

## Visa Waiver Program: ESTA Fees

The Visa Waiver Program (VWP) was implemented in 1986 in order to allow travelers from certain countries to enter the U.S. for vacation or to attend business meetings without requiring a visa. To utilize the Visa Waiver for trips to the U.S. travelers must register online with the Electronic System for Travel Authorization (ESTA) prior to their trip. This electronic system was created by the Department of Homeland Security (DHS) following the "Implementing Recommendations of the 9/11 Commission Act of 2007" (9/11 Act). The system keeps track of the same information that is on the Form I-94 card that foreign nationals fill out when they enter the U.S. on the VWP, but is entirely paperless. Registering with ESTA verifies eligibility to participate in the VWP, and also gauges whether or not an individual may pose security or other risks to the United States. An approval through ESTA is typically valid for two years and for multiple trips in and out of the United States.

Previously, registering with ESTA was free for passengers; however, on September 8, 2010, the government began imposing a \$14.00 fee for new registrations and renewals. This fee may be paid by either credit or debit card. Prior ESTA approvals are still valid until their expiration date.

To participate in the VWP program, travelers must be a citizen of one of 36

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participating countries. In addition, travelers must possess a return ticket home and their trip cannot exceed 90 days. VWP travelers must also hold a machine-readable passport. Nationals from the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, the Republic of Korea, and the Slovak Republic require an e-passport, which contains a computer chip. More information on which countries are eligible to participate, as well as additional guidelines is available on the U.S. Department of State website: [www.travel.state.gov](http://www.travel.state.gov).

## FY 2011 H-1B Cap Count Update – Supply Dwindling Fast

As of December 10, 2010, the total number of H-1B cap-subject petitions counted under the regular cap was 52,400. This means that there will soon be less than 10,000 H-1B visas available. There are 65,000 H-1B visas made available per Fiscal Year under the regular tranche, with 6,800 reserved as H-1B1 visas for citizens of Chile and Singapore pursuant to Free Trade Agreements (FTAs) with those countries. However, the demand for H-1B1 visas reserved for Chile and

Singapore has been very low since the inception of these FTAs and unused numbers from the preceding Fiscal Year are added to the current FY H-1B allocation.

With respect to the 20,000 H-1B visas that are made available under the U.S. Master's degree exemption tranche, 19,100 visas have already been called for as of December 10th. Once the Master's degree exemption limit is reached any petitions received under that category will be counted under the regular tranche. At the present demand rate one should expect the H-1B quota under the Master's degree exemption tranche will be met by Christmas and that a cut-off will be imposed on all H-1B filings by mid January.

As a result, now is a good time to review your hiring plans and determine whether there are any foreign nationals or foreign students whom you expect to hire and will need to sponsor for H-1B visa status.

## USCIS Enhances its Information Gathering of H-1B and L-1 Employers and Employees through Form Revisions

U.S. employers seeking to sponsor foreign workers under the H-1B “specialty occupation” and L-1 “intracompany transferee” categories will need to be prepared to answer more questions and provide more information in the near future. That’s because the USCIS has revised its Form I-129, the principal form that most employers must complete when filing a petition on behalf of a foreign worker for employment on a temporary basis. The new Form I-129 (Rev. 10/15/10)N will replace the current edition and will be the only version that the USCIS will accept on or after December 22, 2010. The new Form I-129 makes a number of significant changes.

One change is to provide a mechanism for identifying employees that sponsor large numbers of H and L workers. In August 2010, President Obama signed into law P.L. 111-230, which imposes additional fees on heavily dependent H-1B and L-1 employers. Under the new law, U.S. employers that employ 50 or more workers, more than 50% of whom are in H-1B or L-1 are required to pay an additional fee of \$2,000 - \$2,250 per petition for sponsorship of an H-1B or L-1 worker. The revised Form I-129 H-1B Data Collection Supplement (Rev. 10/15/10)N incorporates the new law and asks whether the petitioner employs 50 or more individuals in the U.S. and if yes, whether more than 50% of its employees are in H-1B or L nonimmigrant status.

The new Form I-129 also makes

H-1B sponsorship more daunting for staffing companies and companies seeking to sponsor H-1B workers who will be performing work off-site. The revised Form I-129 specifically asks whether the employer has included an itinerary with its petition if the sponsored worker will work at a different address than the employer’s. Further, the Form I-129 H-1B Data Collection Supplement (Rev 10/15/10)N contains a specific section entitled “Off-Site Assignment of H-1B Beneficiaries”. In this section, the employer is asked to respond “No” or “Yes” to the following –

- “The beneficiary will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought”.
- “Placement of the beneficiary off-site during the period of employment will comply with the statutory and regulatory requirements of the H-1B nonimmigrant classification.”
- “The beneficiary will be paid the higher of the prevailing wage or actual wage at any and all off-site locations.”

It is clear that USCIS is intent on gathering more probative information on H-1B employers with sponsored employees who work primarily off-site and is seeking to tighten the noose on violators of the H-1B program. Given these changes employers should anticipate the government to be increasingly active in its enforcement activities in 2011. In the following article “The Labor Condition Application Revisited,” we explore in more detail the rules applicable to the employment of H-1B workers and off-site employment.

## The Labor Condition Application Revisited

One of the core requirements for obtaining an H-1B status or visa for an employee is the certification by the U.S. Department of Labor (“DOL”) of the Labor Condition Application on Form ETA 9035 (the “LCA”). The LCA contains attestations by the employer that it will employ the H-1B employee at prevailing working conditions, that it is not experiencing a strike or lock-out and that it will pay the employee the “required wage”. Required wage is defined as the greater of the actual wage paid for that occupation by the employer and the “prevailing wage” in the area of intended employment. Prevailing wage is commonly determined by reference to a database of wages maintained by the DOL.

