

EMPLOYER VIOLATIONS AND THE IMPACT ON THE EMPLOYEE'S H-1B STATUS

by H. Ronald Klasko *

There are many ways in which an employer can violate the Department of Labor's ("DOL") ACWIA regulations governing the H-1B program. For example:

- The LCA and H-1B petition could be filed for full-time employment, and the employer could reduce the foreign national to part-time status;
- The employer could reduce the employee's salary to a level below the required wage;
- The employer could relocate the employee to a different geographical area without filing a new LCA;
- The employer could bench the alien.

In each of these examples, the employer may be subject to monetary and other penalties as specified in the DOL regulations. However, do these employer violations render the H-1B alien out of status? It is the position of the authors that these employer violations should have no impact on the H-1B status of the foreign national.

The statutory scheme is quite explicit regarding the division of responsibility between the DOL, which regulates and enforces Section 212(n) of the Immigration and Nationality Act relating to labor condition applications, and USCIS, which regulates and enforces Section 214 of the Immigration and Nationality Act entitled "Admission of Nonimmigrants" and Section 101(a)(15)(H)(i)(b), which relates specifically to the H-1B visa. It is highly instructive to review the statutory scheme, the regulatory language and even the agencies' internal memoranda to establish beyond any doubt that issues relating to wages and hours are material only to the DOL.

The employer filing an H-1B petition must attest in the labor condition application to paying the higher of the actual or prevailing wage, to providing working conditions that will not adversely affect the working conditions of workers similarly employed, that there is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, that the employer has provided appropriate notice to bargaining representatives or employees and that the employer has completed and made available a file for public examination. None of these issues are issues over which

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USCIS has jurisdiction over which USCIS would even have knowledge in the H-1B petition process. Section 212(n) provides the enforcement mechanism for failure of an employer to pay proper wages, which enforcement mechanism involves a hearing before the DOL. No role in the enforcement of these provisions is provided to USCIS other than USCIS being precluded from approving further petitions where the DOL notifies USCIS of a violation that results in the DOL debarring the employer.

Unlike Section 212(n), Section 214 makes clear that USCIS has jurisdiction over the admission and status of the alien. Specifically with respect to H-1B aliens, Section 101(a)(15)(H)(i)(b) requires USCIS to determine whether the alien will be employed in a specialty occupation as defined in Section 214(i) and requires the Secretary of Labor to certify that the employer has filed the labor condition application with the Secretary of Labor.

The regulations are completely consistent with this division of responsibility in the statute. DOL has promulgated unusually complete and detailed regulations regarding labor condition applications and specifically regarding wages and hours. These regulations can be found at 20 C.F.R. §655.700 through §655.855. USCIS is not knowledgeable of the details of these regulations because it does not enforce these regulations, and the issues in determining whether proper wages are paid are not material to any USCIS adjudication.

DOL regulations state the following with respect to the roles of the two agencies:

-- The Immigration and Nationality Act “establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.” 20 C.F.R. §655.700(a)(4).

-- “DOL administers the labor condition application process and enforcement provisions... The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible...for investigating and determining an employer’s misrepresentation in or failure to comply with LCAs in the employment of H-1B nonimmigrants. ... INS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation... and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.” USCIS is responsible for denying H-1B petitions filed by an employer found by DOL to have engaged in misrepresentation or failure to meet conditions of the labor condition application. 20 C.F.R. §655.705(a) and (b).

-- DOL makes a decision whether to certify the labor condition application. If certified, the certified labor condition application is filed with USCIS. USCIS then determines “whether each occupational classification named in the certified labor condition application is a specialty occupation...” 20 C.F.R. §655.740(a)(1).

-- If there are any issues regarding the labor condition application, they must be referred to DOL’s Employment Standards Administration to be processed as a complaint. 20 C.F.R. §655.740(b).

-- The Secretary of Labor has sole authority to enforce labor conditions applications and to conduct investigations to determine compliance with the terms of the labor condition application. 20 C.F.R. §655.800 *et seq.* Specifically, the Secretary of Labor, through investigation, shall determine whether an H-1B employer has filed a labor condition application which misrepresents a material fact or failed to pay wages as required. 20 C.F.R. §655.805(a).

Because the division of responsibility is so clear, USCIS regulations governing the H-1B process make no mention of regulatory authority relating to wages or hours or any other provisions contained in

the labor condition application. USCIS regulations state only the following regarding labor condition applications:

-- “Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien will be employed. Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director [USCIS] shall determine if the application involved is a specialty occupation... The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in this specialty occupation...” 8 C.F.R. §214.2(h)(4)(i)(B).

