker is employed pursuant to it *or* until the conclusion of any WH enforcement proceeding involving the LCA, including any hearings and appeals (whichever date is the latest). (20 C.F.R. § 655.750(a).)

(C) For wage obligations during the LCA's validity period, see 20 C.F.R. § 655.731(c)(6) and (7).

(b) *Types of LCAs.* Investigations may disclose several types of LCA forms (LCAs), depending upon the date on which the ER filed the LCA with ETA (20 C.F.R. § 655.720 and http://www.lca.doleta.gov.)

(c) Regardless of which LCA form is used, the ER's submission of and signature on the LCA make "promises," "statements," or "attestations" that are enforced by WH. For the three-page, four-page, or electronic LCA, these promises are fully spelled out in the "cover pages" Form ETA 9035CP (http://www.lca.doleta.gov). In signing and submitting the LCA, the ER is stating that he has read these provisions and agrees to them.

(d) *Procedures for employer's filing of the LCA.* The ER must file the LCA with an ETA processing center, which determines whether to "certify" it for the employment of H-1B workers. The ETA Regional Certifying Officers (located in all of the ETA Regional Offices) do *not* process LCAs. (See 20 C.F.R. § 655.721.) There are two procedures for the ER to file an LCA: electronic (http://www.lca.doleta.gov) or U.S. Mail (20 C.F.R. § 655.720). LCAs require that the ER seeking to employ an H-1B worker attest to:

(1) Paying the H-1B nonimmigrant worker the required wage (20 C.F.R. § 655.731);

(2) Establishing the working conditions requirement (20 C.F.R. § 655.732);

(3) Establishing the no strike or lockout requirement (20 C.F.R. § 655.733);

(4) Establishing the notice requirement (20 C.F.R. § 655.734).

(e) Additional obligations apply to H-1B dependent ERs (20 C.F.R. § 655. 736(a)) and willful violators (20 C.F.R. § 655.736(f)) ERs, and 20 C.F.R. § 655.736(g).

(f) ***Redacted 7e***

71a02 Coverage

(a) An ER is covered under the H-1B program if it has an LCA certified by ETA. WH need not prove an employment relationship between the LCA-filing ER and the H-1B worker(s). The LCA-filing ER is deemed to be the ER of the H-1B worker(s), and the employment relationship exists as a matter of law. (FOH 71d04(f).)

(b) ***Redacted 7e***

(c) Foreign workers might work for an ER before acquiring H-1B status (*e.g.*, employment under another nonimmigrant visa classification, such as F-1 (student) or illegally and/or after their H-1B status has expired (*e.g.*, working after acquiring other employment authorization such as the permanent program's "green" card, or illegally). H-1B provisions apply to the worker only when the worker is in H-1B status (as authorized by USCIS on the Form I-797, Notice of Action, and employed by the ER. A worker employed under the H-1B "portability" provision may begin employment, and be subject to all H-1B provisions, while the Form I-129/I-129W is pending with USCIS, but this pre-adjudication work time will not be reflected on the USCIS Notice of Action when it is issued. (See 65 Fed. Reg. 80110, 80118 (Dec. 20, 2000).)

(1) A worker employed by the ER (even before/after H-1B status) is subject to the protections found under other programs enforced by WH. For example, a foreign worker employed by the ER under the F-1 (student) or J-1 (summer work/travel) visa classification could be protected by FLSA, Family Medical Leave Act (FMLA), Government Contract Acts (Davis Bacon Act (DBA) or Service Contract Act (SCA)), or any other program enforced by WH, assuming the ER has the required program coverage.

71b COMPLAINT INTAKE PROCESS

71b00 General

(a) WH enforcement will be initiated *only* through one of four processes:

(1) Aggrieved party complaints (FOH 71b01, 8 U.S.C. § 1182(n)(2)(A), 20 C.F.R. § 655.806);

(2) Credible Source investigations (FOH 71b02, 8 U.S.C. § 1182(n)(2)(G)(ii), 20 C.F.R. § 655.807);

(3) Secretary-certified investigations (FOH 71b02, 8 U.S.C. § 1182(n)(2)(G)(i), 20 C.F.R. § 655.807(h)); or

(4) Random investigations of willful violators (FOH 71b03, 8 U.S.C. §1182(n)(2)(F), 20 C.F.R. § 655.808).

Complaints received from other than aggrieved parties should be considered as possible credible source investigations. Information which fails to qualify for either investigation process should be considered for a Secretary-certified investigation.

(b) Until further notice, provide a copy of every non-actionable H-1B complaint to the NO/OEP/Immigration Team, to allow the NO to maintain data on total number of complaints received.

(c) All complaints must be in writing. The H-1B complaint form (H-1B Nonimmigrant Information Form, WH-4) (FOH 54: WH-4) may be used for this purpose. This WH-4 form is found at (http://www.dol.gov/dol/esa/public/forms/whd/WH-4.pdf). If the C makes an oral contact, the WHI who receives the oral communication will reduce the complaint to writing. If the WH-4 is not used by the C (*i.e.*, C submits a written complaint without using the form), the information requested on the form must be obtained by the WHI for the investigative file.

(d) Standard MODO procedures specified in FOH 61 will be followed in H-1B cases. Where an H-1B ER has operations in multiple worksites encompassing the jurisdiction of more than a single WH DO but the H-1B ER's main office does not maintain the Public Access files, the WH DO with jurisdiction over the location of the H-1B ER's Public Access file is its "MODO."

