71d ENFORCEMENT ISSUES

71d01 Required wage documentation

(a) The ER is required to maintain all of the documentation it has used to determine both the PW and the AW rates (20 C.F.R. § 655.731(b)(2) and (3); see FOH 71d09 Required Wage Rate).

(b) *Actual Wage* (FOH 71d09(c)). The ER must document the basis used to establish the AW (including how the H-1B worker's wage rate relates to all other workers with substantially the same duties and responsibilities and similar qualifications and experience), and explaining any adjustments in wage rates in the pay system (20 C.F.R. § 655.731(b)(2).

(c) *Prevailing Wage* (FOH 71d09(e)). The ER must document the source utilized to establish the PW for the occupation and geographical area for which LCA was filed (20 C.F.R. § 655.731(b)(3)). If the ER obtained the PW from the SESA/SWA, and the job description was accurate, then WH will not question the validity of the wage rate (*i.e.*, the ER has "safe harbor" on the issue of the validity of the wage rate). Regardless of the source (*e.g.*, SESA/SWA, CBA, PW survey from an independent authoritative source), the ER must be able to provide a copy of the document upon request to the WHI.

(d) Since the required wage rate to be paid to an H-1B worker is the higher of either the AW or the PW, the documentation provided by the ER helps to establish the required wage rate. A failure to obtain, maintain, and/or provide the above documentation may be cited as a violation (FOH 71e14, 71e15, or 71e17). In the investigation, the PW must be determined in order to determine if the ER committed a wage violation. If the ER is unable to provide a valid source, WHI will obtain the PW from ETA (FOH 71d06)).

71d02 Exempt H-1B worker (20 C.F.R. § 655.737)

(a) An H-1B-dependent or willful violator ER is subject to the additional LCA requirements concerning non-displacement and recruitment of U.S. workers *unless the* LCA is designated and used only for the employment of "exempt" H-1B workers.

(b) "*Exempt H-1B nonimmigrant worker*" is a statutory term which is applied *only* in the context of determining which H-1B ERs are subject to the *additional* obligations for recruitment and non-displacement of U.S. workers. This does not relieve an employer from any other H-1B requirements.

(1) An "exempt" H-1B worker is not, individually, outside of the H-1B program's protections for H-1B workers; the worker is fully entitled to all the protections of the H-1B program. The term "exempt worker" in the H-1B program does *not* have the same meaning as under the FLSA. Thus, an "exempt" H-1B worker is not exempt from H-1B protections, in the way that a worker may be exempt from minimum wage and/or overtime protections under various FLSA statutory exemptions.

(2) The H-1B-dependent or willful violator ER may be relieved from additional obligations with regard to particular LCA(s), due to the employment of only "exempt" H-1B worker(s) on the LCA(s).

(c) An "exempt" H-1B worker is either highly-paid or highly-educated, under the following criteria:

(1) *Wages*: The H-1B worker receives wages (including bonuses and similar compensation) at an annual rate equal to at least $60,000 (20 C.F.R. § 655.737(c)). The H-1B worker must actually receive the "exempt" wage. An H-1B worker's wages are not to be pro-rated for unpaid "bench time" (*i.e.*, H-1B worker cannot be "exempt" if unpaid

"bench time" takes his/her wages below $60,000, even if such unpaid status would be acceptable under the regulation concerning "benching" (20 C.F.R. § 655.731(c)(7); FOH 71d07). If an investigation determines that an H-1B worker has not yet worked a year, the WHI would determine whether the H-1B worker had been paid an average of $5,000 per month, including any guaranteed bonuses or similar compensation received. Additionally, as discussed in FOH 71d10, the $60,000 must be reported to IRS as earnings (wages, tips, other compensation). For example, if the ER pays monthly, in any month where the ER reports less than $5,000 (monthly equivalent) to the IRS as earnings, the salary test has not been met.

(2) *Education*: The H-1B worker has attained a masters or higher degree (or its equivalent) in a specialty related to the intended employment. (See 20 C.F.R. § 655.737(d).)

(d) *USCIS determination of "exempt" status.* Prior to approving any Form I-129/I-129W, USCIS will examine (among other things) the exempt status of any nonimmigrant whose petition is supported by an LCA that designates it will be used exclusively for exempt H-1B workers (20 C.F.R. § 655.737(e)(1)). The USCIS will first review the LCA for the guaranteed $60,000 salary. If the salary is not present, USCIS will then review the LCA for education requirements. If USCIS determines that the H-1B worker is not exempt, USCIS will not grant the petition.

(e) *Wage and Hour determination of exempt status based on education.*

(1) If USCIS determines that an H-1B worker is exempt based on wages and the WHI finds that the H-1B worker is not in fact paid the required amount, the WHI shall examine the Form I-129/I-129W package to determine whether the ER designated education as the basis for exempt status. Where such a designation of "education" was made, the WHI shall determine whether the H-1B worker is exempt on this basis (20 C.F.R. § 655.737(d)).

(2) If USCIS, for any reason, has not made a determination of "exempt" status, and the WHI finds that the H-1B worker is not exempt based on wages, the WHI shall determine whether the H-1B worker is exempt based on education *if* the Form I-129/I-129W contains a designation of "education" as a basis for exempt status (20 C.F.R. § 655.737(d)).

(f) If the WH investigation finds that the H-1B worker was not, in fact, "exempt," then the ER would be subject to the non-displacement and recruitment requirements. ***[Redacted 7e]***

71d03 Recruitment and selection of U.S. workers (20 C.F.R. § 655.739)

Requirements for special attestations (*e.g.,* recruitment attestation) applicable to H-1B-dependent and willful violator ERs contained in LCAs (Form ETA 9035 and/or Form ETA 9035E) filed on or after 10/1/2003 were reinstated on 3/8/2005, under the H-1B Visa Reform Act of 2004. However, the special attestations contained in any dependent or willful violator LCA will remain in place for the life of that LCA and will apply to any existing or future H-1B worker placement through the LCA.

(a) All H-1B-dependent and willful violator ERs are subject to the "recruitment of U.S. workers" attestation obligation, *unless* the LCA is designated and used *only* for the employment of "exempt" H-1B workers (see FOH 71d02), *or unless* the LCA is used only for H-1B workers described in § 203(b)(1) of the INA (aliens with extraordinary ability, or aliens who are outstanding professors or researchers, or aliens who are employed by multinational firms to provide executive or managerial services). If an ER claims that the ER does not have to

recruit because the H-1B workers fit one of those descriptions in INA § 203(b)(1), the WHI should contact the NO/OEP/Immigration Team, which will consult with the USCIS.

(b) An ER subject to the recruitment requirement must take good faith steps to recruit U.S. workers prior to filing a LCA, filing a petition to hire an H-1B worker, or requesting an extension of an H-1B worker's nonimmigrant status.

(c) *Recruitment* is a process to attract the attention of individual(s) who may apply for employment, including but not limited to, soliciting applications from individual(s) for employment, receiving/reviewing applications, and considering applications so as to present the appropriate candidate(s) to the official(s) making the hiring decision(s). (See FOH 71e09). As described in 20 C.F.R. § 655.739(d), this process can be internal or external to the ER's workforce, and active or passive. (See (d) below.) The recruitment must use procedures that meet *industry-wide standards* (20 C.F.R. § 655.739(e); FOH 71d03(e)) and it must offer compensation that is equal to at least the "required wage" (20 C.F.R. § 655.731(a)). The ER may use *legitimate selection criteria relevant to the job that are normal or customary to the type of job involved* (see FOH 71d03(g)), as long as the criteria are not applied in a discriminatory manner.

