



Tips and Strategies to Avoid Unnecessary Delays in the Prevailing Wage Process

by the AILA DOL Liaison Committee¹

Obtaining a prevailing wage determination (PWD) from the Department of Labor (DOL) is one of the first steps in the H-1B, PERM, and H-2B processes. Processing times are sufficiently long that most employers opt to bypass the official PWD process in the H-1B context, and instead rely on a private wage survey.² However, this is not an option for PERM and H-2B filings. At one point, PWD processing times were up to 120 days. More recently, the Office of Foreign Labor Certification (OFLC) reports processing times between 80 and 90 days for PERM and 30 to 45 days for H-2Bs. During the March 2017 OFLC stakeholder meeting, when asked whether processing times would continue to decrease and possibly reach 60 days, OFLC indicated that this was most likely not going to happen.³ While employers cannot change OFLC's processing times and resource limitations, they can draft the ETA 9141 in a manner that allows the analyst to assign the most accurate occupational title, the appropriate wage level, and the most accurate wage determination. This practice pointer provides insights and strategies which can be used to help employers avoid delays beyond DOL's normal processing time in the PWD process.

Explain the Job Title

While it is well established that the job title alone is not determinative when it comes to the assignment of an occupational classification, it is certainly relevant to the analyst's review. While an employer does not need to change or use any special job titles on the ETA 9141, it is important to properly explain the management level of the position if it is not obvious. For example, where an employer uses a title that make the position sound more senior than the responsibilities entail (e.g., an honorific "Chief" or "Director" title), it is important to explain in the free-form Box E.b.5., the extent of the position's authority and supervisory duties. Employers should also explain how many levels the organization has and where the role falls within the organizational structure.

Additionally, where the match between a desired SOC O*NET Code is not obvious, the employer should make the extra effort to explain the connection between the job duties of the position with those of the appropriate O*NET Code. Commonly, practitioners write "Please note that: for explanatory purposes only..." in Box E.b.5., to differentiate information provided for mere explanation rather than substantive job requirements.

¹ Special thanks to Loan T. Hyunh and Vincent W. Lau, Vice Chairs of AILA's DOL Liaison Committee.

² Employers who do not obtain a PWD from DOL for H-1B purposes do not have "safe harbor" pursuant to 20 CFR §655.731(a)(2)(ii)(A)(3).

³ See March 7, 2017 OFLC Stakeholder Meeting Minutes, available at AILA Doc. No. 17031303.

Use Clear Job Descriptions and Minimum Requirements

In addition to the job title, the job description (duties) and minimum requirements will inform the O*NET Code and wage level that the analyst assigns. When providing a job description, include only those duties that are relevant and be sure the description is accurate. Read the employer's job description and explain it in layperson's terms. During a May 10, 2017 OFLC webinar, OFLC indicated that details are very important.⁴ For example, if the position is for a teacher, provide information as to what the person will be teaching and what level will be taught (e.g., elementary school, high school, etc.). If the person is supervising others, indicate whether those who will be supervised are at the same level or a lower level in the organization. Be specific about the products, projects, processes, materials, and equipment involved with the position. If the person will be interacting with individuals in other countries or other locations, is travel required? Is a foreign language required or will there be an interpreter? Additionally, the analyst may look to the job requirements (e.g., educational and experience requirements), to assess which O*NET Code to assign. For example, if a position is for a Researcher and the educational requirement is Chemical Engineering, the analyst may be inclined to assign the code for a Chemical Engineer as opposed to the code for a Chemist.

The minimum requirements of the position may also impact the wage level. Review carefully the OFLC's, "Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009," available at AILA Doc. No. 10010468. In short, anything above the "normal" requirements for a position results in a higher wage level. To determine the wage level, check the Specific Vocational Preparation (SVP) for the position. Also check whether a particular license or credential is normal for the position and if it is not clear that such requirements are normal, provide an explanation as to why they are required. If travel is required, indicate the area(s), frequency, and nature of the travel. OFLC has indicated that "preferences" listed will be treated as "requirements" and employers should avoid submitting conflicting information. Employers must also list any alternative requirements that will be included in recruitment and listed on the ETA 9089. In sum, always explain any areas of uncertainty to make it easier for the analyst to make a proper assessment of the O*NET code and wage level. Use the free form boxes on the ETA 9141 to your advantage!

