

Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Mariana Islands 2019 Interim Final Rule

Background:

On March 23, 2019, the Department of Labor (the Department or DOL) received approval to publish an Interim Final Rule (IFR) in the *Federal Register*, establishing the process by which an employer in the Commonwealth of the Northern Mariana Islands (CNMI) will obtain a prevailing wage and temporary labor certification (TLC) from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in CW-1 visa status. The IFR implements provisions of the Northern Mariana Islands U.S. Workforce Act of 2018 (Workforce Act), Pub. L. 115-218 (July 24, 2018).

The Workforce Act establishes, for the first time, a labor certification requirement as a prerequisite for approval, by DHS, of an employer's CW-1 worker petition, and provides the Department with authority to promulgate regulations to carry out this statutory mandate. A TLC granted by the Department serves as confirmation to DHS that an insufficient number of qualified U.S. workers are available to fill the employer's job opportunity in the CNMI, and the employment of a CW-1 worker will not adversely affect the wages or working conditions of similarly employed U.S. workers. The IFR also establishes protections for both CW-1 workers and U.S. workers in corresponding employment and ensures that no U.S. worker is placed at a competitive disadvantage compared to a CW-1 worker or is displaced by a CW-1 worker.

Effective Date:

On and after April 4, 2019, at 12:00 a.m. Eastern Time.

Major features of this IFR:

- The process by which employers obtain a TLC from the Department to petition DHS for approval to employ a nonimmigrant worker in CW-1 status, which involves four basic steps:

STEP 1: Obtain a Prevailing Wage Determination (PWD)

Before filing a request for a TLC, the employer must obtain a PWD from DOL's Office of Foreign Labor Certification (OFLC) by completing and submitting an *Application for Prevailing Wage Determination* (Form ETA-9141C) using the Department's new electronic filing system, the Foreign Labor Application Gateway (FLAG).

Statutory Requirements:

- ✓ The prevailing wage issued by the Department must be the mean wage as determined by a valid occupational wage survey submitted by the CNMI Governor, if the Governor chooses to submit a wage survey to the Department, and the survey meets certain statistical standards; OR

- ✓ In the absence of a valid occupational wage survey submitted by the CNMI Governor, the prevailing wage shall be the mean wage as determined by the Bureau of Labor Statistics through its Occupational Employment Statistics (OES) survey for the territory of Guam.

Important Note: The Department does not have a current occupational wage survey for CNMI at this time. Until an occupational wage survey is approved by the Department, the OFLC will issue prevailing wages for the CW-1 labor certification program using the mean OES hourly wage assigned to the territory of Guam for the occupational classification.

STEP 2: Submit a Request for a TLC

No more than 120 calendar days before the start date of work, an employer seeking to hire a new CW-1 worker must submit a completed *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C) and all appropriate appendices to the OFLC using the FLAG System. Consistent with the Workforce Act, an employer seeking to extend the employment of a current CW-1 worker may file a *CW-1 Application for Temporary Employment Certification* no more than 180 calendar days before the date on which the CW-1 status expires.

OFLC will review the employer's application for compliance with all applicable program requirements and issue either a Notice of Deficiency (NOD) or Notice of Acceptance (NOA). Where deficiencies in the application are discovered, the NOD will require that the employer submit a modified application correcting the deficiencies within 10 business days or the Certifying Officer (CO) will deny the application.

STEP 3: Conduct Recruitment in the CNMI for U.S. Workers

Where all threshold program requirements are met, the employer will receive a NOA from the CO directing the recruitment of U.S. workers for the job opportunity, and requesting a written report of the employer's recruitment efforts. To encourage the hiring of U.S. workers for employment in the CNMI, the employer will be required to advertise the job opportunity in the following manner:

- ✓ Place an advertisement on the CNMI Department of Labor's job listing system;
- ✓ Contact former U.S. workers, including those who have been laid off within 270 calendar days before the start date of work, and solicit their return to the job;
- ✓ Post a copy of the *CW-1 Application for Temporary Employment Certification* at the place(s) of employment where the work will be performed by the CW-1 workers; and
- ✓ Conduct any other recruitment activities (e.g., contacting community-based organizations or trade unions) the CO may require.

