

New Labor Condition Application System Changes H-1B Nonimmigrant Filing Process

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The United States Department of Labor has instituted a new on-line system for the electronic filing of a Labor Condition Application (“LCA”), a necessary element of an H-1B nonimmigrant petition for professional workers. The new system, called iCERT, is now the sole method available for filing an LCA electronically. Users are no longer able to file applications under the prior LCA Online Application system. The new iCERT system, in turn, has an impact on the filing of H-1B petitions for nonimmigrant workers by eliminating the instant LCA certification available through the prior system.

Under the new iCERT system, applications are no longer automatically certified upon submission. All LCA applications are currently being verified manually by the Department of Labor. Once the iCERT system is fully running, certification is expected to take up to seven (7) business days, although some iCERT users report a wait of two weeks

or more to receive certification from the Department of Labor.

The new iCERT system forces H-1B employers to change their approach to filing H-1B petitions. H-1B petitions for professional nonimmigrant workers, including H-1B extension and change of employer requests, cannot be prepared and submitted to the United States Citizenship and Immigration Services (“USCIS”) within the same day, or even the same week, that the employer initiates the petition process. Employers must include a certified LCA in all H-1B petitions to attest that the nonimmigrant worker will be paid at least the prevailing wage available to U.S. workers in the same industry and geographical area. Petitioners at present must wait to receive a certified LCA from the Department of Labor through the new iCERT system before they can file an H-1B initial petition, an amendment or extension or stay or change of employer request with USCIS.



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PRACTICE POINTERS:

With the advent of the iCERT system, employers must think ahead and plan all anticipated H-1B petitions filings in advance of the anticipated date of hire or expiration of the current period of authorized stay in the H-1B classification. While in the past, employers and their immigration attorneys have been able to complete and file an H-1B petition or extension request with only one or two days' advance notice, relying upon instant certification of the LCA, they must now wait a period of seven (7) business days or more to receive a certified iCERT LCA from the Department of Labor before filing with USCIS. USCIS has not yet announced that it will accept pending but non-certified LCAs, as it had under previous manual LCA filing procedures before the introduction of the electronically-filed LCA.

Now for the good news! H-1B visas for nonimmigrant professional workers are still available for the 2010 Fiscal Year for employment beginning on or after October 1, 2009 of foreign national professionals needed to satisfy any unmet skill need. Only 65,000 new H-1B visas may be issued during each fiscal year. For the previous

three fiscal years, this statutory cap on H-1B visa issuance had been reached in April, the first month of the availability of new H-1B visa numbers for the upcoming fiscal year. Reversing the prior demand, USCIS has not yet received a sufficient number of petitions to reach the statutory cap for the 2010 Fiscal Year. Analysts blame the downturn in the U.S. economy for the decreased demand in new H-1B workers.

QUESTIONS OR ASSISTANCE?

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