RESPONDING TO THE LEVEL 1 WAGE REQUEST FOR EVIDENCE

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Background

Following President Trump's April 2017 "Buy American and Hire American" executive order (EO 13788), immigration practitioners across the U.S. have experienced a new wave of H-1B adjudication trends. The overall focus of EO 13788 was to encourage the hiring of U.S. workers and to rigorously enforce the current Immigration and Nationality Act. Further, EO 13788 called for the Department of Homeland Security to reform the H-1B nonimmigrant program.

Since the issuance of the executive order, United States Citizenship & Immigration Services (USCIS) quickly began initiating several policy changes and has begun scrutinizing H-1B applications more closely than ever before. According to agency data, by August 2017, the number of Requests for Evidence (RFEs) issued by the agency had jumped 44% compared with the same period in 2016. Further, in October and November 2017, 86 percent and 82 percent of H-1B applications were approved (respectively), compared to 93 percent and 92 percent for the same months during the previous year. This data does not account for those companies who chose not to respond to the RFEs.

L. Francis Cissna, USCIS's new Director, has said that increased issuance of RFEs are "perfectly rational and perfectly appropriate", and that the agency is dedicated to reviewing the H-1B program to "to ensure the entire thing is administered well and in conformity with congressional intent."

The Level 1 Wage

Among the most impactful policy shifts experienced in recent months has been the widespread issuance of RFEs for positions assigned a "Level 1" wage.

All employers seeking H-1B status for foreign workers must first obtain a certified Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) prior to filing an H-1B petition with USCIS. Essentially, the LCA is the means by which an employer confirms that it will comply with H-1B program requirements, including that the sponsored worker will be paid *at least* the "prevailing wage" for the offered H1B position. A "prevailing wage" is the wage paid to similarly employed workers in a specific occupation classification within the intended worksite location.

The DOL breaks wages into four levels; a Level 1 wage is an "entry-level" wage paid to those who have a "basic understanding of the occupation" and who "perform routine tasks that require limited, if any, exercise of judgment" and who work under "close supervision" and "receive specific instructions on required tasks and results expected." On the contrary, a Level 4 wage is appropriate for positions belonging to those who are "fully competent"; they are highly experienced, receive very little guidance, and often function in a supervisory or managerial capacity.

Following the "Buy American and Hire American" executive order, in an unprecedented move, it has now become standard practice for USCIS to question the wage level of H-1B applicants and to demand evidence of wage compliance for positions with Level 1 wages. In its Requests for Evidence, USCIS posits that an applicant's job duties are not consistent with the Level 1 wage description where they do not appear to encompass "only a basis understanding of the occupation" and appear to contain more than "routine tasks that require limited, if any, exercise of judgment." As a result, USCIS states that the position does not appear to be an entry-level position despite the Level 1 wage classification.

Overcoming the Level 1 Wage RFE

Many practitioners have successfully overcome "Level 1 Wage RFEs" by employing a variety of tactics. First, practitioners should present USCIS with detailed arguments on the appropriateness (or lack thereof) of USCIS questioning the wage level. This includes citing supporting regulations, case law, as well as DOL wage guidance. It should be explained to USCIS that the DOL's definition of Level 1 wages should not control the analysis; rather, the mathematical calculation set forth in DOL guidance for determining wage levels based on the position's requirements (education, experience, skills, and supervisory duties) should be the controlling factor.

Practitioners should direct the adjudicator's attention to "Appendix C: Worksheet for Use in Determining OES Wage Level" from the "Prevailing Wage Determination Policy Guidance" and its application to the position at hand. Using this chart, practitioners should show that the Level 1 wage assignment is an appropriate wage assignment for the employer's *requirements* of the position, and *not* the complexity of the duties set forth.

Next, it is helpful to draw comparisons between *the position's* required duties with the duties for the *corresponding job classification* set forth in the Occupational Outlook Handbook (OOH) and O*Net Online. The duties described in the OOH or O*NET refer to the *minimum* requirements for entry to the field, so you will effectively bolster your argument in support of the position with a Level 1 Wage when its job duties match the duties set forth in the OOH or O*NET.

To further evidence the above, it is important to assign percentages to each listed duty to indicate the amount of time the foreign worker will dedicate to each duty per day. It is also helpful to walk the adjudicator through "a day in the life of" the individual in this given position; provide a listing of daily tasks that correspond to the listed job duties as well as the coursework that prepared the beneficiary for these entry-level duties.

It may also be beneficial to incorporate visuals into the RFE response to evidence the appropriateness of the Level 1 wage. For instance, an organizational chart illustrating the beneficiary's place within the company's hierarchy may be a useful tool if such a chart shows the beneficiary among the lower levels of a reporting structure. This would effectively demonstrate that the beneficiary is indeed actively supervised by others who are in his or her department and have knowledge of the beneficiary's area of specialty. Conversely, if the beneficiary will work in a small office, report directly to a company executive, or have an off-site supervisor, an organizational chart will not be helpful to bolster to the Level 1 wage argument. It is also important to not make the worker's position appear *too* lowly within the hierarchy, as this could weaken your "specialty occupation" argument.

Finally, immigration practitioners may include evidence that a methodology was, in fact, used to determine the beneficiary's wage, rather than haphazardly assigning a wage figure. Letters from a company's Compensation or Human Resource department explaining how the wage was determined is very persuasive, along with the actual documentation used to set the beneficiary's salary – results from any industry-leading wage surveys, outside consultations, etc. All of this shows that the employer "did its homework" to truly set a fair wage for the position.