

Organized H-1B 9035 Comments

Comment Number	Section/Item	Published Instructions	Comment Received	Recommended Resolution
1	How to File Instructions	Summarized the Process for filing an application.	AILA - would like to reference section 20 CFR 655.760(c) describing how long the employer must retain documentation related to filing. Section states "Either at the employer's principal place of business in the U.S. or at the place of employment, the employer shall retain copies of the records required by this subpart for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn."	The Department agrees and has made the appropriate modification to the filing instructions under item B of "HOW TO FILE" by incorporating the record retention requirements contained at 20 CFR 655.760(c).
2	Section A	Visa Category	ACIP - wants a drop down of H-1B categories to avoid error.	The Department agrees and has made the appropriate modification to the filing instructions under Section A - Employment-Based Non-Immigrant Visa Information.
3	B-2 Instructions	Instructions state: "All application information"	ACIP - wants that statement to be clarified b/c they do not know what "etc." means. Instructions should state specific requirements under 20 CFR 655.760(a)	The Department agrees and this comment has already been addressed by the modification made under Comment #1
4	B-2 Instructions	Instructions state: length of time for public examination is five years.	AILA - would like to reference section 20 CFR 655.760(c) describing how long the employer must retain documentation related to filing.	The Department agrees and this comment has already been addressed by the modification made under Comment #1
5	B-4 Instructions	Requesting full or part time.	AILA - would like to clarify full-time, i.e. at least 35 hours per week.	The Department agrees and acknowledges that no regulatory definition of full-time employment exists. Therefore, we have made the suggested modification to Section B of the instructions to indicate that the Department of Labor generally considers 35 hours per week to be the distinction point between full-time and part-time.

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6	B-7 Form and Instructions	Requesting total number of worker positions needed for 6 categories.	AILA - categories have always been unclear on I-129 and continue to be unclear. Although USCIS has provided guidance, section seems unnecessary to DOL's function in H-1B program.	Since the definitions for each of the categories listed in Section B.7 are identical to those historically used by employers in filing I-129 petitions with USCIS, the Department will not seek to define these items any further than what is already provided for through the I-129 form. Employers who anticipate filing an I-129 petition in one of the categories should also mark that same category on the ETA Form 9035.
7	B-7 Form and Instructions	Requesting total number of worker positions needed for 6 categories.	ACIP - categories have always been unclear. What is the difference between "new employment" and "change in previously approved employment" or "amended petition"? Is it for an "amended LCA or "amended I-129?"	The Department will maintain the collection of this information as it establishes, for the first time, consistency with the USCIS I-129 Nonimmigrant Petition and the proposed revised collection in this section was proposed based on input from USCIS staff. <u>The instructions, however, do indicate that the categories are those established and defined by USCIS and should reflect the number of each type of application the employer will be filing with USCIS.</u>
8	B-7 Form and Instructions	Requesting total number of worker positions needed for 6 categories.	ACIP - need more clarification on how to enter the number of workers when they may fall into one or more categories.	The Department will maintain the collection of this information as proposed. The USCIS I-129 petition specifically states that only 1 box (i.e., uses the term "Check One") may be checked when completing the I-129 petition based on a certified LCA. Therefore, the Department does not fully understand why there would be a need on a single LCA for 1 worker to be included in multiple categories.
9	B-7 Form and Instructions	Requesting total number of worker positions needed for 6 categories.	ACIP - should include a box of total # of workers.	The Department agrees and has made the appropriate modification to item B.7 of the form and corresponding instructions to add a collection for "Total Worker Positions Being Requested for Certification." Respondents will then be asked to distribute this total number of worker positions across the different categories under (a) through (f). We believe the addition of this collection item will provide an unduplicated count of the worker positions being requested.
10	C-13 Form	Requesting a "four" digit (at least) NAICS code	AILA - states that the Nails code can be 2-6 digits and form should allow for 2-6 digits.	The Department will maintain the collection of this information as proposed. Although the NAICS provides for 2 to 6 digits, the 2 digit level is too broad to be effectively used for program management purposes. Equally important, the collection of the NAICS code in this manner is consistent with other approved OMB collections such as the ETA Form 9089 under the PERM Program. The Department's LCA Online System will allow the employer to populate this field one-time in order to establish a registration and then the NAICS code will be pre-populated on each Labor Condition Application that is prepared and filed; thereby significantly minimizing any data collection burden associated with this reporting item.