(d) The ER may use a variety of *solicitation methods* to recruit U.S. workers. The focus of the solicitation may be *internal* (recruiting from within the company) and/or *external* (seeking EEs from outside the company). The solicitation techniques may be *active* (seeking out candidates) and/or *passive* (waiting for candidates to respond to notices) (20 C.F.R. § 655.739(d)(2); FOH 71d03(f)).

(1) *Active solicitation* involves direct communication with potential applicants, both inside and outside the organization. Examples would include providing training to current EEs, making contacts with trade/professional associations or labor unions, participating in job fairs, and using placement services at higher learning institutions.

(2) *Passive solicitation* involves the general distribution of information about available positions by advertising through newspapers, trade/professional journals, notices at the work site, Job Banks, or on the ERs' Internet "home-page."

(e) *Industry-wide Standards.* An ER is not required to use any particular recruitment method, but the methods shall be common in the industry (20 C.F.R. § 655.739(e)). "Industry," for this purpose, means the ERs who primarily employ these types of workers (*e.g.*, all healthcare businesses employing computer engineers, and not just computer service/contractor companies employing computer engineers for placement at healthcare worksites) (20 C.F.R. § 655.739(b)).

(f) Legitimate selection criteria relevant to the job that are normal or customary to the type of job involved. The statute and regulations permit the ER to use the criteria listed at 20 C.F.R. § 655.793(f).

(g) The ER may not apply any otherwise-legitimate criteria in a discriminatory manner which could skew the recruitment process in favor of the H-1B workers, such as applying a selection criterion to U.S. candidates and not to H-1B candidates.

(h) The ER must conduct its recruitment in *good faith.* The ER's recruitment process must assure that U.S. workers are given a fair chance in consideration for a job. (See 20 C.F.R. § 655.739(h).)

(i) *Job offer to U.S. Applicants.* An ER subject to the recruitment requirement must also offer the job to a U.S. worker applicant as long as the U.S. worker has equal or better qualifications than the H-1B worker. This hiring provision is *not* enforced by DOL, but by DOJ. DOJ's

enforcement authority requires a complaint from the aggrieved U.S. worker. WH shall refer any such worker to DOJ to file a complaint. The responsibility to administer this provision has been assigned to the Office of Special Counsel for Immigration-Related Unfair Employment Practices in DOJ, which administers several other statutes concerning employment discrimination based on national origin, citizenship status, and immigration document abuse. Its address is P.O. Box 27728-7728, Washington, DC 20038. Its telephone number and Internet web address are 1-800-255-7688 (workers) or 1-800-225-8155 (ERs) and osc.crt@usdoj.gov; see also OSC's website at www.USDOJ.gov/crt/osc.

(j) The ER has the burden to show that it is in compliance with the regulations (20 C.F.R. § 655.739(i)). The WHI must not attempt to contact any media in order to learn whether or not the ER recruited for U.S. workers. (Note FOH 50j.) If the ER does not maintain records or other evidence that is has complied with the regulations pertaining to recruitment, there is a *prima facie* case that the ER did not comply and a violation should be cited.

71d04 Displacement or lay off of U.S. workers (20 C.F.R. § 655.738)

(a) All H-1B-dependent and willful violator ERs subject to the "non-displacement of U.S. workers" obligations are prohibited from "laying off" any U.S. worker either directly (in ER's own workforce) or secondarily (at the worksite of another/secondary ER) from a job that is "essentially the equivalent" of the job for which an H-1B worker is sought (20 C.F.R. § 655.738). An H-1B-dependent or willful violator ER who utilizes an LCA to employ only "exempt" H-1B worker(s) is not subject to this displacement provision (20 C.F.R. § 655.737).

(b) All H-1B ERs (whether H-1B dependent, H-1B nondependent, or willful violators) are subject to an enhanced CMP (up to $35,000) and an increased debarment period (at least three years) for willful violations during which U.S. workers employed by the ER were displaced within a specific period before and after the ER files any H-1B visa petition (*i.e.* beginning 90 days before, and ending 90 days after, the petition or request for extension of H-1B status is filed) (See FOH 71e00(d)(3); FOH 71e10). This "super penalty" applies to all H-1B ERs and to any willful violations, and must not be confused with the special "non-displacement" obligations of the H-1B-dependent and willful violator ER.

(c) There are *two types of displacement* of U.S. workers with regard to the H-1B-dependent or willful violator ER. Each type involves the displacement of a U.S. worker by an H-1B worker that performs the same or "essentially similar" job.

(1) *Direct Displacement.* An H-1B-dependent or a willful violator ER is prohibited from displacing a U.S. worker *in its own workforce* within the period beginning 90 days before and ending 90 days after the date the H-1B petition or request for extension of H-1B status is filed. The ER's own workforce includes all U.S. workers "employed by the employer." The statute does not define "employed by the employer." Therefore, DOL must, per Supreme Court precedents, apply "common law" standards, not the FLSA standards, in determining when such an employment relationship exists (20 C.F.R. § 655.738(c); 20 C.F.R. § 655.715). See paragraph (f) below, for the common law standards.

(2) *Secondary Displacement.* H-1B-dependent and willful violator ERs are prohibited from placing an H-1B worker at a worksite of a secondary ER (the H-1B ER's client) where there are indicia of an employment relationship between the H-1B worker and that other ER, until the H-1B ER inquires whether the secondary ER has or will displace any of its own U.S. worker/EEs during the period 90 days before and 90 days after the date of the placement of the H-1B worker with the secondary ER (20 C.F.R. § 655.738(d)). See paragraph (g) below, for discussion of secondary displacement.

(d) *Lay off.* A U.S. worker is "laid off" (therefore "displaced" for purposes of the H-1B statute and regulations) if the ER causes the U.S. worker's loss of employment by using the H-1B worker to perform the essentially equivalent job performed by the U.S. worker. A loss of employment however, would *not* be considered to be a "lay off" where any of the situations listed in 20 C.F.R. § 655.738(b)(1) occurs. 20 C.F.R. § 655.738(b)(1)(iv)(A)-(C) also lists the criteria to be reviewed in discerning the validity of a similar employment opportunity to determine if it, in fact, is a *bona fide* offer.

(e) *Essentially equivalent jobs.* In order for *displacement* to occur (within the meaning of the H-1B statute and regulations), the job from which the U.S. worker is laid off must be *essentially equivalent* to the job for which an H-1B worker is sought. To determine whether jobs of laid off U.S. workers and H-1B workers are essentially equivalent, the two positions should be compared based upon job responsibilities, qualifications and experience of workers, and area of employment. The comparison of the two jobs should be on a "one-to-one" basis where appropriate. But a more broad comparison may be required if a company eliminates an entire department with several U.S. workers and replaces them with one or more H-1B workers. In the latter circumstance, U.S. worker(s) who held "essentially equivalent job(s)" as the H-1B worker(s) would be protected from such displacement (20 C.F.R. § 655.738(b)(2)). The factors of job responsibility, qualifications and experience, and area of employment (as described in 20 C.F.R. § 655.738(b)(2)) must be closely reviewed and analyzed to determine if jobs are essentially equivalent.

(f) *Employed or employment relationship (Common Law Test)*

(1) The determination of an employment relationship between U.S. workers and an H-1B ER or a secondary ER is necessary *only* in the event of an apparent displacement of such U.S. workers. (NOTE: It is never necessary to determine such a relationship between the H-1B worker(s) and the H-1B ER, since the relationship is deemed to exist as a result of the ER's having sponsored the worker(s) as the ER for H-1B employment-based nonimmigrant visa(s).)