(e) Aggrieved party complaints may not be conciliated except for complaints alleging only a failure to pay a final paycheck (FOH 71c01(a)(6)). WH lacks authority to close an investigation/compliance action "administratively" without issuance of a determination as to whether violations occurred. A determination letter must be issued on every actionable complaint received by WH. (20 C.F.R. § 655.806(3).)

(f) Notice to Complainant: One of the following letters must be issued on each complaint:

(1) *Notice to C that complaint is not actionable.* If the complaint does not present reasonable cause for investigation, the C must be sent a No Cause (to Investigate) Letter advising that no investigation will be scheduled. An oral notice to the C is not sufficient for this purpose. The C may submit a new complaint with additional information; or

(2) *Notice to C that complaint is actionable.* If the complaint presents reasonable cause for an investigation, the C may be sent a Notification Letter to Complainant advising that WH will investigate.

(g) *Determination Letter concluding investigation.* WH is required by the INA to issue a formal determination in every investigation/compliance action, and must assess BWs owed workers and other remedies as appropriate. (8 U.S.C. §1182(n)(2)(A), (B) and (D); FOH 71b07; 20 C.F.R. § 655.815.)

71b01 Complaint from an "aggrieved party" (20 C.F.R. § 655.806)

(a) The INA authorizes DOL to conduct an investigation on a complaint from an aggrieved person or organization (including bargaining representatives), "aggrieved party" (20 C.F.R. § 655.715) filed within 12 months of the alleged violation. To be an *aggrieved party,* the C must be a person or entity whose operations or interests are adversely affected by the ER's alleged non-compliance with the H-1B program (20 C.F.R. § 655.805). The Cs may be anonymous, but the screening of complaints shall establish that they are aggrieved parties. Aggrieved parties include, but are not limited to:

(1) A worker whose job, or job prospects, wages and/or working conditions are adversely affected by the ER's alleged violation(s);

(2) A bargaining representative for workers;

(3) A government agency with programs impacted by the alleged violation(s), such as the Department of State (DOS); or .

(4) An ER's competitor adversely affected by the alleged violation(s).

(b) *Screening of complaint.* Each complaint must be reviewed/screened to determine if "reasonable cause" exists to initiate an investigation, and include the following elements:

(1) *Employer coverage.* The ER must have a certified LCA. Coverage is assumed, if Cs indicate that they are H-1B workers employed by the ER or that the ER employs an H-1B worker, even if the C cannot provide a copy of the LCA. The LCA must be reviewed if there is any question about whether or not an LCA has been certified, see FOH 71a01(f). If there is no LCA on file, there is no coverage to authorize an investigation. If an investigation is initiated and later fact-finding determines that there is *no* LCA on file, the investigation should be discontinued and the C and ER so notified. A no coverage determination letter must be issued. The C must be an aggrieved party.

(2) *Allegation of violation(s) of H-1B program.* An investigation will be initiated where there is reasonable cause to believe that an H-1B violation has been committed (*i.e.*, only on a complaint with allegations which, if true, would constitute violations of the program). In screening a complaint, the WHI may contact the C to clarify allegations or to obtain additional information. Such contacts should not be so detailed or extensive as to constitute "fact-finding," which would begin after the complaint is determined to present "reasonable cause" and an investigation is initiated. The categories of violations are identified in the regulation at 20 C.F.R. § 655.805 (FOH 71e01 through 71e17).

(c) *Deadline for screening a complaint.* The reasonable cause determination must be made within 10 days of the date the aggrieved party complaint is received by WH, 20 C.F.R. § 655.806(a)(2). The complaint is accepted for filing if reasonable cause to believe a violation occurred is found. The date of the *receipt* of the complaint (not the date of the completion of the *screening*) is the controlling date for determining the 12-month "window" for a timely/actionable complaint (*i.e.*, there must be allegation(s) of violation(s) within 12 months prior to date of receipt of complaint). If no reasonable cause exists to initiate an investigation,

the C shall be advised, and allowed to submit a new complaint with additional information. If the C alleges whistleblower (WB) violations, see FOH 71d05.

71b02 Complaint from a credible source (8 U.S.C. § 1182(n)(2)(G)(ii); 20 C.F.R. § 655.807)

(a) Effective March 8, 2005, the H-1B Visa Reform Act of 2004 reinstates and expands WH's authority to conduct an investigation if it receives information from a known "credible source" likely to have knowledge of an ER's practices or labor conditions . The credible source information must meet the requirements listed in FOH 71b02(c)(2). The INA requires that an investigation based on credible information from a source other than an aggrieved party must be conducted under specific procedures, including a notice to the ER to allow a rebuttal of the allegations (FOH 71c03(b) and (d), below). A case shall be set up in WHISARD as an investigation to capture time spent by WHIs on the responsibilities described below pertaining to complaint intake, screening, notice to ER, and opportunity for ER response.

(b) *Receipt of complaint.* A complaint may be filed either orally or in writing. See FOH 71b00(c) and 20 C.F.R. § 655.807(a). The WH office that receives the complaint shall forward the information to the NO/OEP/Immigration Team for review and processing, and shall obtain such additional information as the NO/OEP/Immigration Team may require (including interviewing the C if appropriate).

