

U.S. Department of Labor
Employment and Training Administration

Round 1: 2019 CW-1 Interim Final Rule Implementation FAQs

1. What wage must I pay a CW-1 worker?

Under the statute, the employer must offer and pay a wage that equals or exceeds the highest of the prevailing wage, the Federal minimum wage, or the minimum wage in the Commonwealth of the Northern Mariana Islands (CNMI). The prevailing wage will be the mean hourly wage for the assigned occupation in the CNMI, as determined by an occupational wage survey annually conducted by the Governor of the CNMI (Governor), provided that survey meets the statistical standards established by the U.S. Department of Labor (Department) at 20 CFR 655.410(e). In the absence of a statistically-acceptable survey, the prevailing wage will be the arithmetic mean wage of workers similarly employed in the territory of Guam, based on the Occupational Employment Statistics (OES) Survey conducted by the Department's Bureau of Labor Statistics (BLS). Under the Interim Final Rule (IFR), if wage data is not available from the Governor's survey or the OES survey for Guam, the Department will base the prevailing wage on an adjusted national OES wage for the job classification.

The wage must be paid "free and clear" and may not be based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage. If, during the course of the period certified in the *CW-1 Application for Temporary Employment Certification* (application), the Federal or CNMI minimum wage increases to a level higher than the prevailing wage certified in the application, the employer is obligated to pay that higher rate for the work performed after the new minimum wage takes effect.

2. Do I need to obtain a Prevailing Wage Determination (PWD) before filing a temporary labor certification application?

Yes, the employer must request and obtain a PWD from the Office of Foreign Labor Certification (OFLC) before filing a temporary labor certification application, except in qualifying emergency situations. To make this request, the employer will submit a completed *Application for Prevailing Wage Determination* (Form ETA-9141C) to OFLC's National Prevailing Wage Center (NPWC) containing information about the job opportunity in which the CW-1 workers will be employed. To avoid delays, the Department encourages employers to request a PWD for the CW-1 program at least 90 calendar days before the date the employer plans to file its temporary labor certification application.

The Department's regulations provide an employer in a qualifying emergency situation with some flexibility to participate in the CW-1 program without first obtaining a PWD from the NPWC. Specifically, 20 CFR 655.422(a) permits the OFLC Certifying Officer (CO) to waive the requirement for an employer to obtain a PWD prior to filing an application, provided the employer submits with its application a detailed written statement that demonstrates good and substantial cause. Good and substantial cause may include the substantial loss of U.S. workers

due to Acts of God, similar unforeseeable man-made catastrophic events (such as a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside the employer's control. Issues related to the CW-1 visa cap are not good and substantial cause for a waiver of the filing requirements. Further, a denial of a previously submitted application or CW-1 petition with the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS) does not constitute good and substantial cause.

PLEASE NOTE: The publication of the IFR DOES NOT qualify as an emergency situation which allows for the filing of the CW-1 Application for Temporary Employment Certification without a valid PWD, as publication of the IFR is a foreseeable event. Any applications filed without a valid PWD that do not qualify for emergency waiver will be returned unprocessed.

3. May I use a Guam OES wage without requesting a PWD? May I file an application with a prevailing wage other than the prevailing wage from a Department issued PWD?

No. By regulation, except in a qualifying emergency situation, the employer must request and obtain a PWD from the NPWC prior to filing its temporary labor certification application. The application must offer at least the prevailing wage listed on the PWD.

4. Why do I have to pay the Guam OES wages?

In the absence of an approved survey, the Workforce Act requires that the prevailing wage be the mean OES wage in Guam for the occupation.

5. How long will it take to process requests for CW-1 PWDs?

There is no statutory or regulatory processing time requirement for issuing PWDs. The Department recognizes that it is important for employers to receive PWDs in a timely manner and it is the Department's goal to issue PWDs as expeditiously as possible.

The Department recommends that employers file CW-1 prevailing wage requests at least 90 days before they are needed.

6. What do I do if I disagree with the PWD I am issued?

An employer that does not agree with a PWD may appeal under 20 CFR 655.411. The employer must submit a written request for review to the NPWC Director. The NPWC Director must receive the request for review within seven (7) business days from the date the PWD is issued. The request must clearly identify the PWD for which review is sought, set forth the particular grounds for the request, and include any materials submitted to the NPWC for purposes of securing the PWD. The NPWC Director will review the employer's request and accompanying documentation and issue a Final Determination letter that either affirms or modifies the PWD.

An employer that does not agree with the NPWC Director's decision may request administrative review before the Board of Alien Labor Certification Appeals (BALCA). BALCA must receive the request within 10 business days from the date the NPWC Director issued the Final Determination letter. The employer must submit to BALCA a written request for review of the determination, with a copy simultaneously sent to the NPWC Director who issued the final determination. The request for review must contain only legal arguments and may refer to only the evidence that was within the record upon which the NPWC Director based its decision on the PWD.

7. What is corresponding employment? As a CW-1 employer, what are my obligations to U.S. workers in corresponding employment?

Corresponding employment, as defined at 20 CFR 655.402, means the employment of U.S. workers who are not CW-1 workers in any work included in the approved job offer, or in any work performed by the CW-1 workers. To qualify as corresponding employment the work must be performed during the validity period of the *CW-1 Application for Temporary Employment Certification* and approved job offer, including any approved extensions. Workers in corresponding employment may be either workers hired during the recruitment process, in connection with the application, or workers who already work for the employer and who perform any work included in the approved job offer or any work performed by CW-1 workers.