(2) The prohibition against displacement of U.S. workers is a protection which applies only to U.S. workers who are employed by the H-1B ER (direct displacement prohibition) or by the secondary ER (secondary displacement prohibition). Therefore, *bona fide* consultants and independent contractors who are, by definition, not "EEs," are not protected against the loss of work due to the use of H-1B workers, even though the consultants and independent contractors may be performing services for the H-1B ER or the secondary ER. (See 20 C.F.R. § 655.738(c), (d).)

(3) The H-1B program does *not* use the "suffer or permit to work" test for an employment relationship that is used under the FLSA. Instead, the H-1B program uses the "common law" multi-factor test, in which the key determinant is "the right to control" the means and manner in which the work is performed. For enforcement purposes, WH will assume that any U.S. worker treated as an EE for tax purposes and other purposes (*e.g.*, Federal Insurance Contributions Act (FICA), workers' compensation) is, in fact, an EE. Where the worker's status as an "EE" is not certain, the WHI shall make a determination considering the following and similar factors (which are not all required to be present to determine whether the U.S. worker receives displacement protection):

(A) The putative ER has the right to control when, where, and how the worker performs the job;

(B) The work does not require a high level of skill or expertise;

(C) The putative ER, rather than the worker, furnishes the tools, materials, and equipment;

(D) The work is performed on the premises of the putative ER;

(E) There is a continuing relationship between the worker and the putative ER;

(F) The putative ER has the right to assign additional projects to the worker;

(G) The putative ER sets the hours of work and the duration of the job;

(H) The worker is paid by the hour, week, month or an annual salary rather than for the agreed cost of performing a particular job;

(I) The worker does not hire or pay assistants;

(J) The work performed by the worker is part of the regular business (including governmental, educational, and nonprofit operations) of the putative ER;

(K) The putative ER is itself in business;

(L) The worker is not engaged in his or her own distinct occupation or business;

(M) The putative ER provides the worker with benefits such as insurance, leave, or workers' compensation;

(N) The worker is considered an EE of the putative ER for tax purposes (*i.e.*, withholding of Federal, State, and FICA taxes);

(O) The putative ER can discharge the worker; and

(P) The worker and the putative ER believe that they are creating an EE-employer relationship.

(Q) A useful reference in determining an employment relationship is the EEOC approach (in EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997), which provides a model for identifying particular factors that can be applied in the context of H-1B employment, particularly where workers are placed at third-party ER worksites.

(4) The "indicia of employment" test, found in the H-1B regulation dealing with secondary displacement, is *not* the test for determining an employment relationship for purposes of identifying the U.S. worker(s) entitled to protection against displacement. Instead, the "indicia of employment" test (paragraph (g)(2)(B) below) applies only to the identification of the H-1B worker(s) whose placement at a secondary ER's worksite(s) would trigger the prohibition against secondary displacement (which, in turn, protects the U.S. workers employed by the secondary ER).

(g) *Secondary Displacement.*

(1) *Protected U.S. workers.* An H-1B-dependent or willful violator ER is prohibited from displacing U.S. workers who are outside the ER's own workforce. The prohibition protects *only* U.S. worker(s) who are employed by the "secondary ER" at whose worksite(s) the H-1B ER places its own H-1B workers (not *bona fide* consultants or independent contractors.) The displacement prohibition applies 90 days before and ends 90 days after the H-1B ER *places* an H-1B worker at the secondary ER's worksite(s) (prescribed period) in a position "essentially equivalent" to the job held by the (displaced) U.S. worker .

(2) *"Triggering" H-1B workers.* Not every placement of an H-1B worker will require the H-1B ER to make a displacement inquiry and thereby "trigger"/activate the secondary displacement prohibition. In order for this prohibition to be in effect, both of the following criteria must be met:

(A) The H-1B worker employed by the H-1B-dependent or willful violator ER must perform duties at one or more worksites owned, operated, or controlled by the secondary ER. If the H-1B worker provides services to the secondary ER without being placed at the secondary ER's worksites(s), then the prohibition would not apply *and*

(B) There must be indicia of an employment relationship between the H-1B worker and the secondary ER (FOH 71d04(f)(4)). The common law factors are to be used to determine the existence of "indicia of an employment relationship" (20 C.F.R. § 655.738(d)(2)(ii)(A)-(I)). (It is not necessary for *all* of the factors to be found in the case.)

(C) This "indicia of employment relationship" test does not constitute "employment" of these H-1B workers for purposes of making the secondary ER liable under the H-1B program.

(3) The secondary ER need not be an H-1B ER, but is any ER which accepts the placement of the H-1B workers; the participation of a "middleman" or intermediate ER/operator in the placement of the H-1B workers will not relieve the H-1B ER of its responsibilities regarding displacement of U.S. workers employed by the ER at whose worksite the H-1B workers are placed. The secondary ER's acceptance of the services of the H-1B workers does not make the secondary ER an H-1B ER (20 C.F.R. § 655.738(d)(3)).

(4) The H-1B ER, not the secondary ER, is subject to the non-displacement obligations and is liable if the secondary ER displaces any of its U.S. worker EEs during the prescribed period. The secondary ER is liable only in circumstances where such secondary ER is an H-1B ER and has failed to comply with its own obligations. However, the secondary ER could be liable for violations under other statutes, such as the FLSA, if an "employment relationship" with the H-1B worker(s) exists for purposes of those statutes (20 C.F.R. § 655.738(d)(3)).

(5) *Good faith inquiry by employer.* If there is an indicia of employment between the H-1B worker and the secondary ER, the H-1B ER is prohibited from placing an H-1B worker at a secondary ER worksite or with a secondary ER (the H-1B ER's client)until it has made a good faith inquiry of the secondary ER as to whether that ER has displaced or intends to displace a U.S. worker in the prescribed period (described in paragraph (g)(1) above) (20 C.F.R. § 655.738(d)(5)). The H-1B ER must exercise *due diligence* and *make reasonable effort* to inquire about potential secondary displacement through methods which are to be documented in the public access file. See 20 C.F.R. § 655.738(d)(5)(i)(A)-(C) for methods (not all-inclusive) that an H-1B ER may utilize in this process.

(6) *Further and more specific inquiry by employer.* The H-1B ER's exercise of due diligence may require more specific inquiry about displacement if the H-1B ER has information that suggests that the secondary ER has or will displace U.S. workers during the prescribed period (described in paragraph (d) above) (See 20 C.F.R. § 655.738(d)(5)(ii)).

(7) *Strict liability.* Even if the H-1B ER makes the required inquiry regarding displacement at a secondary ER's job site, the H-1B ER will still be found in violation of the secondary displacement prohibition if the secondary ER in fact displaces any U.S. worker/EE in the prescribed period (FOH 71e08). CMPs and other appropriate remedies may be imposed, but *debarment* can be imposed *only if* DOL's final agency action finds that the:

(A) ER knew or had reason to know of the secondary ER's displacement of U.S. worker(s) in its workforce at the time of the placement of the H-1B worker(s) with the secondary ER (including circumstances where the ER failed to make the required inquiry); or

(B) ER has been subject to a previous sanction for secondary displacement involving the same secondary ER.

(8) Since the secondary ER has no obligations under the H-1B program, the WHI shall not require (but may encourage) the secondary ER to reinstate the U.S. worker(s) and shall not instruct the secondary ER to pay any wages to such worker(s). In appropriate cases, the H-1B ER may be responsible for back pay and/or front pay to such worker(s). Such remedies are only to be used with prior NO/OEP/Immigration Team and NOSOL and RSOL clearance.

