

(3) If the employer does not make the designation of “exempt” H-1B non-immigrants on the LCA, then the employer has waived the option of not being subject to the additional LCA attestation obligations on the basis of employing only exempt H-1B non-immigrants under the LCA. In the event of an investigation under subpart I of this part, the Administrator will not consider the question of the non-immigrant(s)’s “exempt” status in determining whether an H-1B-dependent employer or willful violator employer has complied with such additional LCA attestation obligations.

[65 FR 80227, Dec. 20, 2000]

§ 655.738 What are the “non-displacement of U.S. workers” obligations that apply to H-1B-dependent employers and willful violators, and how do they operate?

An employer that is subject to these additional attestation obligations (under the standards described in § 655.736) is prohibited from displacement of any U.S. worker(s)—whether directly (in its own workforce) or secondarily (at a worksite of a second employer)—under the standards set out in this section.

(a) *United States worker (U.S. worker)* is defined in § 655.715.

(b) *Displacement*, for purposes of this section, has two components: “lay off” of U.S. worker(s), and “essentially equivalent jobs” held by U.S. worker(s) and H-1B nonimmigrant(s).

(1) *Lay off* of a U.S. worker means that the employer has caused the worker’s loss of employment, other than through—

(i) Discharge of a U.S. worker for inadequate performance, violation of workplace rules, or other cause related to the worker’s performance or behavior on the job;

(ii) A U.S. worker’s voluntary departure or voluntary retirement (to be assessed in light of the totality of the circumstances, under established principles concerning “constructive discharge” of workers who are pressured to leave employment);

(iii) Expiration of a grant or contract under which a U.S. worker is employed, other than a temporary employment contract entered into in order to evade

the employer’s non-displacement obligation. The question is whether the loss of the contract or grant has caused the worker’s loss of employment. It would not be a layoff where the job loss results from the expiration of a grant or contract without which there is no alternative funding or need for the U.S. worker’s position on that or any other grant or contract (e.g., the expiration of a research grant that funded a project on which the worker was employed at an academic or research institution; the expiration of a staffing firm’s contract with a customer where the U.S. worker was hired expressly to work pursuant to that contract and the employer has no practice of moving workers to other customers or projects upon the expiration of contract(s)). On the other hand, it would be a layoff where the employer’s normal practice is to move the U.S. worker from one contract to another when a contract expires, and work on another contract for which the worker is qualified is available (e.g., staffing firm’s contract with one customer ends and another contract with a different customer begins); or

(iv) A U.S. worker who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer (or, in the case of secondary displacement at a worksite of a second employer, as described in paragraph (d) of this section, a similar employment opportunity with either employer) at equivalent or higher compensation and benefits than the position from which the U.S. worker was discharged, regardless of whether or not the U.S. worker accepts the offer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(A) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. worker to refuse or an offer made with the expectation that the worker will refuse;

(B) The offered job provides the U.S. worker an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity

for advancement within the organization, and similar tenure and work scheduling;

(C) The offered job provides the U.S. worker equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged. The comparison of compensation and benefits includes all forms of remuneration for employment, whether or not called wages and irrespective of the time of payment (e.g., salary or hourly wage rate; profit sharing; retirement plan; expense account; use of company car). The comparison also includes such matters as cost of living differentials and relocation expenses (e.g., a New York City "opportunity" at equivalent or higher compensation and benefits offered to a worker discharged from a job in Kansas City would provide a wage adjustment from the Kansas City pay scale and would include relocation costs).

(2) *Essentially equivalent jobs.* For purposes of the displacement prohibition, the job from which the U.S. worker is laid off must be essentially equivalent to the job for which an H-1B nonimmigrant is sought. To determine whether the jobs of the laid off U.S. worker(s) and the H-1B nonimmigrant(s) are essentially equivalent, the comparison(s) shall be on a one-to-one basis where appropriate (i.e., one U.S. worker left employment and one H-1B nonimmigrant joined the workforce) but shall be broader in focus where appropriate (e.g., an employer, through reorganization, eliminates an entire department with several U.S. workers and then staffs this department's function(s) with H-1B nonimmigrants). The following comparisons are to be made:

(i) *Job responsibilities.* The job of the H-1B nonimmigrant must involve essentially the same duties and responsibilities as the job from which the U.S. worker was laid off. The comparison focuses on the core elements of and competencies for the job, such as supervisory duties, or design and engineering functions, or budget and financial accountability. Peripheral, non-essential duties that could be tailored to the particular abilities of the individual workers would not be determinative in this comparison. The job

responsibilities must be similar and both workers capable of performing those duties.