(c) *Screening of complaint.* Upon receipt of the complaint (*i.e.*, the WH-4 and any supporting material), the NO/OEP/Immigration Team shall determine if the information constitutes a basis for taking action. The criteria listed in 20 C.F.R. § 655,807 will be applied.

(1) *Examples* of credible sources of information (non-aggrieved parties) include but are not limited to:

(A) An ER, who operates in the same building as an H-1B ER but who is in a different line of business and, therefore, is not a competitor, has been told by the ER's H-1B workers that they are not paid for travel expenses.

(B) A payroll service contractor for an H-1B ER who reports that she was ordered by the ER to illegally reduce wages paid to H-1B workers.

(C) A community activist (*e.g.*, immigrants' rights advocate) who reports that H-1B workers told her that they are not paid for all hours worked.

(D) A police officer who reports that two H-1B workers reported to him that they did not get their last paycheck.

(2) *Types of violations.* The information from the source must provide a reasonable basis to believe that an ER has engaged in one of the following types of activity:

(A) *Willfully* failed to meet one or more of the following conditions listed in 20 C.F.R. § 655.731(wages paid or benefits offered): .732(working conditions); .733 (strikes or lockouts); .738(c) (displacement of U.S. workers); .738 (d) (displacement of U.S. workers by secondary ER); .739 (recruitment of U.S. workers).

(B) Engaged in a *pattern or practice* of failures to meet a condition listed in subparagraph (A); or

(C) Committed a *substantial* failure to comply with a condition listed in subparagraph (A), and the failure affected multiple EEs (see 20 C.F.R. § 655.807(d)(e)).

(3) *Deadline for submission of information.* The violation(s) alleged by the source must have occurred within 12 months of the date that DOL/WH receives the information.

(d) *Notice to employer.* Except as provided in (2), below, if NO/OEP/Immigration Team determines that the non-aggrieved party is a credible source and the complaint is actionable, the DD/ADD will notify the ER in writing that allegations have been received.

(1) The notification shall include a description of the nature of the allegations in sufficient detail to enable the ER to respond, and shall request that the ER respond to the allegations within 10 days from the date of the notification although an additional period should be allowed if needed by the ER to respond before the commencement of an investigation. The notification may identify the source, but ordinarily will *not* do so (20 C.F.R. § 655.807(f)(1)).

(2) The notification to the ER may **be omitted when** such notification might interfere with an effort to secure the ER's compliance (as allowed by the statute). NO/OEP/ Immigration Team's review of the complaint will include a determination on this matter, and the DD will be given instructions by NO/OEP/Immigration Team. (20 C.F.R. § 655.807(f)(2).)

(e) *Opportunity for employer response.* Except as provided in FOH 71b02(d)(2), the ER shall have an opportunity to respond to the allegations made by the C. The response may be in writing, in an informal meeting, or both. If the ER requests a meeting, the DD/ADD shall immediately contact the NO/OEP/Immigration Team for guidance concerning the participants and procedures for the meeting. All documents submitted by the ER shall become part of the WH file. The DD/ADD shall forward the ER's response to the NO/OEP/Immigration Team, through appropriate channels, along with any recommendation or analysis that may be appropriate.

(f) *Investigative procedures.* An investigation shall be conducted in the same manner as an investigation on an aggrieved party complaint. INA § 212(n), 8 U.S.C. 1182(n)(2)(G)(viii), specifies that the Secretary may certify a 60-day investigation. It is WH's position that this time frame is "directory" and not "jurisdictional." It is important that WH make every effort to complete a credible source investigation within the time frame, but if the deadline cannot be met, the investigation will proceed to conclusion. The H-1B Visa Reform Act specifies that if violations are found, WH must provide the ER with a determination of the violation(s) found and the opportunity for a hearing to take place within 120 days of the determination of violation.

71b03 Secretary-certified investigations (8 U.S.C. § 1182(n)(2)(G)(i))

(a) The H-1B Visa Reform Act of 2004 provides new authority, retroactive to 10/1/2003, to initiate an investigation of an ER if there is reasonable cause to believe that the ER is not in compliance with the LCA requirements. The investigation must be conducted under specific procedures described below, and may only be initiated for reasons other than completeness and obvious inaccuracies by the ER in complying with H-1B requirements. The Secretary (or Acting Secretary) must personally certify that reasonable cause exists and approve the investigation, and a notice must be provided to the ER to allow a rebuttal of the allegations (*see* FOH 71c03(d) below). A case shall be set up in WHISARD as a Conciliation to capture time spent by WHIs on the responsibilities described below pertaining to complaint intake, screening, notice to ER, and opportunity for ER response; however, the case *must* be DROPPED and coded as a DROP in WHISARD if the Secretary does not authorize an investigation. If authorized, the file will be changed in WHISARD from Conciliation to Investigation status.

(b) Unlike the aggrieved party and credible source investigating process, there is no statutory 12 month limit on receipt of information after the occurrence of the alleged violation(s) for a Secretary-certified investigation. Information alleging violations occurring more than 12 months previously will be considered during the NO review.

(c) An investigation can be conducted under this authority only if the Secretary (or Acting Secretary) personally authorizes the investigation by certifying that the statutory requirements for such a proceeding have been met. 20 C.F.R. § 655.807(h) discusses the process to obtain the Secretary's certification.

(1) The NO shall determine whether the matter will be referred to the Secretary, based on all the information in the file, including any documents or information provided by the ER in response to the allegations. No hearing or appeal is available from a determination declining to refer the matter to the Secretary.

