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January 3, 2024

U.S. Department of Labor
Wage and Hour Division
Division of Regulations, Legislation, and Interpretation
200 Constitution Avenue, NW, Room S-3502
Washington, D.C. 20210

RE: Opinion Letter Request Regarding LCA Posting Notice Issue

Submitted via email to: WHDopinionletters@dol.gov

Dear Madam or Sir:

AILA seeks an opinion from the WHD on the following Labor Condition Application (LCA) posting issue.

Established in 1946, AILA is a voluntary bar association of nearly 17,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members' collective expertise and experience make us particularly well-qualified to offer a response to the questions included in DOL's request.

As part of this request, AILA represents that the requested opinion below is not being sought:

- By a party in a U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) investigation, its representative, or any third party acting on its behalf; or
- By a party, its representative, or any third party acting on its behalf for use in any litigation that was initiated prior to the submission of the opinion letter request.

LCA Posting Notice Issue

AILA requests clarification on the following issue. If an employer of an H-1B nonimmigrant worker has complied with its obligation to provide the H-1B worker with a copy of the LCA underlying the worker's H-1B petition, and the employee works from the individual's private home residence, all or part of the time as part of a hybrid or fully remote employment arrangement, does the employer have to post the notice of the terms of the LCA at the H-1B worker's private home residence?

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AILA Doc. No. 24010802. (Posted 1/8/24)

Between 2019 and 2021, the U.S. Census reports that the number of people working primarily from their private home residence tripled to almost 18% of the overall workforce.¹ Since the end of the COVID-19 pandemic national emergency in April 2023, employers continue to allow their employees to work either all or part of the time remotely from their private home residences.² A recent study indicates that approximately 48% of the entire workforce are in fully remote or hybrid positions.³ Additionally, the Government Accountability Office (GAO) found that a majority of government buildings are only 25% full because a majority of government workers are working from their private home residences.⁴ For these remote workers, the private home residence is now their employment “home base,” not a corporate office. This shift has highlighted several LCA compliance questions that were previously less common prior to the COVID-19 pandemic.

The Immigration and Nationality Act (INA) at Section 212(n)(1)(C) provides:

- (C) The employer, at the time of filing the application -
- (i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or
 - (ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H–1B nonimmigrants are sought.

The final implementing regulation at 20 CFR §655.734(a)(1)(ii)(A) provides:

An employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 or 9035E that the employer has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in which the H–1B nonimmigrants will be employed or are intended to be employed in the area of intended employment, or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment, in the manner described in this section.

The preamble to the final regulation explains that the purpose of the LCA notification provision “can only be satisfied by notice to all of the affected workers— i.e., all of the workers in the

¹ U.S. Census Bureau Press Release, *The Number of People Primarily Working From Home Tripled Between 2019 and 2021* (Sept. 15, 2022), <https://www.census.gov/newsroom/press-releases/2022/people-working-from-home.html>

² Alexander Nazaryan, *Return to office push is 'totally dead', experts say, as WFH persists*, Yahoo! News, <https://www.aol.com/return-office-push-totally-dead-145905905.html>

³ The Ladders, *Study: Remote Work Growth Beats Ladders' Prediction by 11%*, <https://www.prweb.com/releases/study-remote-work-growth-beats-ladders-prediction-by-11--868116361.html>

⁴ Erich Wagner, *White House calls on agencies to 'aggressively' reduce telework this fall*, Government Executive, <https://www.govexec.com/workforce/2023/08/white-house-calls-telework-reductions-agencies-fall/389173/>

occupation in which the H–1B worker is employed at the place of employment.”⁵ The preamble further confirms that the place of employment is the physical location where the work is actually performed.⁶

Based on these sources, the sole purpose of the notice requirement is to inform U.S. workers where the work is actually being performed that the employer is making the attestations contained in the LCA.

Section 212(n)(1)(C) and 20 CFR §655.734(a)(1)(ii)(A) provide that when there is no collective bargaining agreement in the occupation where the work will be performed, the employer may satisfy the notice provision either through a physical posting or electronic notification. The statute and regulation provide employers with either option and do not require employers to use a specific notification method.

WHD provides employers with a Fact Sheet that summarizes for employers the notification options:⁷

Hardcopy worksite notice:

Posting the notice of the filing of the LCA (or the information therein) at two conspicuous locations at the place of employment for 10 days; or

Electronic notice:

Electronically providing the notice of the filing of the LCA to all workers at the place of employment for 10 days.

However, in the context of posting at the private home residence of an H-1B worker working in a fully or hybrid remote capacity, neither of these options meets the purpose of the notification provision, which is to notify U.S. workers of the attestations being made on the LCA. For the hardcopy worksite notice in the H-1B worker’s private residence, there are no two conspicuous locations that U.S. workers can access to view the notifications. For the electronic notice, the preamble to the final regulation indicates that electronic notice may be accomplished by any means the employer ordinarily uses to communicate with its workers about job vacancies or promotion opportunities.⁸ The preamble further confirms that employers are not required to use a specific type of electronic notification. The electronic notice may be a direct notice (e.g., by email) to all U.S. workers at the place of employment. However, in the context of remote work, there would be no U.S. workers assigned to the place of employment (namely the H-1B worker’s private residence), and thus, nobody would receive the electronic notice.

⁵ 65 Fed. Reg.80110 at 80161 (Dec. 20, 2020). See also DOL Wage and Hour Division LCA Fact Sheet #62M subtitled “U.S. Worker Notification” confirms that DOL defines affected workers as U.S. workers.

⁶ *Id.*

⁷ DOL WHD LCA Fact Sheet #62M, <https://www.dol.gov/agencies/whd/fact-sheets/62m-h1b-notice>

⁸ 65 Fed. Reg. at 8016.

Finally, the regulation indicates that the posting should occur at the “employer’s establishment(s)” when there is no secondary placement. Unlike a corporate office, the H-1B worker’s private home residence is not an establishment of the employer. The employer does not control the terms of the H-1B worker’s private home residence.

Because, as discussed above, the purpose of the LCA notification provision cannot be met in the context of remote or hybrid employment at the H-1B worker’s private residence, AILA would encourage DOL to issue interpretative guidance that employers are not required to post either a physical hardcopy notice at the H-1B worker’s private residence or electronic notice when there are no affected U.S. workers employed at the H-1B worker’s private residence.

Conclusion

Thank you in advance for your guidance on this LCA issue, which impacts our members and their client companies. If you have questions about the guidance being requested in this letter, please feel free to contact AILA Director of Government Relations Sharvari (Shev) Dalal-Dheini at sdalal-dheini@aila.org or AILA DOL Liaison Committee Chair Vincent Lau at VLau@clarklau.com.

Very truly yours,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION