

## ADDITIONAL GUIDANCE REGARDING WAGE LEVEL ANALYSIS

Prior email guidance issued by SCOPS instructed adjudicators to address inconsistencies when the job duties and requirements of the proffered position described in a petition contradict the wage level indicated on the Labor Condition Application (LCA). The internal guidance stated:

While USCIS does not have the authority or jurisdiction to mandate a specific wage level on the LCA, USCIS is required to verify that the information on the certified LCA corresponds to and supports the H-1B petition. The prevailing wage determination for an occupation is based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills, and specific vocational preparation (education, training, and experience) generally required for acceptable performance in that occupation. In general, a petitioner must distinguish its proffered position from others within the same occupation through the proper wage level designation to indicate factors such as the relative complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. The adjudicator may issue a request for evidence if he/she determines that the wage level selected by the petitioner does not appear to correspond to the petitioner's description and requirements for the proffered position. This type of analysis should be conducted on all H-1B petitions.

Officers have requested that more specific guidance be provided on when the wage level does not appear to correspond to the proffered position.

As noted in the prior internal guidance, officers should review all H-1B petitions to determine that the LCA properly corresponds to the position on which the petition is based. Officers should not rely on the wage level description on page 7 of the DOL *Prevailing Wage Determination Policy Guidance* to make the determination. The wage level descriptions are foundational and instructive, but have already been incorporated into DOL's five step process for determining the appropriate wage level (see Appendix A of the DOL guidance). As such, officers should follow DOL's five step process to determine if the wage level selected on the LCA properly corresponds to the petition. Wage levels begin at a Level I (entry level) and may increase based on a comparison of the duties and requirements for the employer's proffered position to the general duties and requirements for the most similar occupation as provided by the Occupational Information Network (O\*NET). If it appears that the position requirements exceed what are normal for the occupation (e.g., Level I wage but education required exceeds normal education requirement for that occupation as stated in O\*NET), otherwise exceed what is appropriate for the occupation and the wage level selected on the LCA (e.g., Level II wage, but experience required is at the high end of the experience and SVP range), or the position does not correspond to the occupational classification in the LCA (i.e., occupational classification selected is incorrect), officers should conduct a more detailed review of O\*NET as described below.

In cases where the officer concludes that the LCA does not properly correspond to the petition, because the wage level selected by the petitioner is less than what appears to be required by DOL, officers must provide an explanation in the denial, based on O\*NET, and not simply based on the definitional wage levels, explaining why the wage level selected by the petitioner on the LCA does not correspond to the position's requirements.

**TIPS TO HELP IDENTIFY WHEN AN LCA WAGE LEVEL MAY BE INCONSISTENT WITH POSITION/PETITION:**

A Level I wage might not be appropriate if:

- 1) The Petitioner's education requirement is higher than what is considered usual for the occupation, as provided in Appendix D of the DOL guidance or, if the SOC code is not listed in Appendix D, the O\*NET Job Zone information.
- 2) The Petitioner's experience requirement is higher than the minimum experience requirement defined by the SVP range provided in the O\*NET Job Zone information.
- 3) The Petitioner requires a foreign language, license or certification, or other special skill beyond what is provided for in the O\*NET description.
- 4) The proffered position is a combination of two unrelated occupations.

In order for the LCA to support the petition, it must be for the correct SOC code and include all worksites described in the petition.

Please note that the following is not intended to replace the 2009 DOL guidance and is not comprehensive wage level guidance.<sup>1</sup> If you have additional questions regarding wage levels, you should consult the DOL guidance. Remember, officers should not determine what the proper wage level should have been. Instead, officers should only determine whether the content of the LCA, including the wage level, corresponds with the H-1B petition. In addition, the following analysis does not apply to employer provided surveys.

If an officer is issuing a denial based on an inconsistent wage level/LCA, please use the below detailed review process and DOL process overview as a guide for what is to be included in the analysis portion of the denial.

