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H-1B Program Bulletin Clarifying Filing Requirements for Labor Condition Applications by Secondary Employers at 20 C.F.R. §§ 655.715 and 655.730(a)

The Office of Foreign Labor Certification (OFLC), Employment and Training Administration, is revising its interpretation of its regulations concerning which employers must file a Labor Condition Application (LCA) under 20 C.F.R. §§ 655.715 and 655.730(a). OFLC now interprets the regulations to require secondary common-law employers of H-1B workers to file an LCA.

H-1B employment frequently involves staffing agencies (primary employers) that petition to hire H-1B workers, as well as staffing agencies' clients (secondary employers) where the H-1B workers are assigned to work. While the primary employer typically serves as the H-1B worker's employer for payroll and tax purposes, the secondary employer often exercises considerable control over the worker's day-to-day work. However, secondary employers, even those who are employers under the common law, have not previously been held responsible for complying with the statutory and regulatory requirements of the H-1B program set forth at 8 U.S.C. § 1182(n).

OFLC acknowledges that interpreting its regulations to require compliance from secondary (but still common-law) employers is a change in its interpretation, but believes the change is appropriate because of the clear language of its regulations, it better comports with the goals of the H-1B program, and is consistent with recent Executive Branch directives. Additionally, the change is independently warranted because of corresponding interpretative changes being made by the Department of Homeland Security's (DHS's) U.S. Citizenship and Immigration Services (USCIS) concerning the requirement of secondary common-law employers of H-1B workers to file nonimmigrant visa petitions (I-129s).

Statutory and Regulatory Framework

The H-1B visa program, codified in the Immigration and Nationality Act (INA), permits the temporary employment of nonimmigrants in specialty occupations in the United States. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(n); 20 C.F.R. part 655, subparts H and I. A prospective H-1B employer must submit an LCA to DOL attesting that the employer will satisfy certain program requirements, including those related to the wages and working conditions that it will provide to the H-1B worker. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.700(b)(1). If DOL certifies the LCA, the prospective employer then submits a nonimmigrant visa petition (I-129) and the LCA to USCIS. 20 C.F.R. § 655.700(b)(2). If the petition is granted, the H-1B nonimmigrant applies to the State Department for an H-1B visa. *Id.* at § 655.700(b)(3).

The term "employer" is not defined in the H-1B provisions of the INA. The Department therefore understands the term to encapsulate the conventional, common law master-servant relationship. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). This is

reflected in the Department's regulations, which provide that "*[e]mployed*, *employed by the employer*, *or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed," (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968), which was in turn cited in *Darden*, *see* 503 U.S. at 324) and that "*[e]mployer* means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B, H-1B1, or E-3 nonimmigrants and/or U.S. worker(s)." 20 C.F.R. 655.715 (emphasis in original). As the Department has previously explained, "the common-law test requires an assessment of all the factors bearing on the employment relationship, with the right to control the means and manner of work being the key determinant but with no one factor controlling." *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 Fed. Reg. 80110, 80142 (Dec. 20, 2000). Thus, under both the INA and the Department's regulations, the mere fact that an entity is a secondary, as opposed to the primary employer of an H-1B worker is irrelevant to whether that employer should file an LCA. Rather, the relevant consideration is whether a common-law employment relationship exists between the secondary employer and the H-1B worker.

Importantly, DOL regulations further state that "[i]n the case of an H-1B nonimmigrant . . . the person, firm, contractor, or other association or organization in the United States that files a petition with [USCIS] on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant," and that "an employer . . . which meets the definition of 'employer' set forth in § 655.715" must file an LCA. 20 C.F.R. §§ 655.715, 655.730(a). Similarly, DHS regulations state that any "United States employer seeking to classify an alien as an H-1B . . . temporary employee must file a petition," and that "[b]efore filing a[n H-1B] petition . . . the petitioner shall obtain a certification from the Department of Labor that it has filed a[n LCA.]" 8 C.F.R. § 214.2(h)(2)(i)(A), 214.2(h)(4)(B)(1). Both Departments' regulations thus treat petitioners and LCA filers interchangeably. The fact that an entity is required to file a petition with USCIS necessarily means it must file an LCA with DOL.

Additionally, USCIS regulations provide that "[i]f [a] beneficiary will perform nonagricultural services for, or receive training from, more than one employer, *each employer* must file a separate petition with USCIS as provided in the form instructions." 8 C.F.R. § 214.2(h)(2)(i)(C) (emphasis added). Notwithstanding this language, however, USCIS has not historically enforced the petition-filing requirement against secondary employers. *See Strengthening the H-1B Nonimmigrant Visa Classification Program*.