(2) The Secretary shall determine whether a certification will be issued to authorize an investigation. No hearing or appeal shall be available from a denial of certification.

(d) Notice to employer: if the Secretary certifies that reasonable cause exists and approves commencement of the investigation, the DD/ADD will notify the ER in writing that allegations have been received, utilizing the guidance provided by 20 C.F.R. § 655.807(f) and NO/OEP/ Immigration Team.

(e) Opportunity for employer response. The same procedure will be followed in this circumstance as is described in FOH 71(b)(02)(e) above.

(f) Investigative procedures. An investigation shall be conducted in the same manner as an investigation on an aggrieved party complaint, except that it shall be limited to the issues certified by the Secretary. The Secretary may certify an investigation that may be conducted for a period of up to 60 days (8 U.S.C. § 1182(n)(2)(G)(viii). It is WH's position that this time frame is "directory" and not "jurisdictional." It is important that WH make every effort to complete a certified investigation within the time frame, but if the deadline cannot be met, the investigation will proceed to conclusion.

71b04 Random investigations of willful violators (20 C.F.R. § 655.808)

(a) WH may initiate random investigations of three categories of ERs:

(1) ERs determined by DOL to have willfully violated an LCA obligation;

(2) ERs determined by DOL to have willfully misrepresented a material fact on the LCA;

(3) ERs determined by the DOJ to have willfully failed to offer a job to an equally or better qualified U.S. applicant after recruitment (applicable only to H-1B-dependent or willful violator ERs), or to have willfully misrepresented a material fact on the LCA with regard to such offer.

(b) Random investigation authority applies only to ERs found by final agency action on or after 10/21/98 to have engaged in such willful conduct. Random investigations may be conducted within a period of up to five years after determination of the willful violation(s).

(c) Random investigations may be initiated *only* with NO/OEP/Immigration Team approval. The investigation will follow the procedures for a complaint from an aggrieved party (except that the "screening" procedure will not be applied) (FOH 71c03(a)to(d)).

71b05 Confidentiality of complainants and informants (20 C.F.R. § 655.800(d))

(a) Confidentiality rules apply in H-1B as applied in other programs. However, if the C or other confidential source requests an administrative hearing on the WH determination letter, confidentiality is waived.

(b) Complaints under the H-1B program should be handled like any other WH program complaint. However, if the ER asks, the ER may be advised that the investigation was initiated as a result of a complaint. The ER may be advised of the identity of the C if the C is a government agency or if the C authorizes his/her identity to be revealed. If the C is easily identifiable (*e.g.*, C is the only H-1B worker employed by ER), permission to use the C's name should be obtained before initiating the investigation, or the C should be informed of the possibility his/her identity may be revealed during the investigation. If the C refuses to permit use of his/her name, and such refusal precludes WH's ability to identify any violation(s), the investigation should be closed with a "no violation" finding.

71b06 Deadline for filing an actionable complaint (20 C.F.R. § 655.806(a)(5), § 655.807(c))

(a) Complaints must allege violation(s) which occurred within the 12-month "window" prior to the date of the receipt of the complaints. Complaints received after this deadline cannot be investigated. (FOH 71b02(c)(3).) NOTE: The crucial consideration is whether there are *allegations* of violation(s) within the 12-month period, not whether the investigation eventually reveals *actual* violations. Thus, if the complaint presents reasonable allegations of such violations, an investigation shall be initiated and shall be completed in accordance with FOH 71c02, even where the investigation does not substantiate the alleged violation(s) in the 12-month period. In the event that an alleged violation has not ended and is ongoing at the time that the complaint is filed/received, the "last day that the alleged violation occurred" (for purposes of screening the complaint) is considered to be the date that the complaint is filed/received.

(b) Examples based on the following scenario: DOL's receipt of the complaint is 11/29/1999, which establishes the 12-month window as 11/30/1998 to 11/29/1999. The date the LCA was filed is 1/19/1998 —

(1) *Wages*: The H-1B programmer C alleges pay at the PW rate, which is lower than the AW paid to similarly employed programmers with equivalent education and experience, from 1/1/1998 to 11/15/1998. The alleged violation is outside the 12-month window and is not actionable.

(2) *Posting the notice*: C alleges that the ER did not post the notice at the worksite when the LCA was filed. Under the posting requirement, the last day the violation could have occurred was 1/29/1998 (10 days after filing of the LCA). The date of the alleged violation is outside the 12-month window and the complaint is not actionable. The analysis would be different if the ER placed H-1B workers at worksites other than the initial worksites during the 12-month window, and has allegedly failed to post notices at such subsequent worksites at the time that the H-1B workers were placed there.

71b07 Employer out of business or bankrupt

Investigations involving ERs who go out of business during the course of the investigation must be completed, not "dropped" or closed administratively. The INA (8 U.S.C. § 1182(n)(2)(A)-(B)) requires that a determination letter be issued on every actionable complaint. The investigation should be completed based on available evidence. The determination letter should be prepared in accordance with the Joint Review Committee

(JRC) procedures, and mailed by certified mail/return receipt to the ER's last known address. Where known, the ER's attorney/representative should be listed as a "cc" on the determination letter and provided a copy.

71c INVESTIGATION PROCEDURES

71c00 Investigation overview and objectives

(a) As every determination is subject to appeal, every investigation shall be prepared to litigation standards.