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11	G-a on Form	Requesting "full street address"	AILA - states that this is confusing. <u>ACIP requests information on how to add 2 additional physical locations.</u>	The Department has modified the instructions under Section G to state that the employer should "Enter the street address of the place of intended employment" and removed any reference to "full street address." This is consistent with the collection other address information in the form <u>and the form now states that the on-line form allows 3 physical addresses.</u>
12	Item 8 on the Form	Listing of four wage levels	ACIP - would like to add "other" b/c some wage sources only have 2 wage levels.	The Department will maintain the collection of the proposed 4 OES wage level. In the event that the employer uses a data source other than OES providing 2 wage levels, the employer must record "N/A" in Item 8. This field is reserved to record wage levels provided by the SWA or obtained through the OFLC Online Wage Library.
13	Item 9 Instructions	Instructions discusses prevailing wage.	AILA -instructions should state "if the positions is part-time, enter prevailing wage on an hourly basis."	The Department does not want to limit what employers may record in Item 9 and 10 of this section. It is quite possible that some data sources will provide prevailing wages on either a weekly or bi-weekly basis regardless of whether the position is full-time or part-time. This approach is consistent with how the Department has historical collected this information.
14	Item 10 Instructions	Instructions discusses prevailing wage per hour, weekly....	AILA -instructions should state "if the positions is part-time, enter prevailing wage on an hourly basis."	The Department does not want to limit what employers may record in Item 9 and 10 of this section. It is quite possible that some data sources will provide prevailing wages on either a weekly or bi-weekly basis regardless of whether the position is full-time or part-time. This approach is consistent with how the Department has historical collected this information.
15	Item 11. a Instructions	Requesting year survey published	AILA -instructions should state "Enter the year in which the data source used to list the prevailing wage was published."	The Department has made the appropriate modification to the form instructions.
16	Item 11 b Instructions	Refer to Appendix II, sample list of survey	AILA - recommend that DOL clarify that any published survey can be used as long as it meets 20 CFR 655.731(b)(3)(iii)(B) or (C) as appropriate.	The Department agrees and has modified the instructions to reference the regulatory standard for an independent or other legitimate source of prevailing wage.
17	Item 11 on Form	List prevailing wage source options.	ACIP - would like to add ACWIA as an option b/c most universities use this option.	The Department will maintain the collection of the prevailing wage source options as proposed to ensure consistency with other OMB approved forms; such as the ETA Form 9089 for the PERM Program. Employers utilizing the ACWIA data source will continue, as they do under the current information collection, record "Other" in Item 11, indicate the ACWIA wage year utilized in Item 11a, and then specify "ACWIA" or "ACWIA - Education Industry Database" in Item 11b.

