

H-1B Petitions

1. Please provide an update on the adjudication of cap-subject H-1B petitions

- How many petitions have been adjudicated?
 - How many approved/How many denied?
- How many petitions are pending a response to an RFE?
- How many petitions have received a response to an RFE, but are not yet adjudicated?
- How many cases have yet to be touched?

RESPONSE:

The Service Centers have made diligent progress toward the adjudication of cap-subject H-1B filings before the beginning of the fiscal year. To date, USCIS has completed an initial adjudicative action (which would include an RFE, Notice of Intent to Deny, or final decision) for the majority of cap-subject H-1B petitions; by October 1, 2013, we anticipate completing an initial adjudicative action on all cap-subject H-1B filings.

2. During the August 14, 2013 call, INA sec. 212(n)(1) was cited as requiring the LCA to match the SOC O*NET code for the occupation in which the individual will be employed. However, the language of INA sec. 212(n)(1) is not that specific. This is perhaps because there are many SOC O*NET codes for which there is no corresponding prevailing wage. Instead, INA sec. 212(n)(1) requires employers to file an LCA in an occupational classification “*based on the best information available.*” Instructions for selecting the “*best information available*” are contained in the DOL’s “Prevailing Wage Determination Policy Guidance” (November 2009)¹ and the complexity of this process is summarized in Attachment A. Moreover, the employer must maintain records explaining the basis on which it selected an O*NET code and corresponding wage. 20 CFR 655.760(a). Given DOL’s expertise in the prevailing wage determination process as it relates to the selection of appropriate SOC O*NET codes, INA sec. 212(n)(2) vests DOL with the authority to receive, investigate, and dispose of complaints with regards to the LCA.

a. What is the legal basis for limiting the job duties of a specialty occupation to those included in the SOC O*NET descriptor?

b. How should employers resolve conflicts between the SOC O*NET code assigned by DOL and the one selected by the USCIS adjudicator?

¹ DOL Policy Guidance is available at <http://www.foreignlaborcert.doleta.gov/wages.cfm>. At the very bottom of the page, it indicates “To read the updated Prevailing Wage guidance, please [click here.](#)”

RESPONSE:

*During the August call, SCOPS indicated that INA § 212(n)(1) requires that H-1B petitions be accompanied by a corresponding LCA, and DHS regulations at 8 CFR § 214.2(h)(4)(i)(B) mandate that the certified LCA corresponds to the specialty occupation in which the alien will be employed. When adjudicating a petition, adjudicators must analyze whether the SOC O*NET code descriptor on the certified LCA directly relates to the petition, and determine whether it sufficiently relates to the proposed duties, as required by the statutory and regulatory requirements for H-1B classification. If the SOC code does not clearly correspond to the proffered position and leads the adjudicator to question whether there is a discrepancy between the SOC code and the proffered job duties, the adjudicator may issue an RFE and ask the petitioner to explain the nexus between the SOC code and the proffered position. The petitioner has the burden of demonstrating eligibility for the benefit sought.*

*USCIS adjudicators do not select the SOC O*NET code. If the DOL selects the SOC O*Net code, the burden is on the petitioner to ensure that the code accurately reflects the duties of the proffered position. The petitioner must review the DOL-assigned SOC O*NET code, and if the proffered position's duties do not correspond to the duties described by the SOC O*NET code, then the petitioner must challenge this determination with DOL.*

3. AILA is concerned that RFEs for Marketing Research Analysts contain boilerplate language and do not specifically reference or acknowledge documentation included with the original submission. These multi-page RFEs place an undue burden on petitioners, particularly when the deficiencies are not clearly articulated (WAC1216550382; WAC1308250100; WAC1312851417; EAC1313650710; WAC1312950535; WAC1312952248; WAC1312951176; WAC1313052026; WAC1312950091; WAC1312950830; WAC1312952360; WAC1313052624 denied. Please comment on efforts to ensure that RFEs are issued in accordance with the [Yates Memorandum “Requests for Evidence and Notices of Intent to Deny” dated February 16, 2005](#), and the [Neufeld Memorandum “Removal of the Standardized Request for Evidence Processing Timeframe Final Rule, 8 CFR 103.2\(b\)” dated June 1, 2007](#) (AILA Doc. Nos. 05021810 & 07062171).²

