

Immigration

“Public Access Files”—Do You Need One?

by Jeffrey A. Van Doren

Employers which hire foreign workers in H-1B nonimmigrant visa status are required to maintain a “public access file” containing certain information regarding the employee’s wages and the employer’s compliance with the Labor Condition Application (“LCA”). Recent changes to the H-1B visa program as a result of the American Competitiveness and Workforce Improvement Act (“ACWIA”) have resulted in additional documentation requirements for the public access file.

To assist employers in complying with the new requirements, following are responses to frequently asked questions.

Q. What is a public access file and do I need one?

A. All employers which employ foreign workers in H-1B nonimmigrant visa status are required to have a public access file. Items that must be included in the public access file are listed below.

Q. What documentation must be maintained in the public access file?

A. As part of the H-1B petition process, the employer is required to prepare and file an LCA with the Department of Labor (“DOL”). In the LCA, the employer attests it is paying the employee the “prevailing wage” for the position and that the employee is being paid the “actual wage” for the position, i.e., the employer is not paying the foreign worker less than U.S. workers performing the same job. Most of the public access file is documents establishing the employer’s compliance, and the following should be included:

- Copy of the filed LCA
- Documentation of the salary
- Explanation of how the “actual wage” was determined
- Documentation or description of the basis for the “prevailing wage” (often this is a copy of the survey

used to determine the prevailing wage)

- Documentation that the LCA was posted for the required notification period notifying employees of the LCA filing (or, if in a unionized workplace, that the union was notified)
- And now required under the ACWIA, documentation indicating whether the employer is “H-1B dependent” as defined in the Act, and if so, documentation of additional recruitment and non-layoff provisions made on the LCA.

Q. How do I know if I am an “H-1B dependent” employer?

A. Under the ACWIA, an employer is “H-1B dependent” if it has in the United States:

- 25 or fewer full-time equivalent (“FTE”) employees and more than 7 H-1B employees;
- Between 26 and 50 FTE employees and more than 12 H-1B employees; or
- At least 51 FTE employees and a number of H-1B employees equal to at least 15 percent of the FTE employees.

If you believe, based upon this formula, that you may be an H-1B dependent employer (and you have not already discussed this matter with us), please contact a Cohen & Grigsby immigration attorney.

Q. How long and where should the LCA be posted?

A. The law requires an employer to post the LCA for ten days in two “conspicuous” locations at the worksite where the H-1B worker will be employed. Acceptable locations for



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posting are where other notices, i.e., OSHA Notice, Wage and Hour Notice, etc., are displayed. After the ten day posting period, the LCA should be taken down, and a memorandum detailing the dates and locations of posting should be prepared and placed in the public access file.

Q. Should a copy of the LCA be given to the H-1B employee?

A. Yes, and documentation of the employee’s receipt of the copy should be placed in the file.

Q. Where should the public access file be maintained?

A. The public access file may be maintained at either the work location where the H-1B employee works or the company’s main office.

Q. How “public” is the public access file? Do I have to let any employee review this information?

A. The public access file must be open for public examination upon request. The employer, however, is not required to make employees aware of the existence of the public access file nor make it generally known that this information is available for public review. In an H-1B visa program compliance investigation, DOL will ask to view the file, but it does not regularly check public access files otherwise.

Q. How long must I keep the records for the public access file?

A. They must be retained for one year beyond either the period of employment shown on the LCA or the date the LCA was withdrawn. In the event of a DOL investigation, all records must be kept until its resolution.

If you have additional questions regarding a public access file or an H-1B visa program, please contact any member of Cohen & Grigsby’s Immigration Group.

Foreign Sales Representatives and Distributors— Look Before You Leap into the Global Market

by Bruce H. Chiu

For companies interested in selling products or services in foreign markets, doing business through foreign sales representatives and/or distributors may be an attractive way of doing international business.

In general, whether you deal with a sales representative or a distributor in a foreign country, among the most important issues are those that deal with the scope and duration of the arrangements.

Be aware that many countries are protective of their local businesses and have passed strict laws for their

Whether you are dealing with a sales representative or distributor in a foreign country, the bottom line is that you need to be aware of the country's laws which, in order to protect the local entity's rights, may adversely affect your rights.

protection. These laws are aimed at foreign businesses which may seek to exploit local businesses in order to develop a local market for the foreign manufacturer's goods or services, only to dump the local business once the local market has been developed. These laws often make it difficult to terminate or even change the scope of a relationship with a local sales representative once initiated.

Many countries have laws, for example, which state that a manufacturer may not terminate a sales representative or distributor unless it can show cause. As a practical

matter, a foreign court may not give much credence to a foreign manufacturer's reasons for terminating a local small business where the local business claims that it spent a lot of money and effort in developing the local market for the manufacturer. Similarly, it may be difficult to terminate even a local representative which is not performing to agreed-upon standards.

For example, in Puerto Rico, it is notoriously difficult as a foreign manufacturer to terminate a Puerto Rican sales representative or distributor. Even if you think you have "cause" for termination (e.g., you have a contractual clause stating that failure to achieve certain minimum performance standards constitutes a breach of the contract and is just cause), a Puerto Rican court has the power to find the quota unreasonable under the circumstances. In such cases the foreign manufacturer may be liable for damages for wrongful termination.

Puerto Rico is a prime example of a foreign jurisdiction in which you run the risk of becoming "wed for life" to the first representative with whom you sign a contract. Depending on the law, you may find it difficult to enter into a relationship with a new representative, even if your contract expressly states that your arrangement is "non-exclusive." You also may find yourself unable to sell a different product line through a different representative although your contract limits the scope of the first representative to a different



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product line. Failure to renew a contract with an express expiration date may be deemed a wrongful termination if you cannot show good cause for refusing to renew. In some circumstances, you may find yourself precluded from selling directly into the territory previously granted to your ex-representative.

Whether you are dealing with a sales representative or distributor in a foreign country, the bottom line is that you need to be aware of the country's laws which, in order to protect the local entity's rights, may adversely affect your rights. Carefully evaluate those with whom you are doing business in foreign countries and any proposed contracts. If not, you may find yourself permanently wed to a mismatch and face a choice of either pulling out of the local market altogether or paying substantial sums to dissolve the relationship in order to pursue other local market options. The importance of issues such as termination, exclusivity, reservation of house accounts, and scope of representation are all magnified in exporting.

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