(h) The H-1B ER is responsible for demonstrating compliance with the non-displacement obligations, both primary and secondary (20 C.F.R. §655.738(e)). The WHI need not make contact with the ER's customers (secondary ERs) to learn whether or not the ER made the appropriate inquiry. Additionally, the WHI is not required to attempt contact with former U.S. workers within the ER's work force to determine if any had been displaced or laid off. If the ER does not maintain records or other evidence that it has complied with the regulations pertaining to displacement or the secondary ER inquiry, there is a violation and it should be cited. If the ER can credibly establish that it made an inquiry and made a contemporary notation of the inquiry (but is unable to produce the document), the ER should only be cited for a documentation violation.

71d05 Whistleblower protections (20 C.F.R. §655.801)

(a) The Whistleblower (WB) protections for employees are stated in 20 C.F.R. § 655.801(a) and administrative remedies available to WH as part of the enforcement process are listed in 20 C.F.R. § 655.801(b).

(b) Additional immigration status relief/protection may be available to the H-1B worker WB. The INA directs the USCIS and the Secretary to devise a process under which an H-1B worker WB who is otherwise eligible to remain and work in the U.S. may be allowed to seek appropriate employment in the U.S. for a period not to exceed the maximum stay allowed for the H-1B worker's visa classification (INA § 212(n)(2)(C)(v)). WH is responsible for providing the information needed by USCIS to initiate this process. The USCIS (not WH) will determine if the H-1B worker/C meets the statutory requirement to be "otherwise eligible to remain and work in the U. S." The resulting visa status action (if any) taken by USCIS is not dependent on, nor does it have to wait for, a final WH determination that a WB violation has in fact occurred.

(c) *Screening of complaint.* WH will screen WB complaints, as it does with all H-1B complaints, to determine (within 10 calendar days of date of receipt) if the complaint provides reasonable cause to initiate an investigation. See FOH 71b01 for Complaint Intake Process (information

may be supplemented, as appropriate, by interview of complainant.). In addition to the requirements listed in 20 C.F.R. § 655.806(a), a WB complaint must:

(1) Concern an EE of the H-1B ER. For purposes of this section, the term "employee" (EE) includes present EEs, former EEs, and applicants for employment, whether or not the EE is an H-1B nonimmigrant;

(2) Allege violations of *protected activities* as listed in 20 C.F.R. § 655.801(a)(1)and(2).

(3) Provide information (supplemented as appropriate by interviews of the C) indicating that the ER intimidated, threatened, restrained, coerced, blacklisted, discharged, or otherwise took adverse action that discriminated against the EE (*e.g.*, a reduction in hours, a failure to promote, a change in work hours, refusal to sponsor for permanent employment or a forced relocation);

(4) Provide information sufficient to raise the inference that the ER may have known about the protected activity and that the protected activity may have been a contributing factor in the adverse action. It would normally be considered sufficient, for example, if the C provides information that the ER took the adverse action shortly after the protected activity occurred; and

(5) Allege discrimination which occurred within the 12 months preceding the filing of the complaint with WH or, if there were continuing instances of alleged discrimination, at least one of the alleged discriminatory acts occurred within the preceding 12 months;

(d) *Determination whether to make a referral to USCIS.* A WB complaint which has been accepted for investigation will be referred to USCIS (to decide if the WB will be allowed to remain in the U.S. and obtain other employment) *only* if the criteria in FOH 71d05(c) above are present and *in addition* (either at the time the complaint is made or thereafter), there is reason to believe that because of a discriminatory action described in FOH 71d05(c), a C who is an H-1B worker:

(1) Has lost his/her position, or is in danger of losing, or is about to lose his/her position with the H-1B ER; or

(2) May have been impeded in his/her opportunity to seek alternative H-1B employment or alternative legal status; or

(3) Has suffered a significant deprivation of income; or

(4) Has been threatened with the actions in (1), (2) or (3); or

(5) Has been subjected to conduct by the ER with the purpose or effect of unreasonably interfering with the EE's work performance or creating an intimidating, hostile, or offensive work environment. If WH determines that there is not reasonable cause to believe a WB violation has occurred, the C will be so notified; the C may choose to provide additional information which may constitute an actionable complaint.

(e) *Method of referral to USCIS.* When the conditions in paragraphs (c) and (d) have been met, the responsible WH office will notify USCIS, after contacting and securing clearance from the NO/OEP/Immigration Team.

(1) Notification shall be made by completing the WB notification letter.

(2) The completed notification letter will be sent to the local USCIS district office (for location see http://www.ins.usdoj.gov/graphics/fieldoffices/statemap.htm), with a copy to the NO/OEP/Immigration Team at: U.S. Department of Labor, Wage and Hour

Division, 200 Constitution Ave., NW, Room S-3510, Washington DC, 20210; Fax 202-693-1302; and a copy included with the notification letter to the C.

(3) The WHI shall note a USCIS referral on WHISARD, the block/screen to be provided.

(4) WH shall advise the C that an investigation will be scheduled, using the Notification Letter to the Complainant and attaching a copy of the WB notification letter sent to USCIS.

71d06 Prevailing wage rate request to ETA during an investigation (20 C.F.R. § 655.731(d))

(a) If the ER has failed to establish or document a valid PW rate (FOH 71d01), the WHI should request that the ER obtain such rate. If the ER refuses, produces a PW source which does not satisfy the regulatory requirements, or refuses to apply the appropriate PW level (from a PW source providing several levels), then a PW rate must be obtained from ETA. In such a case, ETA will be the final arbiter on PW matters. To obtain a PW rate from ETA, the WHI must:

(1) Prepare the PW request letter for all levels in the occupation, with an attached copy of the Form I-129/I-129W (including any attachments that offer a job description, including supplement H). If more than one H-1B worker is involved, attach the Form I-129/I-129W for one or more representative workers. If not provided by the ER at the initial conference, these documents should be requested from the H-1B worker (who would normally have personal file copies of documents relating to his/her nonimmigrant status). If not available from the ER or the H-1B worker, contact USCIS (FOH 71j00(b)).

(2) Submit the PW request letter by mail or FAX to the appropriate National ETA Processing Center with jurisdiction over the geographic location where the PW rate is requested, either Atlanta or Chicago. Address the request to the Center Director. See FOH 71j02 for jurisdictional information and addresses.

(b) Prior to 3/8/2005, PW rates issued by ETA provided two wage levels—"level I" (entry) or "level II" (experienced). The H-1B Visa Reform Act of 2004 requires that surveys used or made available by DOL to determine PWs must provide at least four levels of survey wage determinations commensurate with experience, education, and level of supervision. When requesting a PW rate, the WHI should provide all information available (provided by the ER on the Form I-129/I-129W Supplement H and all attachments) to ETA so that ETA can determine which level applies. The WHI should request not only the applicable "level" but also all "levels" so WH can determine the applicable wage/level if the H-1B worker performed duties at a higher level than described by the ER in the Form I-129/I-129W, or determine the applicable wage/level for other H-1B workers employed pursuant to that LCA. The INA provides that where an existing governmental survey has only two levels, two intermediate levels may be created by dividing by three the difference between the two levels offered, then adding the quotient to the first level, and subtracting that quotient from the second level to yield the two additional levels. The DOL provides wage surveys from the Occupational Employment Statistics Program (OES) at: www.flcdatacenter.com.

(c) The ETA office obtains the PW rate from SESA/SWA to respond to the WHI's PW request. The SESA/SWA is a federally funded unit of the states providing PW rates for immigration programs administered by the ETA. Once the ETA provides a PW rate to the WHI, the WHI immediately notifies the ER of that rate and of rights to appeal. It should be made clear to the ER (whether by letter or orally) that appeal of the PW determination falls solely within the jurisdiction of the ETA. Any appeal must be made to ETA (with a copy to WH) within 10

days of the ER's receipt of the WH letter to the ER providing ETA's prevailing rate determination.

(d) The time spent obtaining a PW rate from ETA (including time involved in an appeal in the ETA system) is not counted against the 30-day statutory period to complete the WH investigation. Investigation fact-finding may continue during this time. The WHI should maintain contact with ETA, to provide additional information which may be needed for the PW determination, and to know the status of the matter in the ETA system. The WHI should request copies of ETA/ER correspondence for the investigation file. Once the ETA process is completed, the WH investigation shall be completed, using the PW rate determined by ETA.

71d07 Nonproductive status/"benching" (20 C.F.R. § 655.731(c)(7))

(a) Nonproductive status—commonly referred to as "benching"—is the term applied to the situation where an H-1B worker is "idle"/nonproductive (not producing income for the ER) due to a decision by the employer, lack of a permit or license, or for any other reason except as specified in 20 C.F.R.§ 655.731(c)(7)(ii) and is not paid the required H-1B wage. The ER's wage obligation begins as soon as the H-1B worker has "entered into employment" with the ER (as defined in subparagraph (c) below), but in no event later than the 30 or 60-day "windows" described in 20 C.F.R. § 655.731(c)(6)(ii).

(1) Once the H-1B worker enters into employment with the ER, the ER must pay the required wage to the H-1B worker even if the H-1B worker is not yet productive (unless the nonpayment of wages is allowable under the "benching" rules, for reasons not attributable to the ER (20 C.F.R.§ 655.731(c)(7)(ii)).

(2) Wages need not be paid during the maximum 30-day and 60-day "windows" periods, prior to the H-1B worker's entering into employment. These periods are not considered to be "bench time" and are not to be analyzed under the "benching" standards.

(b) *"Entered into employment"*

(1) The H-1B worker "enters into employment" (on or after the date of need on the H-1B petition (Form I-129)) when he/she first makes him/herself available for work or otherwise comes under the direction or control of the ER, *or* when the H-1B worker's activities constitute "hours worked" under the FLSA concept (whichever comes first). Examples are described in 20 C.F.R. § 655.731(6)(i).

(2) The file should include documentary evidence substantiating when an H-1B worker entered into employment; for example:

(A) A statement from the H-1B worker indicating the date the worker made himself/herself available for work and the duties that the worker performed;

(B) A statement from another worker who observed the dates and type of work performed by the H-1B worker;

(C) Records of a stipend to the worker (copies of any cancelled checks);

(D) Records of the ER's providing H-1B worker a company car and/or use of the company condo;

(E) Records of the ER adding the H-1B worker to the group insurance plan; and/or

(F) Records of the preparation of the Form I-9 for the H-1B workers.

(c) *"Eligible to work"* (ETW) means the date that an H-1B worker, already present in the U.S. when the petition was approved by USCIS, is ready, able, and available to work for the new ER. The H-1B worker is considered to be ETW upon the date of need indicated on the approved Form I-129/I-129W petition, or the date of USCIS' approval of the worker's H-1B status, whichever is later. The ETW date never precedes the employment authorization date on the Form I-797 issued by USCIS for the worker's H-1B status. Once the ETW date is established, the ER's wage obligation starts on the 60th day after the ETW date (unless the H-1B worker enters into employment on an earlier date (see subparagraph (b) above), which would trigger the wage obligation on that earlier date). When the wage obligation begins, the ER must thereafter pay the required wage for nonproductive/"bench" time, unless the nonproductive status is not attributable to the ER. See FOH 71c08 (Portability).

(d) *Termination of employment.*

(1) Once the wage obligation has been triggered, the ER must pay the required wage until the employment relationship is terminated (20 C.F.R.§ 655.731(c)(7)(ii)), including payment for nonproductive/"bench" time, unless the nonproductive status is not attributable to the ER.

(2) A determination of a *bona fide* "termination" will be based on all the circumstances/evidence in an individual case and may be evidenced in various ways:

(A) The best evidence is a copy of a letter/notice sent by the ER to USCIS, notifying USCIS that the H-1B worker's employment has been terminated as of a particular date. This notice is required by the USCIS regulations so that the worker's H-1B visa is cancelled (8 C.F.R. § 214.2(h)(11)). The WHI should always ask the ER to produce this notice, if there is any question concerning the existence or date of a termination of employment for an H-1B worker. The WHI may obtain additional clarification from USCIS.

(B) If the ER cannot produce a copy of a letter/notice to the USCIS, the WHI should request the ER to provide other evidence regarding the termination of the H-1B worker's employment. For example, the ER may have sent the H-1B worker an E-mail or letter, informing her/him that employment is terminated as of a particular date. The form and date of such evidence will affect its weight (*e.g.*, an E-mail dated 6/1/2001, notifying the H-1B worker that employment is terminated as of 6/15/01, could be appropriate documentation, whereas an E-mail dated 10/1/01, stating the same termination date of 6/15, would probably be unacceptable documentation).

(3) Where there is incomplete, inconsistent or conflicting information concerning the termination of the H-1B worker's employment, the WHI shall make a determination based on an assessment of the completeness and credibility of the available evidence.

(4) WH would *not* consider a *bona fide* termination to have occurred where the ER "re-hires" the H-1B worker if or when work later becomes available, *except* if: the H-1B worker has been rehired after working under an H-1B visa for another ER during the period between the alleged termination and the rehire; the H-1B worker has been re-hired after returning to his/her home country after the ER's cancellation of the H-1B visa (through notice to the USCIS after the alleged termination); or the H-1B worker has been rehired after having been in the U.S. pursuant to a change of status subsequent to the alleged termination. A bon-fide re-hire must involve submission of new petition to USCIS.

(5) The wage obligation covers the entire period until the date of the termination (including period(s) for which WH determined there had not been a *bona fide* termination). "Benching" standards are applied to determine if the ER is relieved from the payment of the required wage for any particular nonproductive time prior to the *bona fide* termination.

(6) The USCIS regulations require the ER to pay the H-1B worker's transportation to his/her home country if the employment is terminated prematurely (8 C.F.R. § 214.2(h)(4)(iii)(E)). However, this requirement is not enforced by WH through BW assessment. Any questions about such return transportation should be referred to the local USCIS office.

(e) *Schools or other educational institutions* may have nonproductive (non-work) periods for their H-1B workers, such as summer vacations or term breaks. The H-1B workers need not be paid during such periods, *provided that* the standards in 20 C.F.R. § 655.731(c)(4) are satisfied.

(f) *Back wages for "benched" H-1B workers are to be computed as follows:*

(1) The H-1B worker must be paid the required wage for all "hours worked" under the FLSA. Therefore, even if the H-1B worker is "benched" for reasons not attributable to the ER, the H-1B worker must still receive BW for any "hours worked" during that time. See 20 C.F.R. § 655.731(c)(7)(ii). For example, an H-1B worker is on a one-month voluntary personal leave (legitimately "benched" without wages), but comes to the office to work for two days on an emergency project ("hours worked"). BW will be assessed for the two days of work.