(b) The basis for any finding of a violation must be fully documented and must be *included in the investigation file.* For example, if there is a finding that an ER failed to have an appropriate public access file (*see* FOH 71c04), then a full copy of the documentation that *was* disclosed in the ER's public access file should be included in the investigation file. If the size of the file means this is impracticable, the WHI should identify the documents in the file.

(c) *Time limit on investigation.*

(1) The statute provides 30 calendar days to conduct an aggrieved party investigation and issue a determination letter (the letter advising the ER of the results of the investigation) (FOH 71h00). The 30 days begin on the day of a finding that there is reasonable cause to conduct an investigation ("Date Registered" for WHISARD purposes). WH must also provide the ER with notice and the opportunity for a hearing within 60 days of the determination of the violation.

(2) The INA specifies that Secretary-certified and credible source investigations may be conducted for up to 60 days. The 60-day period begins on the day that a finding is made that there is reasonable cause to conduct an investigation ("Date Registered" for WHISARD purposes). In addition, WH must provide the ER with notice and the opportunity for a hearing within 120 days of the determination of the violation. Any H-1B investigation must be registered in WHISARD as either full investigation or limited investigation (FOH 71c01(a)(2)).

(3) The 30/60-day time limits do not alter the need to conduct a complete, thorough investigation which meets litigation standards. The Department takes the position that the time limits are not jurisdictional and that WH does not lose its investigative authority if the time limits are exceeded.

(4) The 30-day investigation, and 60-day investigations for Secretary certified and credible source investigations, are suspended when a request is made by WH to ETA to provide needed PW information. The suspension period begins on the date the written request is made to ETA and ends on the date ETA responds to the request. In the event the ER files an appeal to the ETA response, the suspension period extends to the date of final adjudication in the ETA administrative review process. Fact-finding for the investigation may continue during the period when the PW request and/or appeal is pending with ETA (FOH 71d06(d)).

(5) WHISARD provides automatic notification to the responsible manager when an H-1B investigation reaches the 20th calendar day (from the WHISARD "Date Registered"), 30th day, and every 120th day thereafter until the investigation is "Concluded" or placed in "Inactive Follow-up" in WHISARD.

71c01 Scope of investigation

(a) *Matters to be investigated.* Each investigation shall review violation issue(s) alleged in the complaint as well as the following matters, even if not included in the complaint allegation(s) giving rise to the determination of reasonable cause:

(1) Wage and benefit provisions for all H-1B workers (FOH 71d10, 71d11) except in "last paycheck" violations (see (6) below) unless the DD determines that review of all H-1B workers would not achieve the WH goal of securing maximum compliance while insuring effective use of investigation resources. A determination to limit an investigation (only to be done on an initial investigation and to be coded as a "limited investigation" in WHISARD **and** indicated in the determination letter (see (e) below) should be made based on the severity of any violation; the potential benefit to be derived from reviewing all H-1B workers; the availability of pertinent evidence; and the resources needed to investigate and document any violation.

(2) The public access file (FOH 71c04);

(3) Verification of the ER's dependency status if the ER filed any LCA or H-1B petition or request for an extension of status after 1/19/2001 but before 9/30/2003, or after 3/8/2005 (FOH 71c07);

(4) If the ER is H-1B-dependent (or a willful violator), the ER's compliance with recruitment, secondary ER inquiry, and non-displacement provisions (FOH 71d03, 71d04).

(b) Where the complaint alleges *only* a "last paycheck" violation (*i.e.,* no other allegations of non-compliance), the compliance action may be limited to that violation and the case coded as a "limited investigation" in WHISARD. A more general investigation should be undertaken if the ER's conduct is willful. In either case, a determination letter must be issued, citing the violation and assessing appropriate remedy(ies) (*e.g.*, BWs, CMPs if willful).

(c) If the WHI discovers facts that give reason to believe that violations other than those identified in paragraph (a) above may have occurred during the initial 12-month investigation period, the scope of the investigation may be expanded to include those additional potential violations, applying the judgment described in FOH 52a00. The WH goal is to secure maximum compliance while at the same time insuring effective use of investigation resources. The judgment as to the scope of the investigation should take into account the severity of the possible violation and the potential benefit to be derived from pursuing it, along with the availability of evidence bearing on the issue and the resources needed to investigate and document the violation(s). The determination of the expansion of the investigation to include other areas of potential violation shall be made through coordination/consultation between the WHI, DD/ADD, and RSOL.

(d) *Examples* of determining the scope of the investigation (in these examples, there was determined to be reasonable cause to initiate the investigation):

(1) Upon initiating fact-finding, the WHI determines no violation with regard to the public access file and verifies the ER accurately stated its status as non-H-1B-dependent on LCAs. However, the WHI determines that the C was underpaid as was alleged in the complaint, and that other H-1B workers were also underpaid in the initial 12-month investigation period. In this case, the WHI should determine BWs concerning all H-1B workers, not just the C.

(2) Upon initiating fact-finding based on a complaint alleging failure to post the required notice at the worksite, the WHI determines no violations occurred with regard to the matter complained about and also determines no violations occurred involving wages or public access file. Further, the WHI verifies the ER accurately stated its non-H-1B-dependent status on LCAs. However, the WHI has reason to believe that there was a strike/lockout violation. The scope of the investigation would be expanded to include this serious H-1B violation.

