

## LABOR CONDITION APPLICATIONS (LCAS) | FREQUENTLY ASKED QUESTIONS

### 1. I received an email about the LCA from Jackson and Hertogs. What do I need to do?

Submitting ETA Form 9035 (the “Labor Condition Application” or LCA) to the US Department of Labor (DOL) is the first step when preparing an H-1B, H-1B1, or E-3 visa petition by your company. The LCA must be certified by DOL before an H-1B, H-1B1 or E-3 visa petition can be filed. Employers are required notify employees on or within 30 days prior to filing the LCA with the DOL. Notification may be done through:

- (a) hardcopy (i.e., paper) worksite posting or
- (b) electronic notice for 10 calendar days, or
- (c) by direct electronic notification such as email. Note that like paper notifications, electronic notifications must be available to all workers in the occupation at the worksite, whether employed by your company or employed by an entity that owns or operates at the worksite.

You must also notify us that you have started the posting process, so that we can file the application with DOL.

We recommend you **create an LCA public access folder** for each LCA your company files. These folders can be physical files or maintained in electronic folders on a computer server. For physical files, we recommend the files be labelled, and that the labels should include at least the J&H File Number and ETA Case Number. The five-digit J&H File Number appears on the LCA in the preparer field, after the last name of the person who prepared the LCA. DOL assigns the ETA Case Number to an LCA after electronic filing. We recommend you also include the following information:

- Job title
- Worksite city and state
- Validity dates

You will add documents to this folder for the next couple of days and weeks and then you will retain this folder (either in paper or electronic format) for your DOL-mandated public access records. Public Access files must be made available to the public **within one business day upon request**.

If this is the first LCA that your company will be filing, then you must also create a separate file or binder labeled **DOL Access file**. (As the name implies, only DOL officers should be allowed to review DOL Access files, unlike LCA public access folders.) You may also opt to create individual DOL access folders (physical or electronic) for documents related to each LCA filing. The documents contained in this file should not be made available to the public, but must be maintained in case of DOL audit (please see below). To preserve employee confidentiality, any documents which contain actual employee names would not be kept in the Public Access file and would instead be kept in the DOL Access file. DOL Access files must also be available to the DOL **within one business day upon request**.

### 2. You have included several attachments. Which document needs to be posted?

We provide you a one-page notification document that includes all required information. This document is sent to you titled as “LCA Posting Notice”. In lieu of the one-page posting, you may post the entire Form ETA-9035 which is sent to you as a draft. The ETA-9035 is a multi-page document, so all pages of the document must be available to workers if it is used for the LCA posting notice.

#### PHYSICAL POSTING

For hardcopy posting at the worksite, you must print two copies of the posting notice and post in “two conspicuous locations” at the worksite for 10 consecutive days where the H-1B (or H-1B1, or E-3) nonimmigrant will be employed.

#### ELECTRONIC POSTING

An alternative to hardcopy posting is to provide electronic notice. Examples would be to post notice on an intranet homepage or by sending individual emails to workers at the impacted worksite. You must electronically notify all employees at the place of employment. Electronic notice is accomplished by any means the employer ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its “home page” or “electronic bulletin board” (i.e., intranet) to employees who have, as a practical matter, direct access to these resources. If posting on an intranet, notice must be available for 10 consecutive days. Another option is through e-mail or an actively circulated electronic message, such as the employer’s newsletter. This notice must be available to the affected workers (which may be your company’s employees, or the employees of the entity that owns and/or operates the worksite) for a total of 10 days, except that if employees are provided individual, direct notice by e-mail, notification only need be given once during the required time period.

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## 3. What do you mean by “two conspicuous locations”? Can we post where “Wage and Hour notices” are placed?

DOL suggests you post the LCAs where “wage and hour notices” are posted. However, DOL also requires the postings to be in the **actual location(s) of employment**. Therefore, you can post the LCAs where “wage and hour notices” are posted, if that is **also** where the employee will work. Otherwise, you should post the LCAs at two conspicuous locations in the actual building(s) where the foreign national will work.

For example, if wage and hour notices are posted in Building 1 of your company, but the foreign national is to be employed in Building 2, we recommend you post at two conspicuous locations in Building 2. If the employee may work in Building 1, 2 and 3, then post the notice at two conspicuous locations in **all three** places. Note that all known multiple locations of employment must have been provided to us, and must also be listed on the LCA. We recommend you specify the actual locations within each building, so that you can document that the LCA was posted in more than one location. If not using physical posting, you must electronically notify all employees in the occupation at the place of employment as stated above.