(2) If the nonproductive/"bench" time is subject to the wage obligation, then the assessment of BW will consider the following factors:

(A) *Salary vs. hourly wage:*

(i) A *salaried H-1B worker's wages due* would be equal to the appropriate *pro rata* salary for the pay period with "bench" time (*e.g.*, if the monthly salary is $5,000 and the H-1B worker is "benched" without pay for two weeks, the BW would be $2,307.96 ($5000 x 12 divided by 26)). However, unlike the FLSA, the H-1B program does not use the "work week" or "pay period" concept as a rigid measure for compliance with wage obligations (as done under the FLSA). The H-1B ER is allowed some flexibility in satisfying the wage obligations. The regulations permit the ER to have a salary system which pays less than an absolute pro rata installment each pay period, provided that the ER shows that the annual salary is satisfied through nondiscretionary payments such as quarterly production bonuses (see 20 C.F.R. § 655.731(c)(4)). If such a system is evidenced, then it should be taken into consideration in determining the extent of the "benching" violation and the BW assessment.

(ii) An *hourly wage H-1B worker's wages due* would be equal to wages for the H-1B worker's established, regular number of full-time or part-time hours for a pay period (as described in the following subparagraph). In the H-1B program, as under the FLSA, the hourly wage H-1B worker's wages for his/her hours worked are due for the pay period when the work was performed. If the H-1B worker worked more than the "normal" number of hours in one pay period, he/she would be paid for those hours in that pay period; the "extra" or "higher than normal" hours and wages would not be reported/credited into another pay

period for purposes of determining the extent of the H-1B "benching" violation and the BW assessment.

(B) *Full-time vs. part-time:*

(i) A *full-time H-1B worker* is any H-1B worker not designated as "part-time" either on the LCA or the Form I-129/I-129W. If the H-1B worker is *salaried*, then his/her wages due will be the *pro rata* payment for the pay period with "bench" time. If the H-1B worker is an *hourly wage* worker, then the wages due per week will be the hourly rate multiplied by 40 hours (or by a lower number of hours if the ER can show such number to be full-time employment).

(ii) A *part-time H-1B worker* is any worker designated as "part-time" either on the LCA or the Form I-129. The wages due for a pay period with "bench" time will be based on the number of hours for part-time employment specified by the ER on the Form I-129. If the Form I-129 shows a range of hours for part-time employment, then the wages due will be based on the average number of hours normally worked by the H-1B worker (provided that the average is within the range shown on the Form I-129). The regulations require the ER to have hours records for part-time H-1B workers (whether salaried or hourly wage) (20 C.F.R. § 655.731(b)(1)).

(C) *Actual wage vs. prevailing wage.* Where wages are required for a "bench" period, the WHI must determine which of the available rates (AW *or* PW) is the *required wage* to be enforced through BWs.

(i) *Actual Wage.* Where the ER has an established system that yields a specific wage payment regardless of circumstances (*e.g.,* some "salary" systems), then the AW will be enforced for bench time where the AW is higher than the applicable PW. However, the ER's AW system may include variable rates for different periods and circumstances. In particular, the system may have a "no work, no pay" provision, which would generate a wage rate of zero for nonproductive/bench time. A zero rate for an AW would necessarily be lower than any possible PW. In such a situation, the PW will be enforced for bench time.

(ii) *Prevailing Wage.* Where the PW is higher than the ER's AW (either as a general matter, or due to the ER's having a zero rate for nonproductive time), then the PW will be enforced for bench time.

(D) *"Hours worked"* under established FLSA principles must be compensated, whether or not the time is considered by the ER to be "productive" (*e.g.*, H-1B worker must be paid for time spent in training or orientation, and for time "on call").

71d08 USCIS fees

(a) *Basic fees.* An ER filing a Form I-129/I-129W petition with the USCIS must submit a $130 filing fee ($185 filing fee effective 10/26/2005). This fee is considered to be a business expense for the ER. Consequently, the ER is prohibited from recouping this fee from the H-1B worker (through payroll deductions or other means) to the extent it reduces the H-1B worker's wages below the required wage. The amount of such fee illegally paid by the H-1B worker must be repaid.

(b) *Petition fee.* An additional $750 or $1,500 USCIS filing fee is required for most ERs. Payment of this additional fee by the H-1B worker is prohibited by the INA, whether or not the payment would impinge on the H-1B worker's receipt of the required wage. The statute

exempts any institution of higher education, nonprofit organization, entity related to or affiliated with an institute of higher education, or a nonprofit research organization or governmental research organization from payment of this fee. A violation will be cited and CMPs will be assessed if the ER recoups this fee (through payroll deductions or other means) from the H-1B worker or if the fee is paid to a third party by the H-1B worker. BWs will be computed for the entire amount of the fee that was paid by the H-1B worker. Any ER which (mistakenly or otherwise) requires an H-1B worker to pay this fee will be cited for a wage violation (as an illegal deduction) and the entire fee should be repaid to the worker.

(c) *Premium processing fee.* The ER may obtain expedited USCIS processing of the Form I-129/I-129W, by paying an additional special fee of $1,000. This fee, like the basic filing fee, is considered to be a business expense for the ER and, consequently, the ER is prohibited from recouping this fee from the H-1B worker (through payroll deductions or other means) to the extent it reduces the H-1B worker's wages below the required wage. In some rare circumstances, the ER may be able to establish that the use of premium processing was for the worker's primary benefit and was not a business expense. In such a case, the worker's payment of the fee would be permitted. The amount of such fee illegally paid by the H-1B worker must be repaid.

(d) *H-1B Visa Reform Act of 2004 $500 Anti-Fraud Fee.* The H-1B Visa Reform Act of 2004 mandates a $500 "fraud prevention and detection fee" to be paid by all ERs which file an H-1B petition. This fee became effective 3/8/2005. Any ER which (mistakenly or otherwise) requires an H-1B worker to pay this fee will be cited for a wage violation (as an illegal deduction) and the entire fee should be repaid to the worker.

71d09 Required wage rate (20 C.F.R. § 655.731)

(a) The ER must pay the H-1B worker no less than the "required wage," which is the higher of the AW and the PW (attested by ER in all versions of the LCA).

(b) *Overtime pay.* The H-1B required wage does not have an overtime premium wage requirement. If the H-1B workers are *not* entitled to FLSA overtime pay, any overtime premium which is provided by the ER's AW system is counted/credited toward satisfaction of the H-1B's required wage. Such an ER is in compliance as long as the total gross amount paid (including non-FLSA overtime) divided by the hours worked is no less than the required wage rate. However, if the H-1B workers *are* entitled to FLSA overtime pay, the standard FLSA rules regarding the treatment of overtime pay are applicable to the H-1B workers' overtime premium. (See FOH 71d10(g) for explanation of treatment of FLSA overtime pay for H-1B workers.)

(c) *Standards for the actual wage.* The AW for the H-1B worker is the wage paid under *the ER's own wage scale or "system"* to its workers with similar experience and qualifications for the same type of work the H-1B worker was brought into the U.S. to perform. When making the determination of AW, the ER may consider any legitimate business factors such as experience, job qualifications, education, specific job responsibility and function, job performance, and specialized knowledge. The ER's factors must relate to the statutory standards for AW (*i.e.*, experience; qualifications; specific employment in question) and cannot differentiate between H-1B and U.S. workers on the basis of market forces (*e.g.*, ER cannot simply pay the H-1B worker "the lowest wage the H-1B worker is willing to accept"). (FOH 71d01(b) and 20 C.F.R. § 655.731(a)(1).) The ER's AW system must be applied in an even-handed manner to workers in the occupation, so as not to be discriminatory.