RESPONSE:

We appreciate your feedback, which allows us to improve the RFE process in order to achieve consistency and to ensure that RFEs are complete and informative. We have contacted the service centers and have reminded them that RFEs need to include more case-specific analysis

² USCIS Rescinds RFE Memo and Provides New Guidance, AILA Doc. No. 05021810, <http://www.aila.org/content/fileviewer.aspx?docid=12394&linkid=42904> and Neufeld Memo on the Removal of the Standardized RFE Processing Timeframe , AILA Doc. No. 07062171, <http://www.aila.org/content/default.aspx?docid=22708>

and lists of suggested evidence relating to the legal elements of the benefit classification sought.

The quality review procedures in place for RFEs include a regular and periodic review of RFE content prior to the final decision and ongoing cross-center reviews.

Please note that only three of the above-mentioned twelve petitions involve Market Research Analyst positions.

G-28s

4. There are a number of recent reports of errors in G-28 information at both the service center and the lockbox. These include data processing errors and failure to recognize a submitted G-28. Examples include WAC1315450275, WAC1316251691, WAC1390512294, WAC1317050022, WAC1316950698, EAC1317051528, EAC1310600025, SRC1390297409, SRC1390297410, SRC1390297411.

Please comment on efforts to ensure that the G-28 information is correctly entered, and to ensure that properly filed G-28s are not overlooked.

RESPONSE: *USCIS strives to achieve accuracy in all its data entry and processing functions, but it is inevitable there will be some errors. We did inquire as to all the examples given above and provide these findings. There were no systematic issues found causing improper rejections.*

5. When a G-28 is found to be 'defective', neither the attorney of record nor the petitioner are notified. It is only when notices fail to appear or communication with USCIS is prevented that the attorney learns that there is a problem. AILA requests that rejected G-28s be returned to the attorney of record with an explanation of the deficiency, and a routing sheet to allow a properly executed G-28 to be easily matched with the file.

RESPONSE: *This question goes beyond the purview of SCOPS. . We suggest AILA raise this concern during their next Agency-wide meeting.*

6. It is currently very difficult to have a new G-28 matched to a pending application or petition. Would USCIS consider providing a routing sheet with the petitioner's copy of the receipt notice to facilitate this process?

RESPONSE: *We do not generally encounter difficulties in matching a new G-28 to a pending application/petition. Creating a routing sheet with the petitioner’s copy of receipt notice is not a practical option to match a new G-28 to the pending petitions/applications considering the amount of pending cases at the center.*

Lockbox

7. Do the lockboxes in Dallas and Phoenix accept deliveries from “bonded” private couriers? If yes, please provide a list of those accepted.

RESPONSE: *Please direct this question to Lockbox for Response.*

E-Filing

8. There appears to have been a policy change regarding the amount of time provided to submit documentation for an e-filed petition. While stated policy was seven (7) **business** days <http://www.ocalegal.com/ocaenglish/researchbytopic/uscisinformation/adjustmentofstatus/InstructionsforElectronicallyFilingFormI140Updated8232010MC.pdf>, the recently updated USCIS e-filing information page (July 8, 2013), indicates that it is (7) **calendar** days. <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=9059d9808bcbd010VgnVCM100000d1f1d6a1RCRD&vgnextoid=9059d9808bcbd010VgnVCM100000d1f1d6a1RCRD>. Please confirm that this change was intended, and efforts to inform stakeholders of this change.

RESPONSE: Thank you for bringing this to our attention. The website will be changed to reflect 7 business days.

Consular Returns

9. Please provide statistics on the rate of re-affirmations following a consular return on petitions for H-1Bs, O-1s, L-1s, Ps, I-130s, and K-1s.

RESPONSE: The chart below reflects reaffirmation rates from October 1, 2011 to September 11, 2013. For the O1 category, there were no revocations or reaffirmations during the reporting period.