(ii) *Qualifications and experience of the workers.* The qualifications of the laid off U.S. worker must be substantially equivalent to the qualifications of the H-1B nonimmigrant. The comparison is to be confined to the experience and qualifications (e.g., training, education, ability) of the workers which are directly relevant to the actual performance requirements of the job, including the experience and qualifications that would materially affect a worker's relative ability to perform the job better or more efficiently. While it would be appropriate to compare whether the workers in question have "substantially equivalent" qualifications and experience, the workers need not have identical qualifications and experience (e.g., a bachelor's degree from one accredited university would be considered to be substantially equivalent to a bachelor's degree from another accredited university; 15 years experience in an occupation would be substantially equivalent to 10 years experience in that occupation). It would not be appropriate to compare the workers' relative ages, their sexes, or their ethnic or religious identities.

(iii) *Area of employment.* The job of the H-1B nonimmigrant must be located in the same area of employment as the job from which the U.S. worker was laid off. The comparison of the locations of the jobs is confined to the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. For purposes of this comparison, if both such worksites or locations are within a Metropolitan Statistical Area or a Primary Metropolitan Statistical Area, they will be deemed to be within the same area of employment.

(3) The worker's rights under a collective bargaining agreement or other employment contract are not affected by the employer's LCA obligations as to non-displacement of such worker.

(c) *Direct displacement.* An H-1B-dependent or willful-violator employer (as described in § 655.736) is prohibited from displacing a U.S. worker in its own workforce (i.e., a U.S. worker

“employed by the employer”) within the period beginning 90 days before and ending 90 days after the filing date of an H-1B petition supported by an LCA described in §655.736(g). The following standards and guidance apply under the direct displacement prohibition:

(1) *Which U.S. workers are protected against “direct displacement”?* This prohibition covers the H-1B employer’s own workforce—U.S. workers “employed by the employer”—who are employed in jobs that are essentially equivalent to the jobs for which the H-1B nonimmigrant(s) are sought (as described in paragraph (b)(2) of this section). The term “employed by the employer” is defined in §655.715.

(2) *When does the “direct displacement” prohibition apply?* The H-1B employer is prohibited from displacing a U.S. worker during a specific period of time before and after the date on which the employer files any H-1B petition supported by the LCA which is subject to the non-displacement obligation (as described in §655.736(g)). This protected period is from 90 days before until 90 days after the petition filing date.

(3) *What constitutes displacement of a U.S. worker?* The H-1B employer is prohibited from laying off a U.S. worker from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought (as described in paragraph (b)(1) of this section).

(d) *Secondary displacement.* An H-1B-dependent or willful-violator employer (as described in §655.736) is prohibited from placing certain H-1B nonimmigrant(s) with another employer where there are indicia of an employment relationship between the nonimmigrant and that other employer (thus possibly affecting the jobs of U.S. workers employed by that other employer), unless and until the H-1B employer makes certain inquiries and/or has certain information concerning that other employer’s displacement of similarly employed U.S. workers in its workforce. Employers are cautioned that even if the required inquiry of the secondary employer is made, the H-1B-dependent or willful violator employer shall be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s) dur-

ing the applicable time period (see §655.810(d)). The following standards and guidance apply under the secondary displacement prohibition:

(1) *Which U.S. workers are protected against “secondary displacement”?* This provision applies to U.S. workers employed by the other or “secondary” employer (not those employed by the H-1B employer) in jobs that are essentially equivalent to the jobs for which certain H-1B nonimmigrants are placed with the other/secondary employer (as described in paragraph (b)(2) of this section). The term “employed by the employer” is defined in §655.715.

(2) *Which H-1B nonimmigrants activate the secondary displacement prohibition?* Not every placement of an H-1B nonimmigrant with another employer will activate the prohibition and—depending upon the particular facts—an H-1B employer (such as a service provider) may be able to place H-1B nonimmigrant(s) at a client or customer’s worksite without being subject to the prohibition. The prohibition applies to the placement of an H-1B nonimmigrant whose H-1B petition is supported by an LCA described in §655.736(g) and whose placement with the other/secondary employer meets both of the following criteria:

(i) The nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by the other/secondary employer; and

(ii) There are indicia of an employment relationship between the nonimmigrant and the other/secondary employer. The relationship between the H-1B-nonimmigrant and the other/secondary need not constitute an “employment” relationship (as defined in §655.715), and the applicability of the secondary displacement provision does not establish such a relationship. Relevant indicia of an employment relationship include:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services.

(3) *What other/secondary employers are included in the prohibition on secondary displacement of U.S. workers by the H-1B employer?* The other/secondary employer who accepts the placement and/or services of the H-1B employer's nonimmigrant employee(s) need not be an H-1B employer. The other/secondary employer would often be (but is not limited to) the client or customer of an H-1B employer that is a staffing firm or a service provider which offers the services of H-1B nonimmigrants under a contract (e.g., a medical staffing firm under contract with a nursing home provides H-1B nonimmigrant physical therapists; an information technology staffing firm under contract with a bank provides H-1B nonimmigrant computer engineers). Only the H-1B employer placing the nonimmigrant with the secondary employer is subject to the non-displacement obligation on the LCA, and only that employer is liable in an enforcement action pursuant to subpart I of this part if the other/secondary employer, in fact, displaces any of its U.S. worker(s) during the applicable time period. The other/secondary employer will not be subject to sanctions in an enforcement action pursuant to subpart I of this part (ex-

cept in circumstances where such other/secondary employer is, in fact, an H-1B employer and is found to have failed to comply with its own obligations). (Note to paragraph (d)(3): Where the other/secondary employer's relationship to the H-1B nonimmigrant constitutes "employment" for purposes of a statute other than the H-1B provision of the INA, such as the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*), the other/secondary employer would be subject to all obligations of an employer of the nonimmigrant under such other statute.)