Provide Necessary Information When Using Alternate Wage Surveys

Where OES Online Wage Library lacks appropriate wage information for the position, the employer may use an alternative wage survey. In using such a survey, be sure to include sufficient information on the ETA 9141 and supporting documents so that the analyst can conclude that the survey meets DOL requirements:

1. Appropriate occupation;
2. Evidence that employer is using the most recent survey;

⁴ See DOL PowerPoint Presentation from Webinar on the PERM Submission Process, AILA Doc. No. 17051903 (5/10/17), available at <http://www.aila.org/infonet/dol-ppt-webinar-on-the-perm-submission-process>.

3. Date when the data was collected;
4. Publication date, which could be either at the time of print or posted to an online database;
5. Methodology used to reach the wage;
6. Job description for the survey position to ensure that it matches the employer's job description;
7. Leveling information if appropriate;
8. Wage data, which should include the number of employers and number of employees used to arrive at the wage;
9. Evidence of cross-industry survey, explained in the methodology and apparent in the list of survey participants;
10. Wage information from all survey wage levels and similar survey occupations; and
11. Information regarding the survey's geographic coverage:
 - a. Explanation of where the surveyed employers are located. This should be more than just a city name, i.e., incorporated area, city plus select suburbs, or defined MSA.
 - b. Where the survey covers larger areas:
 - i. Wage data for each area;
 - ii. Explanation as to why the surveyed area is larger than the area of intended employment

Counsel should make a preliminary determination of the prevailing wage based on DOL's wage leveling guidelines before submitting the prevailing wage request. If the initial analysis suggests that the DOL prevailing wage is higher than the employer's offered salary for the position, the employer should be proactive and submit an alternate wage survey with the initial prevailing wage request. There is no reason to wait for an unfavorable PWD and further delay the PERM process to allow the employer to submit a second prevailing wage request with an alternate wage survey.

Use a Collective Bargaining Agreement

Where a collective bargaining agreement (CBA) exists, an employer must use the CBA. When using a CBA, the employer must provide a letter on employer letterhead and a letter from the union representative on letterhead stating the relevant section of the CBA, the CBA job title, and the appropriate wage. The employer must also include a copy of the agreement which should include the following information:

- (1) Statement of coverage, i.e., what workers are covered and the limits on coverage;
- (2) Job details, including duties and the levels involved;
- (3) Activities and conditions;
- (4) Wage, which should be the result of arm's length negotiations;
- (5) Signatures putting the CBA into effect; and
- (6) Evidence that the CBA is in effect, i.e., the validity dates and any applicable extensions.

The employer should also check “Yes” on Box D.2 of the ETA 9141 to indicate that the wage is based on a CBA.

Respond to an RFI Promptly

OFLC has reported that when an ETA 9141 is received, a contractor reviews it and if there are questions, a Request for Information (RFI) will be issued. The employer has seven days to respond to an RFI. OFLC states that once an employer responds, the ETA 9141 does not go to the back of the line, but instead resumes its spot among other 9141s filed contemporaneously. In practice, however, processing delays should be expected. In addition, when the ETA 9141 gets back to the analyst, the analyst can issue another RFI if deemed necessary.

At the June 6, 2017, DOL stakeholder meeting, OFLC stated that the top reasons why RFIs are issued are: (1) vague job duties; (2) insufficient detail regarding special requirements; and (3) lack of specificity on education and/or experience requirements. 40 percent of RFIs are due to vague job duties and 30 percent are due to a lack of specificity regarding requirements.⁵ Other reasons include lack of clarity on supervisory relationships.

In responding to an RFI, an employer should be sure to answer all items on the RFI. If the employer does not understand the request, the employer should explain its interpretation of the question and answer accordingly. Responding to an RFI is not an opportunity to remove or update an entry on the form.

Conclusion

To avoid unnecessary delays in the PWD process, be proactive. In providing clear and concise information in the request, you will minimize the chances of an RFI or an incorrect determination, which will further delay an already lengthy process.

⁵ Minutes from DOL PERM/H-1B Stakeholder Meeting (6/6/17), AILA Doc. No. 17062135, *available at* <http://www.aila.org/infonet/minutes-dol-perm-h-1b-stakeholder-meeting-6-6-17>.