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<sup>1</sup> [http://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf)

## DETAILED REVIEW PROCESS

Step 1 SOC Code	<ul style="list-style-type: none"><li>• Confirm that LCA SOC code is correct and includes documented worksites</li><li>• If a combination of two different occupations but<ul style="list-style-type: none"><li>• related (use SOC code for the higher wage)</li><li>• unrelated (one level increase and use SOC code for higher wage)</li></ul></li></ul>
Step 2 Experience	<ul style="list-style-type: none"><li>• For a Job Zone 4 with an SVP of 7 &lt; 8 - if more than 2 years of experience req'd, can't be Level I</li><li>• For a Job Zone 5 with SVP of 8 &lt; 9 - if more than 4 years of experience req'd, can't be Level I</li></ul>
Step 3 Education	<ul style="list-style-type: none"><li>• If education requirement is higher than that listed in Appendix D of the DOL guidance or O*NET Job Zone, if SOC code not listed in Appendix D, can't be Level I</li></ul>
Step 4 Special Skills or Other Requirements	<ul style="list-style-type: none"><li>• Potential level increases</li><li>• Foreign language</li><li>• License or certification</li><li>• Travel for more than incidental training &amp; development</li><li>• Special skills or requirements that aren't part of the normal duties as described in O*NET</li></ul>
Step 5 Supervisory Duties	<ul style="list-style-type: none"><li>• Supervising individuals in the same occupation will usually mean can't be Level I, unless provided for in O*NET</li><li>• Supervising subordinates will only require a one level increase if the supervision is not part of the normal duties as described in O*NET</li></ul>

### DOL'S PROCESS FOR DETERMINING THE APPROPRIATE WAGE LEVEL

DOL guidance provides a five step process for determining the proper wage level for the proffered position, as follows:

**Step 1: Determine whether the LCA contains the correct SOC code as described in O\*NET and review the provided information including the tasks, knowledge, work activities and job zone information**

Note: If the proffered position is a combination of two different, but *related* occupations (for example a combination of computer-related positions), the higher paying SOC code must be on the LCA. If the proffered position is a combination of two different, but *unrelated* occupations (for example a teacher who is also the school's accountant), a one level wage increase is required AND the higher paying SOC code must be on the LCA. In other words, the wage level would automatically increase one level because of the combination of unrelated occupations and the SOC code must be for the higher paying occupation. If the Petitioner did not select the higher paying occupation, and/or list a minimum of a Level II wage, then the LCA would not correspond to the petition. It is important to note that if a proffered position mainly conforms to the O\*NET description, but only an insignificant portion of the beneficiary's time

will be spent on tasks encompassed under a different SOC code, the position would not be considered a combination of two different occupations. However, a wage level increase may still be required under step 4 below because the duties fall outside of the normal duties of the occupation.

**Step 2: Compare the Petitioner's experience requirements to those listed in O\*NET**

For occupations in Job Zones 4 & 5, there is no increase in the wage level if the employer's experience requirement is at or below the level of experience and SVP range. Anything more will require an increase in the wage level.

The two most common SVPs in H-1B adjudications are as follows:

- SVP 7, which is defined as over 2 years up to and including 4 years of experience
- SVP 8, which is defined as over four years up to and including 10 years of experience

Therefore, for a Job Zone 4 position with an SVP of  $7 < 8$  (an SVP of  $7 < 8$  is the equivalent of an SVP of 7), if the employer requires zero to two years of experience, no wage level increase is required because the experience requirement is at or below the SVP range. If the employer requires more than two years of experience, a wage level increase is required as follows:

- more than two years and up to three years of experience = a one level increase (the low end of the range)
- more than three years and up to four years of experience = a two level increase (the high end of the range)
- more than four years of experience = a three level increase (greater than the range)

For a Job Zone 5 position with an SVP of  $8 < 9$ , if the employer requires zero to four years of experience, no wage level increase is required because the experience requirement is at or below the SVP range. If the employer requires more than four years of experience, a wage level increase is required as follows:

