# The H-1B Process Gets Even Harder: DOL Proposes Dramatic Changes to the LCA Form

**Author :** Cora-Ann Pestaina

I still think longingly of the days when certification of a Labor Condition Application ("LCA") could be obtained within seconds. Three years ago, the Department of Labor (DOL) mandated that all LCA filings must be filed through its iCERT portal (http://icert.doleta.gov/) and that each application form, also changed to request additional, new information, would be manually reviewed prior to certification. This change increased the official LCA processing time from a few seconds to 7 business days. Human error and other systemic problems at the onset of the change resulted in filings taking three weeks or longer to process which led to late filings on H-1B petitions, a public outcry and US Citizenship and Immigration Services (USCIS) temporarily allowing employers to file H-1B petitions without certified LCAs! The new iCERT system forced H-1B employers to change their approach to filing H-1B petitions. The LCA process is about to change again.

As a background, an employer seeking to employ a temporary foreign worker in H-1B, H-1B1 or E-3 nonimmigrant status must, as the first step in the petition process, file an LCA with the DOL and receive certification. The LCA is completed on electronic Form 9035 through the DOL's iCERT system. The LCA collects information about the occupation and there are special attestation requirements for employers who previously committed willful violations of the law or for employers who are deemed to be H-1B dependent. An employer is permitted to file the LCA no more than six months before the initial date of intended employment.

The DOL now seeks to once again revise the scope of the information collected on the LCA citing, in its LCA supporting statement, a desire to improve its integrity review and ensure the accuracy and completeness of the information. On July 9, 2012, the DOL published a Notice in the Federal Register announcing a 60-day comment period (to end on September 7, 2012) on its proposed changes to the form ETA-9035. In a process that is likely to take several months, the changes must be approved by the federal Office of Management and Budget before they can be implemented.

Changes include requiring more detailed information about the prevailing wage; requiring more detailed information regarding how the employer determined whether it is H-1B dependent and whether the nonimmigrant worker is an exempt employee or if not exempt, specifying the employer's recruitment efforts to recruit US workers; and requiring the employer to list the address where the employee's public access file is kept.

Some of the changes are even more significant.

**Identification of Intended Beneficiaries**

The current LCA does not require any information identifying the intended beneficiaries. The new form will collect information on the nonimmigrant(s) including name, date of birth, country of birth, country of citizenship and current visa status. If a PERM labor certification application was filed on behalf of the intended beneficiary, the PERM application number must be listed.

In its LCA supporting statement, the DOL states that this new information will allow its Wage Hour

Division (WHD), which was created with the enactment of the Fair Labor Standards Act (FLSA) and is responsible for the administration and enforcement of a wide range of laws which collectively cover virtually all private, State and local government employment, to more efficiently gather information during its enforcement activities and to find beneficiaries who may be entitled to back wages after an investigation. The DOL claims that this change will cause little extra burden because employers “generally know who the beneficiaries are before filing the LCA except possibly for the 2.6 percent of employers who file LCA’s for more than 10 employees.” Because iCERT saves much of the information on an LCA which can later be used to fill out other LCAs, the DOL states that it will not be overly burdensome for an employer to complete more than one LCA. The DOL also refers to its “relatively quick turnaround on LCA approval” as another reason why employers do not need to complete one LCA for large numbers of beneficiaries.

The DOL makes some valid points. The majority of employers do not need to complete an LCA for more than 10 workers at a time. iCERT indeed saves most of the information and it may not be overly burdensome to complete multiple LCAs. However, since employers are required to make LCAs available for public inspection, privacy and identity theft concerns are easily justifiable. The DOL ought to address this.

In addition, what the DOL has not addressed is the flexibility that will be lost because employers will no longer be able to use an existing, certified LCA to file a nonimmigrant petition for a new hire. The new identification requirement may be hard on large employers who file numerous H-1B petitions. The current annual cap on the H-1B category is 65,000. Each year, on April 1, USCIS begins accepting cap-subject H-1B petitions for employment to commence in the new fiscal year, on October 1. Employers typically scramble to prepare and file cap-subject H-1B petitions before the cap closes. For large employers, especially those with branches abroad, it is may be difficult to come up with a list, in March or April, as to who will be transferred to the US to work in October. These hiring decisions are ongoing and employers rely on the flexibility of the LCA which allows them to quickly file an H-1B petition using an existing, certified LCA provided it lists the correct information such as visa category, job classification, etc. This way, employers are not always forced to spend 7 business days waiting for the LCA to be certified and watching existing H-1B visa numbers dwindle.