(d) *Establishing and documenting the actual wage.* It is the ER's responsibility to determine the AW in accordance with 20 C.F.R. § 655.731(a)(1) and to document the determination. The *public access file* must contain a description of the ER's AW system, in sufficient detail to show how the ER applied the system to determine the wage for the H-1B worker(s). At a minimum, the description should identify the factors that are considered and how they are applied. The description may be in various forms (*e.g.*, a copy of a CBA, a copy of a wage scale, a memo summarizing the system). Documentation of the determination of an AW for each H-1B worker must be maintained in that H-1B worker's *individual personnel or payroll file*, showing how the H-1B worker's AW relates to the wages paid to other EEs with similar experience, qualifications, and duties. If this documentation is not maintained, the ER should be cited for violations of public access and/or record keeping, as appropriate.

(1) Discriminatory or illegal factors (*e.g.*, race or nationality) may not be applied by the ER in the determination of the wage rate.

(2) If the ER does not employ any individuals other than one H-1B worker in the occupation listed on the LCA, the rate that the ER pays the H-1B worker will be the H-1B worker's AW.

(3) If the ER has other EEs in the same occupation, the H-1B worker's individual AW would be the rate that the ER's AW system yields for an individual with the H-1B worker's experience, qualifications, duties, *etc.*

(4) If the ER has other EEs in the same occupation but has no discernible system for setting H-1B workers' rates of pay, the WHI shall determine the H-1B worker's AW from the best information available concerning the wages being paid to comparable workers.

(A) If there is no documentation of the AW system and it cannot be reconstructed, it may be necessary to average the wages of the ER's workers with similar experience, qualifications, and duties, and then to use that average as the AW for the H-1B worker(s) in determining the required wage.

(B) The "rate of pay" entered on the LCA (sometimes called "the intended wage") need not be the AW. However, the "rate of pay" should, at a minimum, reflect the required wage. If the "rate of pay" entered on the LCA is significantly higher than the rate paid to the H-1B worker(s), the WHI should examine the circumstances to determine whether the ER misrepresented a material fact on the LCA by entering a wage rate that could not or would not be paid (FOH 71e01).

(5) The ER's AW system may include *variable rates*. These variables in the rate of pay in the AW system will affect the determination of the required wage for particular periods of time. For example, the ER may establish a different rate of pay for different tasks, or a different rate of pay for work at different worksites. The most common variable rates are differences in the pay rates for "bench" time and productive time (*e.g.*, some ERs have a "no work, no pay" system for nonproductive time). Where the ER's AW system has a rate of zero for "bench" time, the PW becomes the required wage for "bench" time (except where the nonproductive status is not attributable to the ER and is, therefore, not subject to the payment of H-1B required wages).

(6) *Pay adjustments* (*e.g.*, cost of living increases, seniority increases), provided in the ER's AW system must be made in H-1B workers' wages in the same manner as in the wages of other EEs (20 C.F.R. § 655.731(a)(1)).

(7) Changing economic conditions (or other valid factors) can require that an ER make substantive changes to its AW system; the AW can go up (merit increases, cost of living, promotions, *etc.*) or down (wage reductions). At the time that the AW change occurs, it should be recorded in the public access file (20 C.F.R. § 655.760(a)(3)). If the AW changes (whether higher or lower than the "rate of pay" on the LCA), there is no need for the ER to file a new LCA to record it (because it is recorded in the public access file). However, if the ER decides to hire another H-1B worker (or extend an existing H-1B worker), the accompanying LCA (attached to the petition package) must correctly reflect the new "rate of pay." If it does not, a new LCA must be obtained.

(e) *Prevailing wage.* The PW rate is the weighted average of wages (mathematical "mean") paid to all surveyed individuals in the same occupational classification and area of employment (listed on the LCA) as the H-1B worker. The Labor Certification for the Permanent Employment of Aliens in the United States (PERM) regulation published on 12/27/2004. (See 69 Fed. Reg. 77327, 77385 (Dec. 27, 2004)) with an effective date of 3/28/2005, has modified the prevailing wage determination process in three significant ways:

(1) The use of the Davis-Bacon Related Acts or the McNamara-O'Hara Service Contract Act is no longer controlling for PW determinations, although an ER may request those sources to be considered as an employer-provided source;

(2) If an employer-provided survey does not contain an arithmetic mean, and only provides the median, the median wage figure can be used for determining the PW. ERs may continue to submit published surveys from public or private sources or employer-conducted surveys as long as the survey complies with acceptable standards. Although the Occupational Employment Statistics (OES) PW data will be provided for four skill levels, employer-provided surveys are not required to contain multiple levels; and

(3) ERs that disagree with their PW determinations are afforded only one opportunity to provide supplemental information to the SESA/SWA. ERs may choose to file a new request for a PW determination or request review by the Certifying Officer and the Board of Alien Labor Certification Appeals (BALCA.)

(f) The ER must identify and document the PW rate level for the occupational classification in the area of intended employment as identified on the LCA. The public access file must identify the PW source and contain a copy of the documentation (*e.g.*, SESA/SWA determination; CBA; published survey).

(g) Unchallenged sources for prevailing wage. WH will not challenge PW rates, provided that the ER obtained the current PW rate for the occupation, area of employment as shown on the LCA, and has correctly applied the "level" (if the survey provides for more than one "level") based on one of the following sources:

(1) CBA; or

(2) OES (Wage component of the survey administered by the Bureau of Labor Statistics (BLS) (www.flcdatacenter.com); or

(3) Validated employer-provided survey.

(h) State Workforce Agency. All PW determinations issued by the SESA/SWAs are the same as OES rates. Most PW determinations issued by SESA/SWAs are expressed as hourly rates. The ER may request that the determination be issued by the SESA/SWA as a salary. Or the ER may convert the SESA/SWA hourly rate into the salary equivalent (hourly rate x 2080 hours for an annual amount). The ER's LCA must accurately state the method of wage payment which will be used (salary or hourly), so that the PW is accurately presented.

However, if the ER obtained a PW rate for an occupation or for an area of employment other than that reflected on the LCA, the ER's use of any of these PW sources (as it pertains to the incorrect occupation or area of employment) would not be considered to be acceptable. Additionally, if the ER has incorrectly applied the "level" (if the survey provides for more than one "level"), that level of the survey would not be acceptable either.

(i) *Additional sources for prevailing wage.* There are two other sources listed in 20 C.F.R. § 655.731(a)(2)(iii)(B)and(C) that may be utilized by an ER in obtaining a PW rate. When evaluating the validity of these two additional sources, the WHI shall assure that the conditions listed in 20 C.F.R. § 655.731(b)(3)(iii) have been met. This should include:

(1) ER PW rate is for the occupation and place of employment shown on the LCA;

(2) Survey is the most current available from that source and it is no older than 24 months (*i.e.*, publication date no earlier than 24 months prior to date of LCA which used the survey), and is based on data collected within 24 months of the date of publication;

(3) Survey was based on a statistically reliable sample of businesses randomly selected;

(4) Survey was cross-industry (except for nonprofit and educational/research organizations as noted below in subparagraph (j));

(5) Survey was stratified (includes small, medium, and large ERs);

(6) Wage rate from the survey is a weighted average (or mathematical "mean");

(7) Survey is local (*i.e.*, produces the PW for the area of intended employment shown on the LCA). This area is defined as the area within commuting distance of the worksite/place of employment. If the survey does not reflect a representative sample for the local area, the survey can be expanded (*i.e.*, not local) until a representative sample can be identified. To help WHIs determine if it is necessary to expand an area to obtain a representative sample, the WHI should consult with the local SESA/SWA.