With respect to both CW-1 workers and workers in corresponding employment, the employer must abide by the conditions of employment described at 20 CFR 655.423. This includes a requirement to offer and provide U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to CW-1 workers. When OFLC issues a CW-1 temporary labor certification (TLC), it must make the determination that there are no U.S. workers available for the job opportunity and that the employment of CW-1 workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. If U.S. workers in corresponding employment were not required to be treated equally to CW-1 workers performing the same duties, OFLC would not be able to determine that U.S. worker wages and working conditions are not adversely affected by the employment of CW-1 workers.

8. Where and how do I file a TLC?

The employer must file a completed *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and appropriate appendices) with the OFLC National Processing Center (NPC) no more than 120 calendar days before the date of need for a new CW-1 worker. An employer seeking to extend the employment of a CW-1 worker may file an application no more than 180 calendar days before the date on which the CW-1 status expires. A job contractor filing as a joint employer with its employer-client must submit to the NPC a completed application that clearly identifies its employer-client, includes the contract or agreement establishing the employer-clients' relationship to the workers sought, and bears the original or verifiable electronic signature of both the job contractor and the employer-client.

OFLC regulations require employers to electronically file both the *Application for Prevailing Wage Determination* (Form ETA-9141) and the *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and appropriate appendices), with limited exceptions. The employer will file its electronic applications using the Foreign Labor Application Gateway (FLAG), available at the following website: <https://flag.dol.gov>. Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. OFLC will publish the address updates for mailed applications in the instructions to the Form ETA-9141C and the Form ETA-9142C. The mailed application must include a statement explaining why the employer qualifies to file by mail. There is no specific format for the statement but it must accompany the application at the time of filing. The NPC will return, without review, any application received by mail that does not include a statement indicating the reason for the employer's need to file by mail.

The address to file the Form ETA-9141C (PWD) by mail is:

Employment and Training Administration
Office of Foreign Labor Certification
National Prevailing Wage Center
U.S. Department of Labor
200 Constitution Avenue, NW- Box #N-5311
Washington, D.C. 20210
Attn: CW-1 PWD

The address to file the Form ETA-9142C (TLC) by mail is:

Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
U.S. Department of Labor
11 West Quincy Court
Chicago, IL 60604-2105
Attn: CW-1 Application

9. Do I need to file a separate TLC application for each CW-1 worker?

No, not in all cases. While each CW-1 worker must be covered by a TLC, an employer may request certification of more than one position on a single application if all CW-1 workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment, and at a location (or locations) covered by the application. Filing more than one application is necessary when an employer needs CW-1 workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or with different starting and ending dates for the job opportunity.

10. Why do I need a TLC when I never needed one before?

The Workforce Act requires an employer to obtain a temporary labor certification from the Department of Labor as a prerequisite for approval of a CW-1 permit by the DHS Secretary beginning in fiscal year 2020. The temporary labor certification serves as confirmation to DHS that there are no U.S. workers who are able, willing, qualified, and available to fill the petitioning CW-1 employer's job opportunity in the CNMI and that a foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

11. What are the steps for processing a TLC application? How long will it take the OFLC to process applications?

The CO 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 direct the employer that it must respond within ten (10) business days of the issuance date of the NOD by modifying the application to correct the deficiencies or the CO will deny the application. When all threshold program requirements are met, the CO will send the employer a NOA that directs the employer to conduct recruitment of U.S. workers for the job opportunity and provides the date by which the employer must submit a written report of its recruitment efforts. The employer must conduct all recruitment required by 20 CFR 655.442 through 655.444, including any additional recruitment ordered by the CO under § 655.445. After all employer-conducted recruitment is completed, the employer will submit a written recruitment report to the NPC for review by the date specified in the NOA. After review of the employer's recruitment report, the CO will make a determination either to certify or deny the application. The CO will certify the application only where the employer has met all regulatory requirements. There is no statutory or regulatory processing time requirement for the CW-1 program, but OFLC will process all applications as expeditiously as possible.

12. What will I receive if my TLC is certified? What is the next step in the visa process? How soon can I file my petition with DHS (USCIS)?

If the employer has met all requirements, the CO will certify the application and electronically send a Final Determination notice and copy of the certified *CW-1 Application for Temporary Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney. For those employers permitted to file by mail under 20 CFR 655.420(c), the CO will send the Final Determination notice and a copy of the certified *CW-1 Application for Temporary Employment Certification* to the employer by first class mail. The CO also will electronically transmit the Final Determination notice and certified *CW-1 Application for Temporary Employment Certification* to USCIS. 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 USCIS. The employer may file its petition with USCIS as soon as it receives notice that OFLC has certified its application. For additional information on filing a CW-1 petition with USCIS, employers may visit www.uscis.gov.

13. Can I still petition for workers under the H-2B program?

Yes. The Workforce Act does not preclude an employer from applying for certification in other programs if the workers it seeks to employ meet the requirements of U.S. temporary employment visas.

14. What do I do if my TLC is denied?

If the employer's application is denied, the CO will send the Final Determination notice to the employer and a copy, if applicable, to the employer's agent or attorney. This notice will offer the employer an opportunity to request administrative review of the denial before BALCA under 20 CFR 655.461. The employer must submit to BALCA a written request for review of the determination, with a copy simultaneously sent to the CO. BALCA and the CO must receive the request within 10 business days from the date the CO issued the determination. The request for review must clearly identify the particular determination for which review is sought and must set forth the grounds for the request. The request must contain only legal arguments and may refer to only the evidence before the CO at the time the CO issued the determination. If the employer does not request administrative review in accordance with § 655.461, the denial will be final, and the Department will not accept any appeal on that application.