USCIS Rule

As explained in the new USCIS final rule, *Strengthening the H-1B Nonimmigrant Visa Classification Program*, USCIS is now interpreting section 214.2(h)(2)(i)(C) as requiring secondary employers that have an employer-employee relationship with an H-1B worker to file a nonimmigrant visa petition. This approach is consistent with the plain regulatory requirement for "each employer" to file a petition. 8 C.F.R. § 214.2(h)(2)(i)(C); *accord Comite De Apoyo A Los Trabajadores Agricolas v. Solis*, No. 09-240, 2010 WL 3431761, at *16 (E.D. Pa. Aug. 30, 2010) (concluding, in the H-2B context, that an interpretation requiring only job contractors to file for labor certifications was contrary to the plain language of the regulation, which required

"each employer" to file a petition with USCIS). Further, this approach is consistent with USCIS regulations that determine employer-employee relationships based on the common law. *See Strengthening the H-1B Nonimmigrant Visa Classification Program* (defining an "employee-employer relationship" as "the conventional master-servant relationship consistent with the common law").

To determine whether there is an "employer-employee" relationship—and thus whether a nonimmigrant visa petition is required—USCIS will consider the totality of the circumstances. *Strengthening the H-1B Nonimmigrant Visa Classification Program* (discussing changes to 8 C.F.R. § 214.2(h)(4)(ii)).

OFLC Understands its Regulations as Requiring Petitioning Secondary Employers to File LCAs: Reasons for the Change

With USCIS now interpreting its regulations as requiring H-1B workers' secondary but common-law employers to file nonimmigrant visa petitions, OFLC will interpret its own regulations as requiring those employers to file LCAs as well. Specifically, as noted above, OFLC's regulations require any entity filing a petition with USCIS to file an LCA as well. *See* 20 C.F.R. § 655.730(a) (stating that "an employer . . . which meets the definition of 'employer' set forth in § 655.715" must file an LCA); *id.* at § 655.715 ("In the case of an H-1B nonimmigrant . . . the person, firm, contractor, or other association or organization in the United States that files a petition with [USCIS] on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.").[1] This interpretation is a necessary consequence of how the H-1B program functions across OFLC and USCIS. Since USCIS will now require secondary but common-law employers to file petitions, and since these employers will be unable to proceed to the petition stage without an approved LCA from OFLC, OFLC must begin both requiring LCAs from these employers and adjudicating them.

OFLC's interpretive change is not only permissible under the statute and regulations, but better effects their plain language and purpose, which is a separate and appropriate reason for this action. The new interpretation harmonizes DOL's definition of an H-1B "employer" with its definition of the H-1B "employment relationship," which is determined under the common law. *Compare* Definition of *Employer*, 20 C.F.R. § 655.715 ("In the case of an H-1B nonimmigrant . . . the person, firm, contractor, or other association or organization in the United States *that files a petition* with [USCIS] on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.") (emphasis added) *with* Definition of *Employed, employed by the employer, or employment relationship*, *id.* ("[T]he employment relationship [is] determined under the common law[.]"). Because DOL's regulations require *all* "employer[s]" to file an LCA, any entity that

[1] OFLC similarly is now interpreting its regulations as requiring secondary employers of H-1B1 and E-3 nonimmigrants who are those workers' common-law employers to file LCAs. Since employers of H-1B1 and E-3 nonimmigrants are not required to file petitions at all, the regulations provide that "[i]n the case of an E-3 and H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant." 20 C.F.R. § 655.715. Previously, OFLC has not enforced the LCA requirement against secondary employers of H-1B1 and E-3 nonimmigrants, providing such secondary employers with treatment analogous to H-1B secondary employers. Going forward, in light of the common-law definition in DOL's regulations and the generally-consistent requirements of the H-1B, H-1B1, and E-3 programs, OFLC is interpreting its regulations as requiring secondary employers under those programs that meet the common-law definition of employer to file LCAs as well.

has a common-law employment relationship with an H-1B worker, including a secondary employer with such a relationship, must do so. OFLC's interpretive change thus brings its practice into accord with the plainest and best reading of its regulations. For the same reason, this change also better comports with the INA itself, which does not define the employers subject to H-1B requirements, and thus presumably includes all common-law employers of H-1B workers. *See Darden*, 503 U.S. at 322.

OFLC's interpretive change also better comports with the goals of the H-1B program and Executive Branch policy. The new interpretation enables the Department of Labor to hold all qualifying employers accountable for compliance with H-1B program requirements—thereby preventing potential abuse and achieving better protection for U.S. workers. *See* U.S. Gov't Accountability Office, *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program* 52–56 (2011), https://www.gao.gov/assets/320/314501.pdf. This is a priority for the Executive Branch. *See* Executive Order 13490, Aligning Federal Contracting and Hiring Practices with the Interests of American Workers, 85 Fed. Reg. 47879, 47880 (Aug. 3, 2020) (directing DOL and DHS to take appropriate action to protect U.S. workers, "including measures to ensure that all employers of H-1B visa holders, including secondary employers," adhere to H-1B program requirements); *see also* Executive Order 13788, Buy American and Hire American, 82 Fed. Reg. 18837 (Apr. 18, 2017).

OFLC understands that many H-1B employers may need to examine their practices in light of this interpretation. Accordingly, to provide time for employers to become familiar with the interpretation and the accompanying guidance issued by the Wage and Hour Division, and in order to prevent this interpretation from being unnecessarily disruptive, secondary employers that meet the common-law test need not file LCAs until 180 days after the publication of this guidance, or July 14, 2021.