## 4. What if we don’t know the exact location where the foreign national will be working?

**Example:** The foreign national will be working in the office Palo Alto, CA, but you are not sure if she will be working in Building 12 or 15. If you do not know the exact location, we recommend you make an educated guess where the foreign national will work. If not, post both copies where wage and hour notices are posted. When you subsequently find out where the foreign national is actually working, post again at that location. If the employee starts in Building 12 and that is where the posting was done, but later moves to Building 15, **repost the notice again in two conspicuous locations in Building 15 for 10 days**.

The simpler procedure of reposting the LCA due to change of location is possible only if the new location is in the same “area of intended employment”. (This typically means an area within normal commuting distance of the original worksite.) If not using physical posting, you must electronically notify all employees at the place of employment as stated above. If the new location is not in the same “area of intended employment,” **you must file a new LCA with DOL and an amended H-1B petition with USCIS**.

## 5. What needs to be done once I have started posting the LCA?

Respond to the original e-mail from J&H and confirm posting has begun. J&H will electronically file the LCA with the DOL only **after** you confirm the posting period has commenced. Do not wait until the end of the 10-day period. **Please contact us as soon as you post**. The DOL usually takes up to seven (7) business days to certify the LCA after filing. When the LCA is filed with DOL, you will receive an email notification from DOL that the LCA has been submitted for processing. You need not take any action with the DOL email.

## 6. Once I have posted the notice for the required amount of time, what must be done with the posting notices?

If physical hard copy posting was used, take down the notices which were posted and complete the confirmation of LCA posting notice document we provide, or write on the back of each one the following information:

- Posting begin & end dates
- Location of posting (address and specific location at that address)
- Name and signature of the person responsible for posting, and date of signature

If electronic posting was used, please record the method of notification on the confirmation of LCA posting notice document:

- Posting begin & end dates
- Manner of posting (intranet, mail, etc.)
- Name and signature of the person responsible for posting, and date of signature

For your convenience, we attach a document titled “Confirmation of LCA Notice” on which you can record this information. When done, all posting notices must be placed in the Public Access file Folder for that particular LCA. If additional postings are required due to employee movement in the same area of employment (i.e., from one building to another or from one location to another in the same area of intended employment), then make new copies of the notice, post them for 10 days in two conspicuous locations at the new work site, **or** post them per the electronic posting notice guidelines, note the above information on them, and retain them in the same file.

## 7. I just received the H-1B/H-1B1/E-3 documents for signature with the “certified” Form ETA-9035 LCA. What do I do with the LCA?

If you return a hard copy of the signed LCA to our office through US post or overnight courier, please print **two copies**. Be sure to sign both copies, then return one copy to our office, along with the signed H-1B forms. Finally, place the other copy in the Public Access file pertaining to this LCA.

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If returning a scan of the signed LCA to our office by email or upload, you need print only **one copy**. Then sign the certified LCA, sending us a scanned copy via email or upload. Finally, place the signed hard copy in the Public Access file pertaining to this LCA. The LCA in your Public Access file must contain your original signature. You must retain the original signed and certified LCA, even if maintaining the Public Access file electronically.

## 8. Along with the H-1B/H-1B1/E-3 documents and LCA for my signature, I also received a folder of documents entitled "Public and DOL File Checklist" from your office. What do I have to do with these documents?

If you are maintaining physical Public Access and DOL Access files, the package contains the following:

- a. **Folder labeled with the LCA details, to use as your Public Access file.** Inside is a reference checklist for all documents required to be included in your Public Access file. We have checked off the documents we included. You must review the entire list, make any necessary corrections to the documents provided, include the other items on the list, check them off, and finally place the Public Access file Folder in the appropriate office location.
- b. **Form ETA-9035CP.** This is DOL's instruction and explanation of required LCA attestations. As stated on the Form ETA-9035CP by signing the LCA, you confirm that (1) you understand the attestations; and (2) that the company agrees that it has and will comply with the attestations and recordkeeping requirements.
- c. **Copy of the prevailing wage documentation used to support the wage.** Place it in the Public Access file Folder. In the event of audit, you may also be required to provide information on the methodology used to obtain the prevailing wage. Note that the only prevailing wage source that provides an employer with a "safe harbor" against DOL challenge on the prevailing wage is the DOL's own prevailing wage determination. However, most employers will find it unduly burdensome to wait the months necessary to obtain a prevailing wage determination from DOL. Instead, J&H attorneys will typically use their best professional judgment to determine whether the wages provided by you properly fit within the DOL's published wage surveys.
- d. **Completed Public Access file Memo.** This document explains the system the employer uses to set the "actual wage" and compares the actual wage to the prevailing wage. Unless you provide us with information on your company's actual wage range for the occupation in advance, **you must complete the requested data for the company's actual wage range.** Place it in the Public Access file Folder. This document maintains employee confidentiality.
- e. **Completed Memo to DOL Access file.** This document explains the system the employer uses to set the "actual wage" and compares the actual wage to the prevailing wage. Place it in the DOL Access file Folder. This document identifies the employee by name.