-- If the Secretary of Labor notifies USCIS that the employer has misrepresented any material fact in the labor condition application, USCIS will not approve petitions for that employer for a period of at least one year. 8 C.F.R. §214.2(h)(4)(i)(B)(5).

Given this statutory and regulatory scheme that assigns sole responsibility for wages and hours and other labor condition application attestations to the DOL, it is not surprising that USCIS adjudicators are not trained to look at wage or hour issues in the adjudication of H-1B petitions. The “INS Adjudicator’s Field Manual” has an entire section (62 pages) on the adjudication of H-1B petitions. Not one word in the 62 pages relates to adjudicators’ responsibilities for reviewing wages or hours. To the contrary, as set forth in the statute and regulations, the Adjudicator’s Field Manual provides detailed instructions to adjudicators regarding the issues they must determine in adjudicating H-1B petitions; *viz.*, whether the position offered is a specialty occupation and whether the alien qualifies for H-1B classification. With respect to the Labor Condition Application, the adjudicator’s examination is limited to the following:

“Review the ETA Form 9035 Labor Condition Application (LCA) to ensure it meets the following criteria: ...is signed by DOL, includes DOL’s certified starting and ending dates, includes an LCA case number, was filed by this petitioner, was filed for the location specified on the petition, and was filed for the position specified on the petition.” (at 699)

In fact, the Adjudicator’s Field Manual emphasizes that “it is extremely important to apply **ONLY** the H-related regulations in adjudicating these petitions.” (At 693).

Finally, the adjudicator is instructed to approve the H-1B petition if all of the adjudicative issues set forth in the Adjudicator’s Field Manual are satisfied (none of which involves wages or hours) and if the adjudicator is satisfied that the LCA and all other required documents are present.

The following INS decisions and memoranda provide further support for the position that there is no role whatsoever for USCIS relating to wages and hours, that matters are not material to USCIS unless they affect the alien’s H-1B status and that violations by the H-1B petitioner relating to wages and hours do not affect the alien’s H-1B status:

-- Decision (nonprecedent) of the Office of Administrative Appeals in Aditi Corporation (LIN9924350365 (May 23, 2000)): “Wage determinations and the enforcement of their payment with respect to the H-1B classification are the sole responsibility of the Department of Labor.” The AAO also made clear that USCIS cannot engage in “exploration” of concepts that are not set forth as areas for USCIS concern in either the statute or the regulations.

-- Legal opinion of the INS Office of the General Counsel dated April 12, 1994: "The language of the Act, as well as the accompanying legislative history, assigns all investigatory and adjudicatory responsibilities under §212(n) of the Act to the DOL... Nowhere in this language is the INS provided an adjudicatory role." The only role of the INS is to implement debarment of an employee when DOL makes a finding of a material misrepresentation.

-- Memorandum from John W. Brown, Acting Chief, Nonimmigrant Branch, INS Office of Adjudications, dated June 8, 1995: "... the only responsibility which the Service has in this area is to ensure that the petitioner has obtained a certified LCA...the Service has no statutory authority to question the veracity of the information furnished on the LCA. That responsibility lies within the jurisdiction of the Department of Labor (DOL). Based on the foregoing, it is suggested that officers involved in the adjudication of H-1B petitions do not question the information provided on the LCA...The Service may, however, act as an aggrieved party to the LCA process and provide information to the DOL regarding possible violations of DOL regulations."

-- Memorandum from Louis D. Crocetti, Jr., Associate Commissioner, Office of Examinations, dated November 30, 1995: "Wage determinations and enforcement of their payment with respect to the H-1B classification are the sole responsibility of the Department of Labor (DOL)."

-- Memorandum from William R. Yates, Deputy Executive Associate Commissioner, INS, dated April 11, 2000: "As long as the alien continues to provide H-1B services for a U.S. employer, most changes will not mean that an alien is out of status... As long as the employer/employee relationship exists, an H-1B alien is still in status. An H-1B alien may work in full- or part-time employment and remain in status. An H-1B alien may also be ... laid off or otherwise inactive without affecting his or her status."

-- Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch, Adjudications, INS, dated October 12, 1995: "A material change is a change that directly impacts the alien's continued eligibility for H-1B classification." A promotion to a higher-level position and a change in salary does not require an amended petition [and does not require INS to determine whether the salary paid for the new position is the proper salary for that position].¹

¹ In addition to this letter, there are also various other written guidances regarding examples of changes in employment that the INS considers material so as to require an amended petition. See, e.g., Memorandum from James J. Hogan, Executive Associate Commissioner, Operations, INS, dated October 22, 1992; see also, INS Adjudicator's Field Manual. In none of these guidance memoranda that provide examples of material changes that require amendments by the employer is there any mention of a change in wages or hours.