

October 4, 2010

**DETERMINING THE PREVAILING WAGE IN THE LABOR CONDITION  
APPLICATION PROCESS**

**1. PURPOSE:** This Veterans Health Administration (VHA) Directive provides policy on filing Labor Condition Applications (LCA) with the United States (U.S.) Department of Labor (DOL) in connection with petitions for H-1B or other non-immigrant visas that require an LCA. The Directive establishes mandatory procedures for making the required prevailing wage determinations.

**2. BACKGROUND**

a. DOL regulations in Title 20 Code of Federal Regulations (CFR) 655.700 through 760 set forth the requirements for filing and maintaining documentation related to the LCA process.

b. Title 20 CFR 655.731 requires that in order for an employer to hire a non-immigrant on an H-1B visa into a specialty occupation, such as a physician, the employer must certify on a Labor Condition Application for Nonimmigrant Workers (Form ETA 9035 or 9035E) that it will pay the H-1B non-immigrant the required wage rate. The required wage rate is to be the greater of the actual wage rate or the prevailing wage.

c. **Definitions**

(1) **Actual Wage.** Actual wage is the market and base pay rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining the wage amount, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors.

(2) **Prevailing Wage.** Prevailing wage is a wage rate for the occupational classification in the area of intended employment as of the time of filing the LCA.

**3. POLICY:** It is VHA policy that each facility Director file an LCA with DOL in connection with petitions for H-1B or other non-immigrant visas that require an LCA.

**4. ACTION:** Each facility Director is responsible for:

a. Fully documenting all determinations that it is not possible to recruit qualified citizens for necessary services before appointing non-citizens to VHA positions.

b. Complying fully with all requirements set forth in 20 CFR 655.700 through 655.760 when considering non-citizen physicians or other occupations for employment on H-1B visas.

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c. Following the procedures in Attachment A of this Directive to make prevailing wage determinations.

d. Approving all Labor Condition Applications filed with DOL.

e. Ensuring that all the requirements in this Directive are adhered to, and that proper documentation is maintained to establish compliance.

f. In accordance with Title 38 United States Code (U.S.C.) 7402(c) and 7407(a), not appointing non-citizens under 38 U.S.C. 7405 when they are able to recruit qualified citizens to provide necessary services.

g. Not filing H-1B petitions in circumstances where they cannot meet all of the LCA requirements.

h. Ensuring that a copy of the Form ETA 9035 or 9035E is submitted to VHA Central Office at the same time a facility submits the form to DOL in accordance with paragraph 6 of Appendix A.

**5. REFERENCES**

a. Title 20 CFR 655.700 through 760.

b. Title 38 U.S.C. 7402(c) and 7407(a).

c. VA Handbook 5005, Part II, Chapter 3.

d. VHA Handbook 5005.1.

**6. FOLLOW-UP RESPONSIBILITY:** The VHA Workforce Management and Consulting Office (10A2) is responsible for the contents of this Directive. Questions may be directed to 202-461-7179.

**7. RESCISSION:** None. This VHA Directive expires October 31, 2015.

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**DISTRIBUTION:** E-mailed to the VHA Publication Distribution List 10/12/10

## ATTACHMENT A

MANDATORY PROCEDURES FOR DETERMINING THE PREVAILING  
WAGE FOR AN OCCUPATION

1. Facility employees who are preparing Labor Condition Applications (LCAs) must use the On-line Wage Library – Occupational Employment Statistics (OWL-OES) Search Wizard found on the Foreign Labor Certification (FLC) Data Center Web site:

<http://www.flcdatacenter.com/OESWizardStart.aspx>.

2. The FLC Data Center Web site has been used in the FLC process since 1998. The user is required to enter pertinent information into the search criteria, such as the state of intended employment and the occupational code or title of the occupation. If users do not have the occupational code, they may go to the O\*NET Web site and obtain that code. That code can then be entered into the FLC data web site in order to proceed with obtaining the associated prevailing wage data. The O\*NET Web site address is: <http://www.online.onetcenter.org>.