(3) Upon initiating the fact-finding, the WHI determines that the C was *not* underpaid as alleged and there appear to be no other H-1B violations. However, there are apparent violations under another WH program (*e.g.*, FLSA, SCA). The WHI should make arrangements to promptly finalize the H-1B investigation following procedures specified in this FOH chapter. This will require a final JRC to review the investigation findings, a final conference with the ER dealing with the results of the H-1B investigation, and a determination letter to the ER with a copy to the C and other interested parties. If a determination is made to pursue the apparent violations under another WH program (*e.g.*, FLSA, SCA), care must be taken to insure that the ER understands the separate and distinct nature of the issues and WH's separate and distinct authority to investigate them. It is not necessary to hold up on the investigation of the other program violations while the H-1B case is being closed. As a matter of policy, WH will *not* rely upon authority under a different program to conduct H-1B investigations (*e.g.*, WH will *not* rely upon its investigation/subpoena authority under the FLSA in order to investigate facts which may lead to possible H-1B violations). However, apparent H-1B violations revealed in the course of a lawful investigation under a different program, may be pursued only if personally authorized by the Secretary of Labor (FOH 71(b)(03)).

(e) *Violations occurring while the investigation is in progress.* Ordinarily, the period during which the investigation is in progress should be short, because of the statutory deadline of 30 days for completion. However, absent unusual circumstances, the investigation should be updated for any case that has been pending for one year or less at the time of the final conference. In cases where the investigation is not completed for a longer period of time, consideration should be given in the JRC process whether to update the investigation to include violations that have occurred while the investigation is under way. Updating the investigation will also be considered in those cases where a subsequent actionable H-1B complaint is received against the same ER before the ongoing investigation is completed. Where the investigation is not updated, the determination letter should identify the last date covered by the investigation and make it clear that the ER is liable for any violations that occur after that date.

71c02 Investigation period

The period covered in every investigation initiated as a result of an aggrieved party complaint will be limited, at the outset of the investigation, to the same 12-month period that constitutes the "window" used for determining reasonable cause. The investigation may be expanded to include periods before or after (see FOH 71c01(e) above) this initial 12-month period only in accordance with the following instructions:

(a) *Period Investigated.* H-1B investigations shall always cover the 12-month period ending on the day WH received the complaint. The WHI should also review payroll records for the preceding two years (see FOH 71c03(a)(2)(B)). The only exception will be any last pay check investigation (FOH 71c01(a)(6)) or other limitations as provided in FOH 71c01(a)(2).

(b) A timely, actionable complaint provides WH the authority to investigate any compliance issues. If during the course of the investigation, WH learned that there was no violation for the C during the 12-month window, the investigation would not be terminated. Since there was reasonable cause to initiate the investigation, the investigation should be completed and all violations should be cited, even if the C receives no remedy such as BWs.

(c) *Violations outside the 12-month window.* As a general rule, the investigation only examines the 12-month window prior to receipt of the complaint, to determine compliance. However

an "incident" of a particular matter that occurred *only* before or after the 12-month window (*e.g.*, is not part of a continuing violation within the 12-month window), can also be cited.

(d) *Wage and benefit violations occurring during and prior to the 12-month investigation period.* If during the 12-month window the ER failed to correctly pay a certain H-1B worker, the investigation will be extended "backwards" on that individual until a calendar period is reached where the individual was no longer incorrectly paid. While collecting wage information regarding such incorrectly paid individuals, the investigation may uncover other H-1B workers who were underpaid prior to the 12-month window but never during the 12-month window; these under payments may be pursued. (See also subparagraph (e), below.)

(e) *Violations other than wage violations occurring during and prior to the 12-month investigation period.* Violations other than wage violations found to have occurred within the initial 12-month investigation period may be pursued "backwards" beyond the window to include the entire period in which the violation occurred and for which reliable evidence is available. The decision whether or not to pursue such other particular violations "backwards" shall be made in consultation with the RSOL, giving consideration to the compliance benefits to be derived from the backward extension balanced against the resource expenditures involved. Extending an investigation "backwards" should be considered where there is a need for information that would aid in determining the substantial (see FOH 71e00(c)) or willful (see FOH 71e00(d)) nature of the ER's actions, if reliable evidence of the violation is available prior to the 12-month period. The imposition of larger CMP amounts, the establishment of "additional" debarment offenses or the identification of technical violations and/or inadvertent omissions or errors are *not* valid reasons to extend the investigation "backwards."

(f) *Statute of Limitations.* No statute of limitations, *per se*, applies to H-1B violations except for the effective date of the H-1B legislation (October 1, 1991) and the date on which the LCA applicable to the H-1B worker(s) (through the visa petition and/or request for extension of status) was filed and/or certified by ETA. However, when violations (whether wage or otherwise) appear to have extended "backwards" to a point in time *prior to two years* before the date of the complaint's filing, any decision to extend the investigation for a period longer than two years must include consultation with the RSOL to consider the availability of reliable evidence. (See also FOH 71g00 Review and Disposition.)

71c03 Initial contact with employer; investigative techniques

(a) Investigation based on "aggrieved party" complaint:

(1) As with most other programs coming under WH enforcement, there is no statutory or regulatory requirement detailing the method of first contact with the H-1B ER when WH has determined a complaint provides reasonable cause for investigation. Whether initial contact is by phone, by letter, or by unannounced visit, it is always advisable to present an appointment letter to the ER detailing the documentation to be made available for inspection.