(j) *Academic and research organizations.* The PW rate for an institution of higher education or an affiliated or related nonprofit entity, a nonprofit research organization or a Governmental research organization as defined in 20 C.F.R. § 656.40(c), need only take into account employees at such institutions and organizations in the area of intended employment (20 C.F.R. § 655.731(a)(2)(viii)).

(k) The investigation cannot be completed until the determination of the required wage has been made. If there are questions concerning the sufficiency of the documentation, the RSOL should be consulted. The BW (if any) will be the difference between the required wage and the wages actually received by the H-1B worker(s) (FOH 71f02).

(l) The H-1B Visa Reform Act 2004, effective 3/8/2005, eliminated the *five percent "discount" on a SESA/SWA's prevailing wage determination.* Effective 3/8/2005, WH ERs must pay at least 100% of the prevailing wage and back wages will be computed accordingly. Prior to 3/8/2005, if an ER relied on a PW from the wage component of the OES Survey (see FOH 71d09(g) above) (whether obtained through the SESA/SWA or BLS directly), there will be no violation cited and no BW assessed where the ER paid at least 95% of the rate (20 C.F.R. § 655.731(a)(2)(iii) and (d)(4)). However, if the investigation reveals that the ER paid less than 95%, then the BW will be computed based on 100% of the SESA/SWA PW. (The ETA Permanent Labor Certification regulation (on which this H-1B regulation is modeled) states that the 5% tolerance/discount does not apply to PW source such as SCA, DBA, or CBA rates; therefore, there can be no "discount" on such rates. Also, the ETA regulation deals only with the PW and therefore has no effect on the ER's AW under the H-1B program; there is no tolerance/discount whatsoever on the AW.)

71d10 Payment of wages, and benefits (20 C.F.R. § 655.731(c))

(a) *Satisfaction of wage obligation.* Once the WHI has determined the required wage rate, the fact-finding should assure that the required wage rate is satisfied. The H-1B worker must be paid his/her wages "cash in hand, free and clear, when due.". The H-1B worker must actually receive the wages each pay period, except that deductions from wages may be made in accordance with 20 C.F.R. § 655.731(c)(9), FOH 71d11, and FOH 71e02. The H-1B worker's wages are "due" in accordance with the following standards:

(1) *Salaried H-1B worker* wages are due pro rated payments on the ER's usual pay schedule but no less often than monthly, except that a rigid pro rata payment is not required if the ER has a pay system which includes nondiscretionary bonuses (see subparagraph (c) below; 20 C.F.R. § 655.731(c)(2)(v) and (4)).

(2) *Hourly wage H-1B worker* wages are due at the end of the pay period in which the hours of work are performed, and no less often than monthly. The hourly rate payout may take into account the ER's nondiscretionary bonus system (see subparagraph (c) below; 20 C.F.R. § 655.731(c)(2)(v) and (5)).

(3) *Schools or other educational institutions* may pay the required wage on a compressed schedule which may not provide a pro rata payout for every pay period (see FOH 71d07(f); 20 C.F.R. § 655.731(c)(6)).

(b) *"Wages paid"* (for purposes of satisfying the required wage) must meet the criteria which are identified in 20 C.F.R. § 655.731(c)(1)and(2). (See subparagraph (d) below, and FOH 71d11.)

(1) *Tax reports filed and taxes paid in accordance with the Internal Revenue Code.* The ER must be able to show that payments as reported for tax purposes have been paid to the IRS as required (both the ER's and H-1B worker's payments). The gross wage is the compensation payment that should be reported as the H-1B worker's earnings for tax purposes.

(A) The ER's payment of the required taxes should be shown on the IRS Form W-2 filed by the ER with the IRS (not the IRS Form 1099 which reports compensation paid to non-EEs or contractors.) DOL does not enforce the IRS regulations concerning the use of the appropriate tax-reporting forms. Therefore, DOL cannot refuse to credit/count the ER's compensation to H-1B workers merely because the ER chose not to use the W-2 reporting form. However, since the H-1B worker is the EE of the sponsoring ER by operation of law, it may be appropriate to refer the matter to the IRS where the WH investigation reveals that the ER is not properly acknowledging its employment status in the payment of income taxes.

(B) WH will accept amended tax returns which show that the ER reported "wages" for IRS purposes. If this is done, the additional wages reported in the amendment may be credited as part of the ER's satisfaction of the H-1B required wage.

(C) If earnings are paid in a foreign currency, the IRS instructions for Form W-2 require that the ER convert the foreign currency to U.S. dollars for tax purposes and keep records of the conversion rate. Therefore, any ER paying its H-1B worker(s) in the worker's home country in that country's currency must be able to show that the IRS reporting requirements have been met, or that the earnings were not subject to U.S. federal taxes under the IRC. If the ER is unable to make

this showing, the WHI shall use the best available information to determine the U.S. dollar value of all wages paid in foreign currency payments and reported as the H-1B worker's earnings for tax purposes.

(2) *Payment of Federal Insurance Contributions Act (FICA).* Unless the H-1B worker's home country has a "totalization arrangement" with the U.S. Social Security system, the ER must withhold and pay the FICA payments (see 20 C.F.R. § 655.731(c)(2)(iii)).

(c) *Non-discretionary bonuses as "wages."*

(1) The H-1B program does not require the use of the "workweek" or "pay period" concept used in FLSA investigations. The H-1B ER may take credit for certain payments that are not made during the pay period credited. (See 20 C.F.R. § 655.731(c)(2)(v) and (c)(4).)

(2) *Projected but not-yet-paid bonuses and similar payments* (20 C.F.R. § 655.731(c)(2)(v)). The ER may pay less than a *pro rata* salary or less than the required hourly rate in the pay period when the hours of work are performed, *provided that* the ER intends to use some form of non-discretionary supplemental payments in order to meet the wage obligation in the future. The ER must have documentation showing his/her commitment to make such payment such as a documented history of making such payments when due. The ER must be able to show the method of determining the amount of such supplemental/bonus payments, and that the payments combined with the routine/regular wage payments would ensure payment of at least the required wage for each pay period.

(3) Unlike non-discretionary bonuses, projected but not-yet-paid *discretionary bonuses* are not applicable toward the required wage rate as they are not guaranteed.

(4) Claims of supplemental payments or bonus systems should be reviewed with RSOL to determine whether a wage violation exists and, if so, the method of BW computation.

(d) Once the supplemental/bonus payments are made (whether discretionary or non-discretionary), the payments are treated as wages under the standards for "wages paid" (described in subparagraph (b) above).

(e) *Facilities furnished to H-1B worker(s).*

(1) An ER may take a "wage credit" (*i.e.*, may reduce or make a deduction from the cash-in-hand payment of the required wage) for matters which are principally for the benefit of and voluntarily agreed to by the H-1B worker in writing (See FOH 71d11 on deductions).

(2) *Housing and food allowances* meet the "principal benefit of the worker" test, *except in circumstances in which* they are ER business expenses as described in 20 C.F.R. § 655.731(c)(9)(iii).

(3) The wage credit (deduction) cannot exceed the fair market value or actual cost (whichever is lower) and must be documented by the ER.

(4) The amount of the wage credit (deduction) must appear on the payroll records and tax reports as wages.

(5) The amount of the wage credit (deduction) must not exceed the limit on garnishments under the Consumer Credit Protection Act (CCPA) (29 C.F.R. Part 870).