3. If the occupation being researched is not specifically listed, use the job category that most closely matches the occupation or specialty. Occupational code 29-1069, “Physicians and Surgeons, All Other,” may be used to capture those specialties that are not specifically listed in the FLC database.

4. Department of Labor (DOL) requirements specify that determinations using a government survey are to be made available for each occupation at four levels of wages commensurate with experience, education, and the level of supervision. The levels specified in the FLC database and an explanation of how those levels compare to Veterans Health Administration (VHA) Physician Pay Tier Levels, are defined as follows:

a. **Level I (entry)**. Level I wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. *This corresponds to a Tier 1 staff physician who has just completed a residency and has less than 3 years of experience or is not board certified in the assigned specialty, regardless of their years of experience.*

b. **Level II (qualified)**. Level II wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. *This corresponds to a Tier 1 staff physician who has 3 or more years of experience and is Board certified in the assigned specialty.*

c. **Level III (experienced)**. Level III wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained either through education or experience special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. *This would correspond to a Tier 2 physician in a First Line Supervisor or Team Lead role.*

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d. **Level IV (fully competent)**. Level IV wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. These employees use advanced skills and diversified knowledge to solve unusual and complex problems. They generally have management or high-level supervisory responsibilities. *This category corresponds to a Tier 3 Service Chief or a Tier 4 physician involved at a national program level.*

5. **EXCEPTION (When no wage data is available)**. There will be occasions when no wage data is available, but rather states” *No wage data are available in Area XXXXX for the occupation code 29-XXXX - Employers will need to provide an alternative wage source”*

a. In this situation, you will need to submit a Prevailing Wage Determination (PWD) request by using ETA Form 9141. This form needs to be completed and submitted directly to the National Prevailing Wage and Helpdesk Center (NPWHC).

(1) It is strongly recommended that this be submitted online through iCERT. To access the iCert Portal go to: <http://icert.doleta.gov/>.

(2) Requests can also be mailed to the following address:

U.S. Department of Labor  
Employment and Training Administration  
National Prevailing Wage and Helpdesk Center  
Attn.: PWD Request  
1341 G Street, NW  
Suite 201  
Washington, DC 20005-3142

b. The NPWHC will send the PWD electronically to the requesting agency contact. Therefore, it is important to include the correct email address on the ETA Form 9141 under item B15.

c. Requests are reviewed on a first come, first serve basis. The NPWHC strongly encourages requestors to submit their requests at least 60 days in advance of the employer’s initial recruitment efforts. Once the employer receives the PWD, the agency may begin recruitment or file an application for foreign labor certification (FLC). In addition, the agency must then follow the procedures as outlined in the preceding, i.e., send the PWD and FLC forms to DOL with copy to the VHA Workforce Management and Consulting Office for review. Note that an individual’s VA pay may not be lower than the NPWHC wage.

6. The process of determining the prevailing wage is subject to audit and investigation. Facilities must develop and maintain documentation which meets the burden of proving the validity of the wage statement required and attested to on Form ETA 9035 or Form ETA 9035E. Documentation which meets this burden includes a copy of the prevailing wage finding from an employer survey or an independent authoritative source, which reflects wage data within the

24-month period immediately preceding the filing of the LCA. Documentation must be made available to DOL upon request; this includes the individual wage determination and a copy of the prevailing wage finding.

7. To ensure facilities are fully meeting the requirements of the LCA process, they are required to submit a copy of every Form ETA 9035 or 9035E to VHA Central Office at the same time they submit the form to DOL. In the case of physicians, the form must be accompanied by a copy of the approved compensation panel form showing the base and market pay that will be paid to the physician. These forms are reviewed for compliance with DOL regulations and facilities will be notified of any deficiencies found, so appropriate corrected action can be taken. Forms are to be submitted by fax to the VHA Workforce Management and Consulting Office (10A2A) at (202) 273-6639. The fax cover sheet must provide a name and telephone number of an individual who may be contacted for questions.