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18	Item 11(b) on Form	Refer to Appendix II, sample list of survey	ACIP - very confusing. Suggest using "If using a prevailing wage source not listed in question 11."	The Department will maintain the collection of the prevailing wage source options as proposed. The suggested comment will not address circumstances where employers utilize the OFLC Online Wage Library (i.e., not obtaining an OES wage from a SWA) and must indicate "OES" in item 11 and identify the wage source in item 11b as "FLC Online Wage Library." To minimize confusion, the Department has included <u>an</u> example in the instructions of how the information in this section should be populated in various scenarios using the wage source options listed.
19	Section H Instructions	Discusses working conditions, notice and strike or lockout	AILA - states that there are typos: (1) nonimmigrants instead of nonoimmigrants; (2)the instead of ht; (3)within three days instead of with three days; (4) As instead of AS.	The Department has made the appropriate modification to the form instructions.
20	Section H Instructions	Discusses working conditions, notice and strike or lockout	ACIP - states that there are typos: (1))the instead of ht.	The Department agrees and has made the appropriate modification to the form instructions.
21	Section I Instructions	Section refers to H-1B, H-1B1 and E-3.	AILA - if this section applies only to H-1B should be removed from 7 subsections.	The Department agrees and has made the appropriate modifications to Section I of the instructions and removed references to H-1B1 and E-3 visas.
22	Section I Instructions	Instructions state: "that if it uses his application."	AILA - there is a typo in item 1, 2nd paragraph, 3rd line should be "that if it uses this application."	The Department agrees and has made the appropriate modifications to Section I.
23	Section I Instructions	Instructions state: "that if it uses his application."	AILA - there is a typo in item 2, 2nd paragraph, 4th line should be "that if it uses this application."	The Department agrees and has made the appropriate modifications to Section I.
24	Section I Instructions, Subsection 2 Attestation (C)	Instructions require attesting to recruitment and hiring.	ACIP - statement in bold does not reflect statutory/regulatory rules for dependent employers. No relationship to between employer's requirement to make Attestation (C) and immigrant categories found in INA Sec. 203(b)(1)(A), (B) or (C)	The Department has made modifications to the instructions under Section I, Subsection b. <u>to reflect that this provision is applicable only to H-1B applications, however, the reference to the "priority worker" immigrant categories is in the statute.</u>
25	Section J on Form	States: either "Employer's principal place of business" or "Place of Employment."	AILA - no impact on validity of certification if documents subsequently moved. Questions should be deleted.	The Department is maintaining the collection of this item on the form as part of the LCA attestation for employers.

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26	Section L on Form	Requesting information about the LCA preparer.	ACIP - instructions unclear b/c (1) can a paralegal complete if working for an attorney? (2) If attorney prepared LCA, would they complete this section? (3) No way to know whether employer or attorney prepared LCA.	The Department believes it is permissible for an employee of the attorney/agent or employer, which may be the person other than the one listed in sections D and E of the form, to prepare the LCA form. In these circumstances, the employee of the attorney (e.g., paralegal) would complete the LCA preparer section. If the employer or attorney/agent contact listed in sections D and E was the person preparing and submitting the LCA, then this section will be left blank. As far as identifying whether the person is an employer or attorney, we did include a "Firm/Business Name" in this section that would allow us to see if the person completing the form was affiliated with the employer or attorney/agent firm. The Department believes the collection, as proposed, is appropriate, however, we have added an explanation to the <u>instructions for clarity</u> .
27	Section N on Form	How to file complaints	ACIP - the complaints that are sent to the Office of Special Counsel are only for willful violators and H-1B dependent employers and this should be reflected in this section.	The Department agrees and has included the appropriate language and regulatory citations under Section N of the instructions.
28	Appendix II	Sample of Acceptable Wage Surveys	AILA - recommend that DOL clarify that any published survey can be used as long as it meets 20 CFR 655.731(b)(3)(iii)(B) or (C) as appropriate.	The Department agrees and has included the appropriate regulatory citations under Section G of the instructions.
29	Form WH-4	Complaint Form for Aggrieved Parties	AILA - concerned that form may be misused by disgruntled employee. Suggest that an attestation verifying truthfulness is required.	The Department has no authority to require complainants to attest the truthfulness of their statements, the Department recognizes the potential for baseless complaints underlying the recommendation. Consequently, the Department thoroughly screens each complaint that it receives. A complaint is not investigated unless it is deemed that there is a reasonable cause that a violation has occurred. See 20 CFR § 655.806. This mandatory reasonable cause determination process serves as a check against frivolous complaints. Screening of complaints during the intake process is critical for the Department to meet its burden and not investigate needlessly. Experience has shown that complainants contacting the Department complain of problems that the agency cannot resolve for a variety of reasons. Complainants are not familiar with the nuances of the INA or with the specific requirements that must be satisfied; therefore, it is agency practice to contact complainants to determine if the matter that is subject of the alleged complaint is within the Department's enforcement jurisdiction. With this screening process, the agency representative is able to ascertain the necessary information to determine a complaint's validity and eliminate baseless complaints and thus has decided not to follow the