For employees whose job requires that they perform work at different locations or for truly peripatetic employees – that is, those who do not have a regular office and who primarily travel to customer work sites to perform their work - determining the “prevailing wage” in the area of intended employment can be quite complex.

In the past several weeks, the U.S. Citizenship & Immigration Services (“USCIS”) has introduced revisions to the H-1B petition form, called the Form I-129, Petition for Non-immigrant Worker. These changes require H-1B employers to disclose whether their employee will be working primarily off-site and also require the H-1B employer to certify that they are complying with the LCA requirements. See the companion article “USCIS Enhances its Information Gathering...” in this *Immigration Alert*. These changes in the H-1B visa

petition form warrant a revisiting of the LCA rules as they apply to employees who may travel as part of their employment.

As noted above, in determining whether it is complying with the LCA regulations, an employer must determine what is the prevailing wage in the place of employment where the H-1B employee will work. If an employee works at a location that constitutes a “place of employment”, the employer must determine the prevailing wage for the H-1B employee’s occupation in that location, confirm that the salary being paid to the H-1B employee at least equals that prevailing wage and also obtain a certified LCA with respect to that location.

As a general proposition, an employee’s “place of employment” is where the employee is performing his or her job function. The LCA regulations provide, however, that an employee’s place of employment does not include:

- A location to which an employee is moved temporarily to participate in an “employer-required development activity” such as a management conference, trade show, staff seminar or training course; or
- If the nature of the employee’s job functions require frequent trips to other locations of a short duration, then those locations do not constitute “places of employment” provided they meet the following requirements:
  - o Either the employee’s job is peripatetic in nature (i.e., requires frequent travel from location to location) or the job requires that the employee spend most of their time at one location (a “home office”) but occasionally travel for short periods to other locations;
  - o For a peripatetic employee, the duration of the visit to any single location cannot exceed 5 consecutive workdays and for non-peripatetic employees the duration of the visit cannot exceed 10 consecutive workdays; and
  - o The employee is not at a particular location as a strikebreaker.

The following examples illustrate the application of these rules:

1. Employee primarily works from the employer’s headquarters in Denver, Colorado. Employer has obtained a certified LCA with respect to that location. Employee is now required to relocate to a customer location in Chicago, Illinois as part of a large customization and integration project that will last approximately 60 days. Because the employee will be at this new location for more than 10 consecutive days, that location becomes a “place of employment”. As a result, the employer must insure that its wage paid in Denver meets or exceeds the prevailing wage for this occupation in Chicago and must also file and obtain a certified LCA with respect to the Chicago work site.

2. Employee primarily works from the employer’s headquarters in Boston, Massachusetts and employer has obtained a certified LCA with respect to that worksite. Employee is an Implementation Engineer and as part of her job must travel to customer locations to participate in the implementation and integration process on a regular basis. Although employee travels frequently, her trips are always no longer than 1 working week (Monday through Friday). While she may return to the same

customer worksite several times during the year, her stay on each visit will be less than 10 consecutive days. The customer locations to which the employee will travel are not considered “places of employment” for that employee. Thus, the employer will have to meet the prevailing wage standard only at its home office in Boston.

3. Employee is an Area Sales Manager with responsibility for the New England territory of a company located in Miami, Florida. Employee works out of his home in Worcester, Massachusetts but spends his days on the road visiting current and prospective customers. Employee is a peripatetic employee and never spends more than 1 workday at a time at a particular location. Employee qualifies for the exception for the definition of place of employment for true peripatetic employees. As a result, employer must ensure that its wage at least equals the prevailing wage for this position in Worcester, Massachusetts.

4. Employee is a Management Consultant and works out of his home in Stamford, Connecticut. The home office of his employer is in New York City and employee will often spend time over the course of the year at the headquarters office. Employee performs most of his work from his home office but travels frequently to customer locations – in no case staying at the customer location for more than 10 consecutive days. This example is similar to the fact pattern in Example #2, except that the employee is arguably working both at the New York City office and at his home office in Stamford and thus should have LCA and prevailing wage coverage in both locations.

5. Employee is a Civil Engineer. Employer is an engineering firm that does in-house engineering work but also, pursuant to long-term contracts, will relocate its engineers for years at a time to the location of a particular customer. Employee, nominally “attached” to an office of the employer in Richmond, Virginia, actually performs all of her work with a government agency located in Reston, Virginia pursuant to a long-term contract between her employer and the government agency. The employee’s “place of employment” is clearly Reston and thus the employer must insure that the employee is being paid at least the prevailing wage for her occupation in Reston and must obtain a certified LCA with respect to that job location. It would also be sensible – although may not be technically required – to obtain a certified LCA with respect to the employer’s Richmond location.

job are complicated and may be difficult to fully comply with. Please be sure to check with your Immigration counsel when you have any situation involving an H-1B employee who is required to travel as part of their work.

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When a second LCA is required to be obtained with respect to a workplace location that the employee visits temporarily or is assigned to on a longer-term basis, there can be additional complications in complying with the LCA requirements. The LCA regulations require that the LCA form (the Form ETA 9035) filed with respect to a particular location must be posted at the place of intended employment for a period of 10 consecutive business days. This rule applies even if the location of employment is a third party company, such as the office of a customer. It may of course be difficult in these situations to obtain the consent to post the LCA from the customer.

As this article points out, the rules regarding the determination of prevailing wage and the filing of an LCA for an employee who travels as part of their

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