A checklist for your reference of all documents required to be included in your DOL Access file. Mark off the items that you include and place this document and all attached items in your DOL Access file.

**Note:** You will very likely need to additionally complete an updated H-1B dependency calculation prior to each H-1B (not H-1B1 or E-3) filing. We sent you information on how to calculate H-1B dependency in our cover letter. If you would like an H-1B Dependency Worksheet, please contact our office. Please complete the calculation, and update it whenever your total employee vs. H-1B employee numbers change (this typically will happen each time you file an H-1B petition). The dependency information need not be provided to the public. This information must only be provided to the DOL in the event of audit, and only if you were required to do a "full calculation" to determine non-dependency. Retain the calculation in your DOL Access file. Notify us immediately only if your H-1B dependency status has changed.

If you are maintaining electronic Public Access and DOL Access files, we email you. Alternatively, if access is provided, please directly upload the same documents to your electronic Public and DOL Access files, minus the physical folder labeled with the LCA details.

In either case, our documents assist with – but do not complete – compliance with LCA record requirements. You are responsible for including or maintaining access to the other items that comprise the Public and DOL Access files and binders, which are described in detail in our LCA Procedures and Requirements memorandum.

## 9. What if I fail to post the LCA, do not create a Public Access or DOL Access file, or otherwise do not follow these instructions?

If the DOL conducts an investigation your company may be fined a minimum of \$1000 **per violation**. Egregious violations could bar the company from filing nonimmigrant or immigrant visa petitions for a period of up to 3 years. Furthermore, if the DOL finds these failures were willful, fines increase substantially. If DOL finds that the company failed to pay the required wage (which is the higher of the prevailing and actual wage), DOL can also order that back wages be paid to affected employees. It is also possible that other agencies, such as Immigration & Customs Enforcement (ICE) will engage in investigations or enforcement actions.

In addition to the DOL audit, at any time, a member of the public can ask to review your Public Access files. "Review" does not include making copies of documents. All such requests must be accommodated with certain limits. We recommend that you establish a corporate system that enables the public to examine your records including:

- a. Setting nonrestrictive business hours for supervised examination,
- b. A sign-in procedure, and
- c. An educational program for reception and the HR department in case a letter/notice is received.

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## 10. Why is our company being asked if we are “H-1B dependent” or a “willful violator”?

If you are deemed an “H-1B dependent” employer, or a “willful violator” of the LCA rules, you must make additional, special attestations before filing any new LCAs for future H-1B workers. Further, if the company was deemed a willful violator, the company will be subject to random DOL investigations for a five-year period after a final determination is made that it is a willful violator.

## 11. If our company is “H-1B dependent” or deemed a “willful violator,” what special attestations must our company make?

Your company must promise that your H-1B worker is not directly or indirectly displacing any U.S. workers, and must demonstrate that your company is making good-faith efforts using industry-wide standards to recruit US workers for the position to be filled by the H-1B worker.

## 12. How would I know if our company is deemed a “willful violator”?

Your company will be put on notice by the DOL if it is deemed a “willful violator”. This would occur after an administrative proceeding.

## 13. How would I know if our company is “H-1B dependent”?

Your company is definable as “H-1B dependent” depending upon the ratio of H-1B workers it employs against its total number of full-time employees. There are three different formulas for determining H-1B dependency, depending upon the size of your company. H-1B dependent companies would include:

- Companies with 1-25 full-time equivalent employees where 8 or more are H-1B workers,
- Companies with 26-50 full-time equivalent employees where 13 or more are H-1B workers, or
- Companies with 51 or more full-time equivalent employees where 15% or more are H-1B workers

If you think your company may be H-1B dependent, please notify your attorney at J&H to discuss how this may impact current and future H-1B petitions.

## 14. What if our company is H-1B dependent, or deemed by the DOL to be a “willful violator”? Is there any way to avoid the special attestations?

Yes. Even if your company is H-1B dependent or deemed a willful violator, the special attestations do not apply if your company hires a so-called “exempt” H-1B employee. “Exempt” employees hold at least a Master’s degree or higher in an academic field related to the H-1B employment, or earn over \$60,000 annually in their H-1B position. Note that if your company is either dependent or a willful violator, **and** files H-1B petitions for “exempt” employees, it must maintain a list of all “exempt” employees in the DOL Access file.