(2) At a minimum, access to the following *documents* should be requested:

(A) The ER's public access file (FOH 71c04). The WHI should request any "missing" materials including documentation of "notice" requirements (FOH 71c06.)

(B) Payroll records for EEs in the affected categories for last two years;

(C) Complete petition package for every H-1B worker employed by the ER in the last two years, including the Form I-129/I-129W and the Form I-797 (FOH 71c05);

(D) If an ER's dependency status is a part of the investigation:

(i) Computations of the ER's H-1B dependency, including computations of the "snap-shot" test or the full computation (FOH 71c07).

(ii) Records relating to displacement and recruitment of U.S. workers including documentation of the non-displacement inquiry the ER has made of any secondary ER worksites at which the H-1B workers were placed (FOH 71c08(c)).

(3) ***Redacted 7e***

(b) *Investigation based on "credible source" and "Secretary-certified" complaints.* The initial contact with the ER will, in many cases, consist of the notification of the allegations, followed by the opportunity for a response by the ER (FOH 71b02(c)). If the investigation is a credible source investigation, the WHI's contact with the ER shall follow the procedures for investigation on aggrieved party complaints. Secretary-certified investigations (FOH 71b02(e)) shall follow the procedures for investigations on aggrieved party complaints as modified by the Secretary's certification.

(c) *Random investigations of willful violators*: Follow procedures for "aggrieved party" investigations outlined above.

(d) ***Redacted 7e***

71c04 Public access file (20 C.F.R. § 655.760)

Location of public access file. The ER is obligated, within one day of filing the LCA, to maintain documents described in 20 C.F.R. § 655.760(a) for public examination at the ER's principal place of business in the U.S. or at the "place of employment." The public access file shall be made available to members of the public (including EEs) who request it. There are no regulatory standards for the appearance of the public access file. The file may be maintained in hardcopy format or in electronic format. If the file is electronic, then the ER must provide effective access.

71c05 Documents authorizing employment.

(a) The WHI will review several types of employment documents as part of the investigation, including the LCAs, PW documents, and the USCIS petitions. The documents can be obtained, for investigation purposes, from a variety of sources: the ER, an H-1B worker, the C, ETA, SESA/SWA, or USCIS. The file must identify the source of each employment document in order to adequately address FOIA requests. An exhibit chart should be prepared and included as an attachment to the case narrative, listing the sources of all of these documents in the case file.

(b) *Labor Condition Application.* While the LCA does not, by itself, authorize employment, it contains the ER's H-1B obligations and is, therefore, the basis for WH enforcement. The LCA must be obtained during the course of the investigation (FOH 71a02).

(1) The ER 0is required to maintain all LCAs it has filed with ETA and to provide certified LCAs to WH upon request. A failure to maintain this documentation after employing H-1B workers should be cited as a violation.

(2) If no certified LCAs are provided by the ER or found by an ETA search (FOH 71a02(g), the WHI may obtain the LCA and related forms from the appropriate USCIS Service Center (FOH 71j00(b)).

(3) The WHI may be able to obtain copies of the LCAs from the H-1B workers. The regulations require that the ER provide H-1B workers a copy of the LCA under which they are employed.

(c) *U.S. Citizenship and Immigration Services Forms: I-129/I-129W; I-797; I-94.*

(1) *Form I-129/I-129W visa petition.*

(A) The Form I-129 "Petition for Nonimmigrant Worker" (accompanied by the Form I-129W "H-1B Data Collection and Filing Fee Exemption") is the ER's petition for a visa for a particular foreign worker. The Form I-129/I-129W provides information specific to individual workers, such as their experience and education, job title, job description, intended place(s) of employment, and the wages to be paid. The LCA is the primary supporting document to the Form I-129/I-129W package. The Form I-129/I-129W should be obtained from the ER to identify each H-1B worker the ER has employed under the program. Both sides are to be copied and placed into the investigation file as C exhibits with document source noted on exhibit chart. The WHI can contact the USCIS Service Center to obtain copies of the I-129/I-129W, if the ER fails to provide it.

(2) *Form I-797.* The Form I-797 is a "Notice of Action" issued by USCIS to the ER informing the ER of either the approval or denial of the Form I-129/I-129W petition. The Form I-797 specifies the period of time that the H-1B classification is to be valid for a specific H-1B worker working for a specific ER. Upon ER's receipt of the Form I-797, the visa application process for entry into the U.S. can proceed. A prospective H-1B worker already in the U.S. obtains an updated Form I-94 from USCIS. (See paragraph (3), following).

(A) The Form I-797 contains the "eligible to work" date for determining the *ER's wage obligations* for H-1B workers already residing in the U.S. H-1B workers are entitled to wages beginning on the first day after the "eligible to work" date that the employee makes himself available for work, but no later than 60 days after the "eligible to work" date or the date of adjustment of the worker's H-1B status, whichever is later. (FOH 71d07(b) and 20 C.F.R. § 655.731(c)(6).)

(B) An H-1B worker may begin working for a "new" H-1B ER on the date of the filing of the new ER's non-frivolous Form I-129/I-129W, pursuant to the "portability" option (which allows the H-1B worker to move to a new ER without waiting for the USCIS to complete the adjudication of the Form I-129/I-129W). An H-1B worker who "ports" to a new ER under this option would be "eligible to work" even without a Form I-797.