CATEGORY	Reaffirmed%
I129F	47.48%
I129 H1B	29.45%
I129 L1A	18.02%
I129 L1B	13.04%
I129 O1	0.00%
I129 P	25.93%
I130	18.70%

ATTACHMENT A

In its 2009 Prevailing Wage Determination Policy Guidance,³ the DOL sets out the steps it takes in making a prevailing wage determination (PWD). This guidance was written for DOL analysts, but is also helpful to those requesting prevailing wages in predicting the DOL's determination and may offer comfort to those who forego 'safe harbor'.⁴ Chapter 8 of NAFSA Advisor's Manual is also extremely informative; it contains an excellent description of the prevailing wage process and what's involved in making a prevailing wage request. Both the DOL guidance and the Advisor's Manuals are critical documents to review as you delve into the world of prevailing wages. This article is not meant to be used in place of either of those resources, nor is it meant to be a 'how to' resource for calculating the wage. Rather, it is simply intended to give a broader view of the DOL process with the hopes of providing a basic understanding of the DOL framework.

Very generally, DOL calculates the prevailing wage by comparing the employer's requirements for the job with the 'normal' requirements for the job. Using the job duties the employer provides on the ETA-9141, DOL will select what it believes to be the most appropriate SOC O*NET code. This may or may not be the one the employer considered the best match (the one listed on the ETA-9141.) Once it selects the SOC O*NET code, DOL uses the information related to that code to define what is 'normal' for the job. The 'normal' education requirements for most professional SOC O*NET codes are found in Appendix D of the 2009 Prevailing Wage Guidance.⁵ For those occupations not found in Appendix D, the 'normal' education would be the level that 'most' of these occupations require in the O*NET Job Zone for that occupation. The 'normal' experience is based on the code's Job Zone and the tasks, technology, and knowledge described in the O*NET descriptor. Therefore, two things necessary to understand how DOL calculates the prevailing wage is 1) a copy of Appendix D and 2) access to the SOC O*NET codes.⁶

For prevailing wage purposes, DOL boils all jobs down into four levels: entry (Level I), qualified (Level II), experienced (Level III), and fully competent (Level IV).⁷ Depending on how the employer's education and experience requirements compare with those in Appendix D and O*NET, DOL will calculate the level appropriate to the position as described on the ETA-9141. DOL starts all positions at Level 1, and adds additional levels if the position as described on the ETA-9141 exceeds the baseline education and/or experience requirements.⁸ DOL separately evaluates each component of the job duties and

³ Department of Labor's "Prevailing Wage Determination Policy Guidance" (November 2009) (hereinafter "policy guidance") is available at <http://www.foreignlaborcert.doleta.gov/wages.cfm>. At the very bottom of the page, it indicates "To read the updated Prevailing Wage guidance, please [click here](#)."

⁴ Safe harbor is the term used to refer to the DOL's regulation that states that "*In all situations where the employer obtains the PWD from the NPC, the Department will deem that PWD as correct as to the amount of the wage.*" This suggests that the employer is "safe" from investigations questioning the validity of the prevailing wage.

⁵ Appendix D is included in the DOL Policy Guidance.

⁶ The best resource for this is <http://www.onetonline.org/>, not fldatacenter.com.

⁷ These levels only apply to OES wage data, and not to other wage sources or surveys.

⁸ Review DOL policy/guidance Appendix B/C check sheet and work sheet for calculating wage

requirements.⁹ For example, DOL uses Appendix D to consider if, and how many, levels should be added based on the education requirement listed on the ETA-9141. For example:

- Appendix D lists the normal educational requirement for a Physicist (O*NET code 19-2012) as a Ph.D. If the ETA-9141 indicates that a Ph.D. is required, no point or level will be added.
- Appendix D lists the normal education requirement for an Economist (O*NET code 19-3011) as a Master's Degree. If ETA-9141 indicates that a Ph.D. is required, one point or level will be added.
- Appendix D lists the normal educational requirement for a Chemical Engineer (O*NET code 17-2041) as a Bachelor's Degree. If the ETA-9141 indicates that a Ph.D. is required, two points or levels will be added, since a Ph.D. is two degree levels higher.