- more than four years and up to seven years of experience = a one level increase (low end of the range)
- more than seven years and up to ten years of experience = a two level increase (high end of the range)
- more than ten years of experience = a three level increase (greater than the range)

**Step 3: Compare the petitioner's level of education requirement to that listed in Appendix D of the DOL guidance (listed by SOC code), or if the SOC code is not in the Appendix, to that listed in O\*NET**

If the employer's education requirement is higher than that provided in Appendix D of the DOL guidance or O\*NET, if the SOC code is not in the Appendix, an increase is required and a Level 1 wage would not be appropriate. If the position usually requires a bachelor's degree and the Petitioner requires a master's degree, the wage would increase by one level and if the Petitioner requires a doctorate, the wage would increase by two levels.

**Step 4: Determine whether the proffered position contains any special skills or other requirements which would warrant a wage level increase**

Generally, any special skills or other requirements which are not listed in O\*NET as usually being part of the occupation require an increase in the wage level.

#### LICENSES & CERTIFICATIONS:

Generally speaking, if the Petitioner requires a certification or a license that is not normally required for entry into the occupation as described in O\*NET, then a wage level increase would be required. For example, if the proffered position is for an accountant and the employer requires a certified public accountant, or the proffered position requires a licensed professional engineer (as opposed to an engineer in training for example), a Level I wage would not be appropriate. If the occupation as described in O\*NET normally requires a license even at the entry-level (such as a doctor or lawyer), then there would not be an increase in the wage level.

#### TRAVEL:

Generally, incidental travel for training and development would not require a wage level increase. However, extensive travel, especially outside of the beneficiary's location, may require a wage level increase. DOL has given the following examples: a house painter would typically travel to job sites in the same city, but national travel would require a one level increase. A sales manager travelling to regional offices to provide oversight and monitor performance would be considered typical, but more extensive travel may be considered atypical and require a one level increase. The same one level increase would likely be required for a physician travelling to various cities in the state or various states on a rotational basis to provide services. Review the information provided in O\*NET to determine if the Petitioner's travel requirements are atypical for the occupation.

#### FOREIGN LANGUAGE:

A foreign language requirement will also generally require an increase in the wage level. An increase in the wage level would not be required, however, if the foreign language requirement is a normal requirement for the occupation (e.g., a foreign language teacher, interpreter, translator, or caption writer). Note: The following SOC codes include teaching a foreign language and would not require a wage level increase 25-1124.00 - Foreign Language and Literature Teachers, Postsecondary; 25-2022.00 - Middle School Teachers, Except Special and Career/Technical Education; and 25-2031.00 - Secondary School Teachers, Except Special and Career/Technical Education. However, if the beneficiary will be teaching more than one language, for example French and Spanish, a wage level increase would be required.

#### ADDITIONAL SKILLS & REQUIREMENTS:

Although the above are the most common instances when an increase in the wage level occurs, the Petitioner may require additional skills and/or requirements which are atypical for the occupation that would necessitate an increase in the wage level. As noted in step 1 above, when the proffered position's duties include duties that are not normally part of the occupation as described in O\*NET, but do not rise to the level of a combination of occupations, a one level increase in the wage may be required.

**Step 5: Review the duties the Petitioner provided to determine if there are any supervisory duties and compare to the information in O\*NET**

Supervisory duties do not automatically indicate that a Level 1 wage is not sufficient. A wage level increase is only required when supervision is not part of the information provided in O\*NET. Further, if supervisory duties are in O\*NET, it is important to determine the level of the individuals supervised. Generally speaking, if O\*NET includes supervisory duties, they do not usually include supervising individuals in the same occupation. For example, if a lawyer is supervising other lawyers, a wage level increase is required, but if a lawyer is supervising legal assistants, there would not be an increase in the wage level because supervising legal assistants is one of the tasks listed in O\*NET. If the employer describes the supervision in general terms, such as supervises/manages team, additional information regarding the titles and duties of the team members would be required.