(C) It is possible for CIS to approve two Forms I-129/I-129Ws (from two different ERs) for one H-1B worker, thus allowing the H-1B worker to be legally employed part- time, at the same time, by two different H-1B ERs. Each ER would have its own, separate obligations under the program; the FLSA concept of "joint employment" is not applicable.

(3) *Form I-94.* Form I-94 is the "Arrival/Departure Record." This form is issued by USCIS to the H-1B worker, and is stamped by U.S. officials at the U.S. border to show the H-1B worker's arrival/departure dates. This form is also up-dated by the USCIS as a work authorization document, if the H-1B worker is already in the U.S. when the Form I-129/I-129W is approved.

(A) The Form I-94's date stamp by U.S. border officials shows the date of entry by the potential H-1B worker into the U.S. The ER's wage obligation to such an H-1B worker begins when the H-1B worker "enters into employment" with the ER, but no later than 30 days after the date-of-entry on Form I-94 (FOH 71d07 and 20 C.F.R. § 655.731(c)(6)).

(4) Copies of the above-described documents and any other USCIS documents reviewed during the investigation, which have a material impact on the conclusions of the investigation, shall be placed in the investigation file as C exhibits with an appropriate listing on the exhibit chart.

71c06 Posting Of Notice, via hand copy or electronically

The ER is required to document compliance with notification requirements and to provide such documentation to the public (FOH 71c04) and to DOL upon request (20 C.F.R. § 655.734(b); FOH 71d14).

71c07 H-1B-dependent and Willful Violator Employers (20 C.F.R. § 655.736(d))

Special attestations apply to H-1B-dependent and willful violator employers using LCAs filed from 1/20/2001 through 9/30/2003 and after 3/8/2005.

(a) An employer is considered H-1B dependent if it has:

(1) 25 or fewer full-time equivalent employees *and* at least eight H-1B nonimmigrants; or

(2) 26 – 50 full-time equivalent employees *and* at least 13 H-1B nonimmigrants; or

(3) 51 or more full-time equivalent employees and 15 percent or more are H-1B nonimmigrants (INA § 212(n)(3)(A) and 20 C.F.R. § 655.736(a)).

(b) An employer found to have committed either a willful failure or a misrepresentation of a material fact by either DOL (INA § 212(n)(2)) or DOJ (INA § 212(n)(5)) is considered a "willful violator." A list of "willful violators" is found in Fact Sheet #59 S.

(c) *Background.*

(1) Per 20 C.F.R. § 655.736(c), every ER which files an LCA or seeks access to H-1B worker(s) (by filing any Form I-129/I-29W petition or application for extension of status during these periods) must take steps to determine whether it is an "H-1B-dependent" ER and must declare its status on the LCA and the Form I-129/I-129W. The ER must choose one of three statements listed on the LCA (see 20 C.F.R. § 655.736(e)).

(2) (2) LCAs remain in effect for their validity period, as entered on the LCA by an ETA certifying official, with regard to the ER's obligations under these LCAs. An ER may continue to use a still-valid one-page or two-page LCA to support Form I-129/I-129W petitions and requests for extension of H-1B status, *provided that* the ER is, in fact, nondependent.

(d) Every H-1B-dependent or willful violator ER is subject to additional attestation obligations on the LCA (20 C.F.R. § 655.736(g)) that include the non-displacement of U.S. workers, the recruitment of U.S. workers, and the offer of employment to equally or better qualified U.S. applicants (this last obligation is enforced by the DOJ, rather than by WH).

(e) *Change in corporate structure or identity.* An ER which experiences a change in corporate structure or a change in identity must re-determine its dependency status if it wishes to file a new LCA, a new H-1B petition, or a request for an extension of H-1B status for a worker.

Required documentation is described in the public access materials (20 C.F.R. § 655.736(d)(6); see also 20 C.F.R. § 655.730(e)).

(f) *"Single employer."* An ER may determine its dependency status as a "single employer" under the IRC test (20 C.F.R. § 655.736(b)) and conclude that it is not H-1B-dependent. (See 20 C.F.R. § 655.736(d)(7).) Such an ER is instructed by the regulations to perform the "snap-shot" test (and/or full calculation if appropriate). (See 20 C.F.R. § 655.736(c)(2).) [***Redacted 7e***]

In all cases, the ER must maintain records, which should show the number of EEs from each entity included in the "single employer" for purposes of the determination. In addition, the ER's public access file must contain a list of all entities included as a "single employer" (20 C.F.R. § 655.736(d)(7)).

(g) An H-1B-dependent or willful violator ER using an LCA to employ only "exempt" H-1B workers (20 C.F.R. § 655.737; FOH 71d02) is not subject to the additional non-displacement and recruitment attestation obligations on the LCA. However, that ER is required to maintain a list of all "exempt" H-1B workers in the public access file (20 C.F.R. § 655.760(a)(9)).

(h) ***Redacted 7e***

(i) ***Redacted 7e***

71c08 **Portability (20 C.F.R. § 655.705(c)(4))**

Under the October 2000 Amendments, an H-1B worker may begin working for a "new" ER at the time a non-frivolous H-1B petition has been filed by the new ER with the USCIS, without waiting for USCIS' adjudication of that new petition. This so-called "portability" option for the movement of an H-1B worker from one ER to another does not change the worker protections enforced by WH under the H-1B program. (See 65 Fed. Reg. 80110, 80118 (Dec. 20, 2000).)