(4) *When does the "secondary displacement" prohibition apply?* The H-1B employer's obligation of inquiry concerns the actions of the other/secondary employer during the specific period beginning 90 days before and ending 90 days after the date of the placement of the H-1B nonimmigrant(s) with such other/secondary employer.

(5) *What are the H-1B employer's obligations concerning inquiry and/or information as to the other/secondary employer's displacement of U.S. workers?* The H-1B employer is prohibited from placing the H-1B nonimmigrant with another employer, unless the H-1B employer has inquired of the other/secondary employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of such placement, the other/secondary employer has displaced or intends to displace a similarly-employed U.S. worker employed by such other/secondary employer. The following standards and guidance apply to the H-1B employer's obligation:

(i) The H-1B employer is required to exercise due diligence and to make a reasonable effort to enquire about potential secondary displacement, through methods which may include (but are not limited to)—

(A) Securing and retaining a written assurance from the other/secondary employer that it has not and does not intend to displace a similarly-employed U.S. worker within the prescribed period;

(B) Preparing and retaining a memorandum to the file, prepared at the same time or promptly after receiving the other/secondary employer's oral statement that it has not and does not

intend to displace a similarly-employed U.S. worker within the prescribed period (such memorandum shall include the substance of the conversation, the date of the communication, and the names of the individuals who participated in the conversation, including the person(s) who made the inquiry on behalf of the H-1B employer and made the statement on behalf of the other/secondary employer); or

(C) including a secondary displacement clause in the contract between the H-1B employer and the other/secondary employer, whereby the other/secondary employer would agree that it has not and will not displace similarly-employed U.S. workers within the prescribed period.

(ii) The employer's exercise of due diligence may require further, more particularized inquiry of the other/secondary employer in circumstances where there is information which indicates that U.S. worker(s) have been or will be displaced (e.g., where the H-1B nonimmigrants will be performing functions that the other/secondary employer performed with its own workforce in the past). The employer is not permitted to disregard information which would provide knowledge about potential secondary displacement (e.g., newspaper reports of relevant lay-offs by the other/secondary employer) if such information becomes available before the H-1B employer's placement of H-1B nonimmigrants with such employer. Under such circumstances, the H-1B employer would be expected to recontact the other/secondary employer and receive credible assurances that no lay-offs of similarly-employed U.S. workers are planned or have occurred within the prescribed period.

(e) *What documentation is required of H-1B employers concerning the non-displacement obligation?* The H-1B employer is responsible for demonstrating its compliance with the non-displacement obligation (whether direct or indirect), if applicable.

(1) Concerning *direct displacement* (as described in paragraph (c) of this section), the employer is required to retain all records the employer creates or receives concerning the circumstances under which each U.S. worker, in the same locality and same occupation as

any H-1B nonimmigrant(s) hired, left its employ in the period from 90 days before to 90 days after the filing date of the employer's petition for the H-1B nonimmigrant(s), and for any such U.S. worker(s) for whom the employer has taken any action during the period from 90 days before to 90 days after the filing date of the H-1B petition to cause the U.S. worker's termination (e.g., a notice of future termination of the employee's job). For all such employees, the H-1B employer shall retain at least the following documents: the employee's name, last-known mailing address, occupational title and job description; any documentation concerning the employee's experience and qualifications, and principal assignments; all documents concerning the departure of such employees, such as notification by the employer of termination of employment prepared by the employer or the employee and any responses thereto, and evaluations of the employee's job performance. Finally, the employer is required to maintain a record of the terms of any offers of similar employment to such U.S. workers and the employee's response thereto.

(2) Concerning *secondary displacement* (as described in paragraph (d) of this section), the H-1B employer is required to maintain documentation to show the manner in which it satisfied its obligation to make inquiries as to the displacement of U.S. workers by the other/secondary employer with which the H-1B employer places any H-1B nonimmigrants (as described in paragraph (d)(5) of this section).

[65 FR 80228, Dec. 20, 2000]

§ 655.739 What is the "recruitment of U.S. workers" obligation that applies to H-1B-dependent employers and willful violators, and how does it operate?

An employer that is subject to this additional attestation obligation (under the standards described in § 655.736) is required—prior to filing the LCA or any petition or request for extension of status supported by the LCA—to take good faith steps to recruit U. S. workers in the United States for the job(s) in the United