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30	Form WH-4	Complaint Form for Aggrieved Parties	AILA - inconsistent use of terms "items," and "sections." Be consistent.	We thank the commenter for pointing this out. We have changed the form to provide uniform consistency.
31	Form WH-4, Item 4	Description of Alleged Violation	Inaccuracies create appearance of lack of objectivity and encourage baseless complaints.	See response to comment #30.
32	Form WH-4, Item 4(a)	States: "labor certification application"	AILA - Should state: labor condition application.	We thank the commenter for pointing this out. We have changed the form as suggested.
33	Form WH-4, Item 4(d)	Lists alleged violation as : employer made illegal deductions from worker's wages...	AILA - only unlawful if the employee is required to pay for the ACWIA training fee or if the deductions from the wages for petition processing causes the offered wage to fall below required wage. Please clarify.	We thank the commenter for pointing this out. We have changed the form as suggested.
34	Form WH-4, Item 4(i)	Lists alleged violation as : "Employer required H-1B worker to pay all or any part of the \$750/\$1500 fee."	AILA - "Employer required H-1B worker to pay all or any part of the \$750/\$1500 scholarship and training fee."	We thank the commenter for pointing this out. We have changed the form as suggested.
35	Form WH-4, Item 4(j)	Lists alleged violation as : "Employer imposed an illegal penalty on H-1B for ceasing employment with eth employer prior to a date agreed upon by the worker and employer."	AILA - regulations allow liquidated damages for early departure. This should be clarified.	We thank the commenter for pointing this out. We have changed the form as suggested.
36	Form WH-4, Item 4(m), (n), (o), (p)	Continued list of violations.	AILA -violations applicable only to dependent or willful violators. Should be clarified.	We thank the commenter for pointing this out. We have changed the form as suggested.
37	DOL Supporting Statement, Section A-12	Estimate for complying with recordkeeping is 5 minutes.	AILA - Estimate is too low for requirements found in 20 CFR 655.731(b). Should be 20 minutes b/c "extensive" requirement.	The Department dealt with this particular hourly burden in A.12.H. of the supporting statement and assigned it 1.5 hours for most companies and an additional 30 minutes for the special requirements for multi-national requirements. The five minutes referred to by the commenter pertains only to the requirement of keeping a copy of the LCA and payroll records. Therefore, we have not amended our supporting statement on this hourly burden requirement.
38	DOL Supporting Statement, Section A-12	Estimate for documenting a change in corporate entity is 30 minutes.	AILA - Estimate is too low because this section of the regulations (20 CFR 655.730(e)) require more than the sworn statement. Should be 60 minutes b/c corporate transactions can be complex.	The Department has reviewed its hourly burden estimate for this particular requirement and agrees with the commenter that, depending on the size of the company and number of H-1B employees, it can take more than 30 minutes on average to comply with this requirement. We have adjusted our burden to 60 minutes.

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39	DOL Supporting Statement, Section A-12	Estimate for individual completing Form WH-4 is 4 is 20 minutes.	AILA - Estimate is too low. Should be 45 minutes to encourage individual to put as much information as possible.	The Department has found, through program experience, that the majority of the WH-4 forms are filled out by WHD investigators who do the intake for the complaints and it takes them less than 20 minutes to fill in the forms, but because a few are filled out by others outside the agency, we have determined that the average would be 20 minutes per complaint. Therefore, we decline to revise this estimate.