These examples indicate that even before DOL includes experience or other requirements in its calculation, the wage for the Economist would be at least Level II and the wage level for the Chemical Engineer would be at least Level III. This is because, as noted, DOL calculates education requirements separately from experience and other requirements. So even if a position does not require any experience, it can still be issued a Level III wage. This may explain why many post-doctoral research positions are issued a Level III wage when you are expecting a Level I wage.

However, in its guidance, DOL specifically recognizes that a position for *“a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.”*¹⁰ Moreover, the DOL guidance also states that *“the process...should not be implemented in an automated fashion. The NPWHC must exercise judgment when making prevailing wage determinations. The **wage level should be commensurate** with the complexity of the tasks, independent judgment required, and **amount of close supervision received.**”*¹¹ This means that it should be possible to get a Level I wage, even when the degree requirements exceed what is ‘normal’ for the occupation. Keep in mind that DOL will only go by the description on the ETA-9141, so it is important to clearly spell out if a position is entry level. It may be helpful to indicate in the job description that the duties are performed *“under supervision of the principal investigator”* or something similar.

Moving on to the next component, DOL adds experience into the equation. Requiring experience in and of itself does not necessarily mean that the resulting wage will be higher than Level 1. It depends on the complexity of the position as described in SOC O*NET, and the specifics of the amount and type of experience required on the ETA-9141. However, this comparison is not as straightforward as it was with education, as the DOL defines ‘normal’ in a somewhat convoluted manner. The guidance refers to the SOC O*NET Job Zones, but the Job Zones actually correspond to an older system, Specific Vocational Preparation (SVP), which is also expressed in code. The following is a rough estimate of the conversion from Job Zone into actual years:¹²

⁹ This article deviates from the DOL's Appendix B check sheet by beginning with education.

¹⁰ DOL policy guidance, *op cit.* 1, page 7.

¹¹ *Id* p 13

¹² Not to make things even more confusing, but the SVP experience requirement for PWD purposes is a separate analysis from how SVP is applied in PERM to determine whether the requirements are normal to the occupation.

- Job Zone 5 = SVP Range 8 and above = over 4 years and up to 10 years
- Job Zone 4 = SVP Range 7 to under 8 = over 2 years and up to 4 years
- Job Zone 3 = SVP Range 6 to under 7 = over 1 year and up to 2 years
- Job Zone 2 = SVP Range 4 to under 6 = over 3 months and under 2 years
- Job Zone 1 = SVP Range below 4 = less than 3 months

Converting the Job Zone into a quantified range provides a simpler formula to determine if experience requirements add a wage level, and if so, how many. It is important to note that at this step, only the duration of experience required is considered. Any specific skills, tools, or techniques listed as part of the experience is considered separately, as part of the next step. For purposes of this step, DOL will add a level if the duration of experience required is above the bottom of the range.¹³ This is illustrated in the following examples:

- Physicist (O*NET code 19-2012) is **Job Zone 5**.
 - If four years of experience is listed on the ETA-9141, no point or level should be added because four years is below the bottom of the range.
 - If five years of experience is listed on the ETA-9141, no point or level should be added because five years is 'at' the bottom of the range.
 - If six or seven years of experience is listed on the ETA-9141, one point or level should be added because six or seven years is at the lower end of the range.
 - If eight, nine, or ten years of experience is listed on the eTA-9141, two points or levels should be added because eight to ten are at the higher end of the range.¹⁴
 - If eleven or more years of experience is listed on the ETA-9141, three points or levels should be added because it is greater than the range.

- Chemical Engineer (O*NET code 17-2041) is **Job Zone 4**.
 - If two years of experience are listed on the ETA-9141, no point or level will be added, since two years is 'at' the lower end of the range.
 - If three years of experience are listed, one point or level will be added, since it is at the low end of the range.
 - If four years of experience are listed, two points or levels will be added since it is at the high end of the range.
 - If more than four years of experience are listed, three points or levels will be added since it is greater than the range.