What about that H-1B worker who just received notice from his current employer and has luckily found a new employer willing to file an H-1B on their behalf? How significant would it be if the new employer is able to use an existing, certified LCA and file an H-1B transfer petition before that worker falls out of status? What the DOL describes as a “relatively quick turnaround on LCA approval” can seem interminable in the case of an emergency. The DOL must bear in mind that no matter the emergency, it provides no expedite procedures for the LCA. Flexibility is therefore very important.

Interestingly, the new LCA would require listing the beneficiaries’ PERM application numbers. At this time, the possible acceptable responses to this question are not clear. But, since the PERM application is filed by the employer, a new employer of an H-1B transfer might not have this information. But this requirement suggests that the DOL may begin to cross reference the job opportunities in the nonimmigrant and immigrant cases as well as match the wages in both the cases.

**Limiting the LCA to only 10 workers**

Currently, a single LCA may be filed for up to hundreds of workers. An employer may use a single LCA to request multiple positions where they are in the same visa category and job classification and are either all part-time or all full-time positions.

The DOL now seeks to limit the number of workers to 10 per LCA explaining that it has found enforcement of LCA obligations difficult when an LCA is for 50 or 100 job opportunities and it would be a significant expenditure to build an electronic form to accept more than 10 names.

The issue, as discussed above, may not be with the limit of 10 names, but with naming requirement itself and the limitations that come from that.

**Worksite Identification**

The current LCA form requires the employer to identify the place(s) of intended employment. This entails listing the complete address and county where the beneficiary will work. The proposed new LCA will require significant additional detail.

The employer will have to indicate whether the intended worksite is the employer's business premises; the employer's private household; the worker's private residence; or other business premises which type must then be inserted on the form. The employer must state whether the employee placement is at an end client location. If yes, the form then requires the name of the end client.

In its LCA supporting statement, the DOL stated simply that the additional information is needed for "clarification on actual worksite to enable employer to demonstrate regulatory compliance regarding changes in worksite." This requirement could cause serious problems.

Again, the employer's flexibility may be taken away. Currently, the employer has the flexibility to send employees to new worksite locations without filing a new LCA provided the new location is in the same area of intended employment listed on the certified LCA. *See* 20 C.F.R. §655.731(a)(2) which states that the wage on an LCA is valid for the area of intended employment. If each LCA has to list the end client information, will the employer be required to complete a new LCA each time it moves an employee even if it is within the intended area of employment?

Also, in cases where the employer is filing a change of status petition on behalf of the beneficiary or the beneficiary is abroad and will obtain an H-1B visa to enter the US, until the beneficiary is lawfully present in the United States in valid H-1B status and is thereby authorized to accept employment in the United States, the employer cannot hold him out as an employee. *See* 8 C.F.R § 274a.1(c) and (f). Therefore, the employer may not be able to obtain that end client agreement prior to preparing the LCA.

Business immigration practitioners may already know that cases involving telecommuting and roving employees are currently being given increased scrutiny by the DOL. In light of that, the proposed changes to the LCA form are not surprising and seem to stem from some concern on the part of the DOL, with regard to LCA compliance and the bona fides of the offer of employment. Following the request for end client information on the proposed form is the irrelevant and possibly offending question, *"Is this a bona fide job opportunity?"* The DOL's makes no effort to hide its blatant mistrust of the employer who places its employee at an end client site.

In recent times, the US government has taken small steps to attract foreign workers and to show that they are an asset rather than a liability. The changes to the LCA will again add more burdens on the employer by eliminating flexibility. On March 12, 2012, the USCIS issued revised guidance indicating that the failure to obtain an end client letter would not be fatal to an H-1B petition. The DOL is now insisting on exactly that by requiring that the precise worksite be listed on the LCA. We need less regulation rather than more in order for US companies to attract global talent. In addition to the proposed changes to the LCA, there is proposed legislation in the form of HR 3012 (following the compromise between Senators Grassley and Schumer) that will grant the DOL draconian powers in denying LCAs based on undefined indicators of suspected fraud and thus hold up the processing of H-1B petitions. Are the proposed changes to the LCA form taking two steps back?