U.S. Citizenship and Immigration Services

# Questions and Answers

March 20, 2009

## Employ American Workers Act and its Effect on H-1B Petitions

**Introduction**

U.S. Citizenship and Immigration Services (USCIS) today announced additional requirements for employers, who receive funds through the Troubled Asset Relief Program or under section 13 of the Federal Reserve Act before they may hire a foreign national to work in the H-1B specialty occupation category.

**Background**

On Feb. 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act ("stimulus bill"), Public Law 111-5. The stimulus bill contained the Employ American Workers Act ("EAWA"), Pub. L. 111-5, Div. A, Title XVI, § 1611.

**Questions and Answers**

**Q. What does EAWA do?**

*A*. EAWA prevents a company from displacing U.S. workers when hiring H-1B specialty occupation workers if the company received funds through the Troubled Asset Relief Program ("TARP"), Pub. L. 110-343, Div. A, Title I, or under section 13 of the Federal Reserve Act (collectively referred to in this document as "covered funding").

Under EAWA, any company that has received covered funding and seeks to hire H-1B workers is considered to be an "H-1B dependent employer."

An "H-1B dependent employer" must make the following additional attestations to the U.S. Department of Labor (DOL) when filing a Labor Condition Application (LCA):

- It has taken good faith steps to recruit U.S. workers (defined as U.S. citizens or nationals, lawful permanent resident aliens, refugees, asylees, or other immigrants authorized to be employed in the United States (i.e., workers other than nonimmigrant aliens) using industry-wide standards and offering compensation that is at least as great as those offered to the H-1B nonimmigrant;
- It has offered the job to any U.S. worker who applies and is equally or better qualified for the job that is intended for the H-1B nonimmigrant;
- It has not "displaced" any U.S. worker employed within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing. A U.S. worker is displaced if the worker is laid off from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought; and
- It will not place an H-1B worker to work for another employer unless it has inquired whether the other employer has displaced or will displace a U.S. worker within 90 days before or after the placement of the H-1B worker.

**Q. Are the EAWA requirements permanent?**

*A.* No. EAWA took effect on Feb. 17, 2009 and will sunset two years from the date of enactment.

**Q. Which specific U.S. companies are affected?**

*A.* USCIS is working with the Department of the Treasury and other relevant agencies to identify companies that have received covered funding. USCIS, however, expects companies seeking to hire H-1B workers to know whether or not they have received covered funding and act accordingly with respect to hiring an H-1B nonimmigrant.

EAWA only applies to U.S. companies that received covered funding and want to hire new H-1B workers.
The normal exception to the H-1B dependent employer requirements that an H-1B nonimmigrant is exempt from the dependency calculation if the individual earns a salary of at least $60,000 or has a master's degree or higher is not available to companies that have received covered funding.

**Q. What is an H-1B nonimmigrant?**
*A.* An H-1B nonimmigrant is a foreign national who comes to the United States temporarily to work in a specialty occupation. A specialty occupation position is one that generally requires a bachelor's or higher degree and specialized knowledge.
A U.S. employer seeking to hire H-1B workers must file an LCA with DOL and submit the certified LCA with the H-1B petition with USCIS. There also is an annual limit of 65,000 on H-1B workers, subject to certain exceptions. Additionally, the first 20,000 H-1B petitions filed on behalf of aliens who have earned a U.S. masters' degree or higher are exempt from the fiscal year cap.

**Q. To which H-1B hires does EAWA apply?**
*A.* EAWA applies to any "hire" taking place on or after Feb. 17, 2009, and before Feb. 17, 2011. EAWA defines "hire" as an employer permitting a new employee to commence a period of employment; that is, the introduction of a new employee to the employer's U.S. workforce.
EAWA applies to:

- Any LCA or petition filed on or after Feb. 17, 2009 involving any employment by a new employer, including concurrent employment and regardless of whether the beneficiary is already in H-1B status.
- New employment (i.e., hires) based on a petition approved before Feb. 17, 2009, if the H-1B employee had not actually commenced employment before that date.

EAWA does not apply to:

- A petition to extend the H-1B status of a current employee with the same employer.
- A petition seeking to change the status of a current U.S. work-authorized employee to H-1B status with the same employer.

**Q. How is USCIS implementing EAWA?**
*A.* EAWA affects the current LCA process administered by DOL and the USCIS petition process for companies seeking H-1B workers. Companies subject to EAWA will now need to make new statements regarding recruitment and hiring of U.S. workers.
USCIS is revising Form I-129, Petition for Nonimmigrant Worker, to include a question asking whether the petitioner has received covered funding. This revised form will be posted to the USCIS website in time for the next cap subject H-1B filing period that begins on April l, 2009. While USCIS encourages petitioners, whenever possible, to use the most up-to-date form, USCIS will not require use of the revised form in time for the start of the filing period for fiscal year 2010.
However, USCIS urges H-1B petitions who have already prepared packages for mailing using the previous Form I-129 (January 2009 version) to complete only the page in the revised version of the Form I-129 (March 2009) which has the new question on EAWA attestation requirements and to file this single page with the prepared package. The single page referenced is the first page on the H-1B Data Collection and Filing Fee Exemption Supplement.
A valid LCA must be on file with DOL at the time the H-1B petition is filed with USCIS. Therefore, if the petitioner indicates on its petition that it is subject to the EAWA, but the LCA does not contain the proper attestations relating to H-1B dependent employers, the H-1B petition will be denied.

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