¹³ It is important to note that the amount of experience required may be different from the amount of experience the beneficiary has. For prevailing wage purposes, DOL is only looking at the job requirements as described on the ETA-9141, not at any specific beneficiary.

¹⁴ This is an estimate based on DOL's guidance, which does not clearly indicate the number of years that fall within the lower or higher end of the range.

These examples demonstrate that depending on the Job Zone, the addition of a requirement of four years experience may have a very different effect. Whereas a Physicist that requires four years of experience will be Level 1, a Chemical Engineer that requires four years experience will be Level 4. Rounding back to include the earlier education requirements, after the first two steps are calculated the wage levels would be:

- Physicist (O*NET code 19-2012) requiring a Ph.D. and four years experience should be issued Level 1 wage. (no point for education, and no point for experience)
- Physicist (O*NET code 19-2012) requiring a Ph.D. and seven years experience should be issued Level 2 wage. (no point for education, and one point for experience)
- Chemical Engineer (O*NET code 17-2041) requiring a Ph.D. and two years experience should be issued a Level 3 wage. (Two points for education, and no point for experience)
- Chemical Engineer (O*NET code 17-2041) requiring a Ph.D. and four years experience should be issued a Level 4 wage. (two points for education, and two points for experience)

So even before the final two components of the position, special skills or requirements and supervisory responsibilities, are added, the Chemical Engineer is at Level 4, while the Physicist remains at Level 1. With the Chemical Engineer, there is no going higher than Level 4; if the ETA-9141 also indicated that many special skills were required and that the position involved supervisory duties, it would remain at Level 4.

As discussed above, the experience requirement only considers the duration of the experience required; whether the substance of the experience required adds a wage level is based on whether the substance of the experience constitutes a 'special skill.' It is not entirely clear what DOL will consider 'special skills' for purposes of the PWD. The ETA-9141 requests information on foreign languages, licenses, certificates, certifications, and whether the position involves travel. The DOL guidance indicates that those requirements plus anything contained in the job description should be compared to the O*NET tasks, work activities, knowledge, and job zone examples. A point or points should be added if the requirements indicate skills that are beyond those of an entry-level worker. However, unlike the education and experience requirements, there are no quantified parameters to determine if and when a point or level should be added.

The DOL guidance recognizes that there may be circumstances in which there are special skills and requirements, but no additional point should be added because it does not sufficiently increase the seniority and complexity of the position. As an example, it notes that if a license or certification is normally required to perform the duties at an entry level – such as for a physician - no point should be added. Moreover, if a substantial amount of experience or education is required to obtain the license or certification, and a point was added at Step 1 or Step 2, no additional point should be added here. The DOL guidance notes that for some requirements, *“a point could be added either in Step 2 for the work*

experience, or in Step 3 for the education or training, or in Step 4 for the license. A point or points should not be added in every step.”¹⁵

The final step is to consider if the position has any supervisory responsibilities. Similar to the reasoning for ‘special skills’, a point should only be added if the supervisory duties are not customary for the O*NET occupation. Specifically, the DOL guidance states that the *“requirement for supervisory duties will not automatically warrant a determination of the highest wage level because the wages for supervisory occupations already account for the supervision of employees.”¹⁶* For example, a doctor’s supervision of nurses should not result in an added level, nor should a professor’s supervision of post-docs. However, a chemical engineer or physicist whose duties include ‘leading’ a project may receive a higher level. Like the ‘special skills’, this is another component of the prevailing wage determination that is somewhat more opaque.

The most certain thing about prevailing wage determinations is that there is nothing certain. While the DOL guidance delineates clear and seemingly objective standards, there are many parts where the DOL analyst is given broader discretion. Nevertheless, it is important to understand the framework within which this discretion is used, as at the very least, it may lessen the risk of surprise. Perhaps more significantly, it may actually allow you to predict the wage.

¹⁵ Id page 12

¹⁶ Id page 13