Important Note: The recruitment period will last 21 calendar days, and an employer must complete all of its recruitment before it may prepare, sign, and submit its written recruitment report to the National Processing Center for review.

STEP 4: Obtain a TLC Determination

Upon review of the recruitment report, the CO will make a determination either to certify or deny the *CW-1 Application for Temporary Employment Certification*. The CO will grant a TLC only where the employer has met all regulatory requirements. Where certification is appropriate, the CO will send a Final Determination notice and the certified *CW-1 Application for Temporary Employment Certification* **electronically** to the employer and, if applicable, to the employer's authorized agent or attorney. The employer will use the Final Determination notice, as well as any other required documentation, to support the filing of a CW-1 petition with DHS.

- As a condition of receiving a TLC, employers are required to protect the employment of both CW-1 workers and U.S. workers in corresponding employment, such as assuring the job opportunity represents full-time employment; guaranteeing employment for a total number of work hours equal to at least three-fourths of the workdays of the total period of employment; requiring that U.S. workers in corresponding employment receive the same wages and benefits as the CW-1 workers; and requiring the payment of wages by employers to be finally and unconditionally “free and clear” and that payment be no less frequently than every 2 weeks.
- Employers must pay visa and related fees of CW-1 workers, as well as the inbound transportation and subsistence costs of workers who complete 50 percent of the job order period, and the outbound transportation and subsistence expenses of employees who complete the entire work contract period.
- To protect U.S. workers in their employment from displacement by a CW-1 worker, employers are prohibited from laying off any similarly-employed U.S. worker in the occupation beginning 270 calendar days before the date of need through the end of the work contract period, or retaliating against employees for exercising rights under the CW-1 program. The regulation also protects U.S. workers from discriminatory hiring practices.
- To ensure increased transparency, employers must provide workers with detailed earnings statements on or before each payday, disclose all deductions from pay, and provide a copy of the work contract in a language the worker will understand. The Department is also required to maintain an electronic file, accessible to the general public, with information on all employers applying for temporary labor certification to employ CW-1 workers.
- To protect the integrity of the program from fraud and abuse, employers must retain all documents and records establishing compliance with the regulations for a period of three years after the *CW-1 Application for Temporary Employment Certification* is adjudicated or from the date the CO receives a letter of withdrawal. The employer must also make these documents and records available to the DOL, DHS or to any federal government official performing an investigation, inspection, audit, or law enforcement activity. Finally, the Department has authority to impose sanctions on employers who violate program requirements, such as more intensive or assisted recruitment requirements, revocation of a

certified *CW-1 Application for Temporary Employment Certification*, or debarment from all employment-based immigration programs administered by the Department for up to five years.

How to File:

- Except for employers that lack adequate access to electronic filing, either due to lack of internet access or physical disability, employers must submit both the *Application for Prevailing Wage Determination* (Form ETA-9141C) and the *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and appropriate appendices) electronically for processing.
- The Department is introducing FLAG, a new cloud-based electronic filing and application processing system, which will be used for the CW-1 program. Employers must file the Forms ETA-9141C and ETA-9142C through the FLAG system, which may be accessed at the following website: <https://flag.dol.gov/>.
- Employers may visit the website now to create a FLAG System account. The CW-1 module in the FLAG System will be available early next week.

Questions:

- For assistance creating or accessing a FLAG account, please contact the Department's technical help desk at <https://flag.dol.gov/support/contact>.
- For questions related to CW-1 program requirements, please contact the relevant OFLC helpdesk staff as follows:
 - Prevailing Wage: FLC.PWD@dol.gov
 - CW-1 Temporary Labor Certification: TLC.Chicago@dol.gov

Note: These versions of the regulations may vary slightly from the published document if minor technical or formatting changes are made during the review by the Office of the Federal Register. Only the version published in the Federal Register is the official regulation.